[redacted]

NATIONAL UNIVERSITY LIBRARY

SAN DIEGO

NON CIRCULATING

CALIFORNIA REPORTER REFERENCES

---

84 CALIFORNIA APPELLATE REPORTS, 2d SERIES

Cal.App.	P.2d	
Page	Vol.	Page
1	189	796
6	189	771
11	189	758
15	189	774
18	189	868
34	189	799
39	189	744
46	190	277
61	190	40
64	190	286
72	190	290
81	190	240
87	190	30
95	189	842
100	190	35
107	190	307
115	190	219
123	190	270
126	190	46
131	190	21
135	190	48
141	190	246
167	190	24
177	189	816
185	190	333
193	190	262
208	190	42
214	190	295
227	190	306
229	190	312
236	190	272
243	190	209
250	190	214
257	190	632
260	190	634
263	190	317
269	190	224
271	190	243
276	190	330
281	190	230
293	190	617
295	190	218
297	190	943
306	190	316
308	190	653
308	192	45
320	190	642
322	190	209
323	190	659
333	190	649
339	191	54
347	190	949
357	190	972
361	191	25
374	191	35
383	191	50
390	190	956
394	190	629
398	190	616
401	190	958
409	190	968
417	190	990
427	190	975
435	190	665
445	191	564
454	190	984
459	191	82
469	191	541
476	191	126
482	191	66
483	191	67
494	190	987
500	191	109
509	190	941
513	191	75
521	191	73
523	191	115
531	191	32
536	191	21
541	191	98
547	191	102
548	190	955
550	191	16
552	191	60
562	191	17
569	191	95
575	191	78
581	191	102
592	191	88
603	191	124
606	191	511
610	191	120
616	191	129
624	191	466
632	191	480
637	191	501
645	191	521
649	191	478
653	191	460
657	191	497
663	191	59
665	191	569
679	191	506
687	191	517
694	191	484
700	191	123
702	191	513
709	191	487
716	191	523
722	191	463
726	191	776
728	191	761
736	191	768
746	191	791
754	192	55
765	191	766
769	191	796
778	191	494
783	192	81
787	192	45
802	192	76
810	191	802
815	191	777
816	192	66
827	191	816
830	191	804
840	190	303
841	190	304
843	190	305
845	190	338
849	191	134

Digitized by the Internet Archive
in 2023 with funding from
Kahle/Austin Foundation

https://archive.org/details/californiareport0197unse_197P.2d-198P.2d

CALIFORNIA REPORTER

COVERING CASES REPORTED IN

PACIFIC REPORTER
SECOND SERIES

KEY NUMBER SYSTEM

197 P.2d – 198 P.2d

CITE BY VOLUME AND PAGE
OF THE
PACIFIC REPORTER
SECOND SERIES

Thus:
197 P.2d 1

ST. PAUL, MINN.
WEST PUBLISHING CO.
1949

COPYRIGHT, 1948, BY WEST PUBLISHING CO.
Pacific Reporter, Second Series, Vol. 197, Nos. 1-5; Vol. 198, Nos. 1-5.

COPYRIGHT, 1949, BY WEST PUBLISHING CO.

CAL.REP.197-198 P.2d
3—1970

JUDGES AND OFFICERS

SUPREME COURT

Chief Justice

PHIL S. GIBSON	San Francisco

Associate Justices

JOHN W. SHENK	San Francisco
DOUGLAS L. EDMONDS	San Francisco
JESSE W. CARTER	San Francisco
ROGER J. TRAYNOR	Berkeley
B. REY SCHAUER	Los Angeles
HOMER R. SPENCE	San Francisco

Clerks

William I. Sullivan	Clerk	San Francisco
I. M. Johnson	Chief Deputy Clerk	San Francisco
Loren F. White	Deputy Clerk	San Francisco
Harry M. Gardiser	Deputy Clerk	San Francisco
L. A. Endres	Deputy Clerk	Sacramento
Henry P. Crabtree	Deputy Clerk	Los Angeles
William J. Sinkford	Deputy Clerk	Los Angeles

DISTRICT COURTS OF APPEALS

FIRST DISTRICT—SAN FRANCISCO

Division 1

Presiding Justice

RAYMOND E. PETERS	San Francisco

Associate Justices

LOUIS H. WARD	San Francisco
A. F. BRAY	San Francisco

Division 2

Presiding Justice

JOHN T. NOURSE	San Francisco

Associate Justices

C. J. GOODELL	San Francisco
MAURICE T. DOOLING, Jr.	Hollister

Clerks

Walter S. Chisholm	Clerk	San Francisco
W. B. Sullivan	Deputy Clerk	San Francisco
John J. Noonan, Jr.	Deputy Clerk	San Francisco

SECOND DISTRICT—LOS ANGELES

Division 1

Presiding Justice

JOHN M. YORK	Los Angeles

Associate Justices

WILLIAM C. DORAN	Los Angeles
THOMAS P. WHITE	Los Angeles

Division 2

Presiding Justice

MINOR MOORE	Los Angeles

Associate Justices

MARSHALL F. McCOMB	Los Angeles
EMMET H. WILSON	Los Angeles

DISTRICT COURTS OF APPEALS—Cont'd.

Division 3

PRESIDING JUSTICE

CLEMENT L. SHINN	Los Angeles

ASSOCIATE JUSTICES

PARKER WOOD	Los Angeles
PAUL VALLEE	Los Angeles

CLERKS

JAMES E. BROWN	Clerk	Los Angeles
JOHN W. SHENK III	Deputy Clerk	Los Angeles
WM. E. DORAN	Deputy Clerk	Los Angeles

THIRD DISTRICT—SACRAMENTO

PRESIDING JUSTICE

ANNETTE ABBOTT ADAMS	Sacramento

ASSOCIATE JUSTICES

ROLFE L. THOMPSON	Sacramento
PAUL PEEK	Long Beach

CLERKS

GEORGE N. DIDION	Clerk	Sacramento
THOMAS J. DILLON	Deputy Clerk	Sacramento

FOURTH DISTRICT

Fresno—San Bernardino—San Diego

PRESIDING JUSTICE

CHARLES R. BARNARD	Fresno

ASSOCIATE JUSTICES

LLOYD E. GRIFFIN	San Diego
STANLEY MUSSELL	San Bernardino

CLERKS

EARL J. VERDECKBERG	Clerk	San Diego
LLOYD E. HIDDEN	Deputy Clerk	San Bernardino
ROY M. BOSTWICK	Deputy Clerk	Fresno
GEORGE J. KOBELIN	Deputy Clerk	San Diego

APPELLATE DEPARTMENT, SUPERIOR COURT

LOS ANGELES COUNTY

Presiding Judge

HARTLEY SHAW	Los Angeles

Judges

EDWARD T. BISHOP	Los Angeles
JESS E. STEPHENS	Los Angeles

Clerk

J. J. MacGregor	Los Angeles

SAN FRANCISCO COUNTY

Presiding Judge

FRANKLIN A. GRIFFIN	San Francisco

Judges

EDWARD P. MURPHY	San Francisco
HERBERT C. KAUFMAN	San Francisco

Clerk

S. I. Hughes	San Francisco

SAN DIEGO COUNTY

Presiding Judge

L. N. TURRENTINE	San Diego

Judges

GORDON THOMPSON	San Diego
ROBERT B. BURCH	San Diego

Clerk

Bruce Robinson	San Diego

SACRAMENTO COUNTY

Presiding Judge

PETER J. SHIELDS	Sacramento

Judges

MALCOLM C. GLENN	Sacramento
RAYMOND T. COUGHLIN	Sacramento

Attorney General

Fred N. Howser	Los Angeles

CASES REPORTED

	Vol.		Page
Abeles; Chamberlain v., App.	198	P.2d	927
Abellera v. Tom, App.	198	P.2d	324
Abila v. Spendrup, Sup.	197	P.2d	10
Abila's Estate, In re, Sup.	197	P.2d	10
Adams; Metropolitan Water Dist. of Southern Cal. v., Sup.	197	P.2d	543
Alegria v. Alegria, App.	197	P.2d	571
Alegria's Estate, In re, App.	197	P.2d	571
Allen; Harder v., App.	198	P.2d	329
Anderson v. Anderson, App.	197	P.2d	65
Anderson v. Anderson, App.	197	P.2d	66
Anderson; People v., App.	197	P.2d	839
Andrade; Matthews v., App.	198	P.2d	66
Arbuckle; Brown v., App.	198	P.2d	550
Associated Farms; Prytz v., App.	198	P.2d	110
Back v. Young, Sup.	197	P.2d	161
Ballentine; De Sylva v., App.	197	P.2d	359
Bank of America Nat. Trust & Sav. Ass'n; Washer v., App.	197	P.2d	202
Bank of Cal.; Young v., App.	198	P.2d	543
Banta; Johnson v., App.	198	P.2d	100
Barlow v. City Council of City of Inglewood, Sup.	197	P.2d	721
Barrabee v. Crescenta Mut. Water Co., App.	198	P.2d	558
Bastanchury v. Stearns, App.	198	P.2d	919
Bean; People v., App.	198	P.2d	379
Bedell v. Mashburn, App.	197	P.2d	98
Benard v. Vorlander, App.	197	P.2d	42
Board of Police and Fire Pension Com'rs of City of Long Beach; Tyra v., Sup.	197	P.2d	710
Board of Sup'rs of Los Angeles County; Cantrell v., App.	197	P.2d	218
Boris; Lunt v., App.	197	P.2d	568
Boyce; People v., App.	197	P.2d	842
Bradshaw v. Glenn-Colusa Irr. Dist., App.	198	P.2d	106
Braverman v. Horn, App.	198	P.2d	948
Breitman v. Gattman, App.	198	P.2d	311
Brewer v. Second Baptist Church of Los Angeles, Sup.	197	P.2d	713
Brock v. Hall, App.	198	P.2d	69
Broderick v. Torresan, App.	198	P.2d	75
Brown v. Arbuckle, App.	198	P.2d	550
Bundte; People v., App.	197	P.2d	823
Burelli; Svetina v., App.	197	P.2d	562
Burwell v. McCabe, App.	197	P.2d	35
Butler; Cavett v., Sup.	197	P.2d	161
Butterworth; Tsang v., App.	197	P.2d	378
Byrd; People v., App.	198	P.2d	561
Byrnes, Ex parte, Sup.	198	P.2d	685
Cairo v. Cairo, App.	197	P.2d	208
California Employment Stabilization Commission; Northrop Aircraft v., Sup.	198	P.2d	898
California Trust Co.; Nelson v., App.	198	P.2d	66
Camp v. Matich, App.	197	P.2d	345
Cantrell v. Board of Sup'rs of Los Angeles County, App.	197	P.2d	218
Carlesimo v. Schwebel, App.	197	P.2d	167
Carpenter v. Fitch, App.	197	P.2d	174

	Vol.		Page
Cavett v. Butler, Sup.	197	P.2d	161
Cavin; Luis v., App.	198	P.2d	563
Chamberlain v. Abeles, App.	198	P.2d	927
Christensen; Nemanick v., App.	197	P.2d	785
Citizens Nat. Trust & Sav. Bank of Los Angeles v. Hawkins, App.	197	P.2d	385
City and County of San Francisco; Silva v., App.	198	P.2d	78
City Council of City of Inglewood; Barlow v., Sup.	197	P.2d	721
City of Fairfield v. Hutcheon, App.	197	P.2d	78
City of Los Angeles, Dept. of Water & Power; Gettman v., App.	197	P.2d	817
City of Pomona; People ex rel. Wagner v., App.	198	P.2d	959
Clarke; Thompson v., Sup.	197	P.2d	161
Clayton v. Wilkins, Sup.	197	P.2d	162
Clinard; Stafford v., App.	197	P.2d	84
Coca-Cola Bottling Co.; Hoffing v., App.	197	P.2d	56
Coca-Cola Bottling Co. of Los Angeles; Cunningham v., App.	198	P.2d	333
Columbia Pictures Corp. v. De Toth, App.	197	P.2d	580
Conan; Fullerton v., App.	197	P.2d	59
Cornett; People v., Sup.	198	P.2d	877
Cortez; Reed v., App.	198	P.2d	911
Cotter v. Wolff, App.	198	P.2d	950
Council of City of Vallejo; Swars v., App.	198	P.2d	955
Cowan; Riverside Rancho Corp. v., App.	198	P.2d	526
Crane; Morin v., Sup.	197	P.2d	162
Crescenta Mut. Water Co.; Barrabee v., App.	198	P.2d	558
Crocker; Pearce v., Sup.	197	P.2d	161
Cunningham v. Coca-Cola Bottling Co. of Los Angeles, App.	198	P.2d	333
Cunningham v. Taylor, App.	197	P.2d	565
Dabb; People v., Sup.	197	P.2d	1
Dalton's Estate, In re, App.	197	P.2d	62
Danziger v. Peebler, App.	198	P.2d	719
Davy v. Ogier, App.	198	P.2d	92
Dawson; People v., App.	198	P.2d	338
De Pier v. Maddox, App.	197	P.2d	87
De Sylva v. Ballentine, App.	197	P.2d	359
De Sylva v. De Sylva, App.	197	P.2d	359
De Toth; Columbia Pictures Corp. v., App.	197	P.2d	580
Di Giorgio v. Di Giorgio, App.	197	P.2d	213
Downing v. Municipal Court of City and County of San Francisco, App.	198	P.2d	923
Downs v. State, App.	198	P.2d	51
Drew; Nichols v., App.	198	P.2d	707
Duffy; Williams v., Sup.	197	P.2d	341
Dynan v. Gallinatti, App.	197	P.2d	391
Elbert, Limited, v. Nolan, Sup.	197	P.2d	537
Emden v. Vitz, App.	198	P.2d	696
Engasser v. Jones, App.	198	P.2d	546
Ettlinger's Estate, In re, App.	197	P.2d	163
Fairfield, City of, v. Hutcheon, App.	197	P.2d	78
Ferry & Hensler; Kuhn v., App.	197	P.2d	792
Fields; People v., App.	198	P.2d	104
Filtzer's Estate, In re, App.	198	P.2d	329
Finkelstein v. Finkelstein, App.	198	P.2d	98
Fischer v. Means, App.	198	P.2d	389
Fitch; Carpenter v., App.	197	P.2d	174
Flatley; Hobgood v., App.	198	P.2d	523
Fleming; Merriweather v., Sup.	197	P.2d	161
Franklin v. Peterson, App.	197	P.2d	788
Frazier; People v., App.	198	P.2d	325
Free v. Sluss, Super.	197	P.2d	854

	Vol.		Page
French Art Cleaners v. State Bd. of Dry Cleaners, App.	198	P.2d	91
Fullerton v. Conan, App.	197	P.2d	59
Fun Him v. Occidental Life Ins. Co., App.	198	P.2d	711
Gaither; Schwenger v., App.	198	P.2d	108
Gallinatti; Dynan v., App.	197	P.2d	391
Garner; Landfield v., App.	198	P.2d	717
Gattman; Breitman v., App.	198	P.2d	311
Gettman v. City of Los Angeles, Dept. of Water & Power, App.	197	P.2d	817
Gillespie; Reid v., App.	197	P.2d	566
Gilmore v. Placer County Bank, App.	198	P.2d	910
Glenn-Colusa Irr. Dist.; Bradshaw v., App.	198	P.2d	106
Gonzales; People v., App.	198	P.2d	81
Gotcher v. Gotcher, App.	197	P.2d	199
Greer Custom Originals v. Superior Court, Los Angeles County, App.	197	P.2d	768
Gregory v. State, Sup.	197	P.2d	728
Gryszkiewicz; People v., App.	198	P.2d	585
Gulyas; Love v., App.	197	P.2d	405
Haglund; Lindstrom v., App.	197	P.2d	844
Hall; Brock v., App.	198	P.2d	69
Hamilton; People v., Sup.	198	P.2d	873
Hamilton; People v., App.	198	P.2d	907
Harder v. Allen, App.	198	P.2d	329
Hardy; People v., Sup.	198	P.2d	865
Harem Corp. v. State Bd. of Equalization, App.	198	P.2d	48
Harker's Estate, In re, App.	198	P.2d	51
Harrington, Ex parte, App.	197	P.2d	783
Harris; People v., App.	198	P.2d	60
Hathaway; Wolfsen v., Sup.	198	P.2d	1
Hawkins; Citizens Nat. Trust & Sav. Bank of Los Angeles v., App.	197	P.2d	385
Hearn; People v., App.	198	P.2d	305
Heinze; Jones v., App.	198	P.2d	520
Helmer v. Helmer, App.	197	P.2d	558
Hensgen v. Silberman, App.	197	P.2d	356
Higgins; People v., Super.	197	P.2d	417
Hill; Snidow v., App.	197	P.2d	801
Him v. Occidental Life Ins. Co., App.	198	P.2d	711
Hobgood v. Flatley, App.	198	P.2d	523
Hodges v. Porikos, App.	198	P.2d	577
Hoffing v. Coca-Cola Bottling Co., App.	197	P.2d	56
Holmes' Estate, In re, App.	198	P.2d	708
Holt; People v., App.	198	P.2d	58
Horn; Braverman v., App.	198	P.2d	948
Houston; People v., App.	198	P.2d	53
Howard v. Lampton, App.	197	P.2d	69
Howard Greer Custom Originals v. Superior Court, Los Angeles County, App.	197	P.2d	768
Hughes v. Superior Court in and for Contra Costa County, Sup.	198	P.2d	885
Hunter v. Sparling, App.	197	P.2d	807
Hutcheon; City of Fairfield v., App.	197	P.2d	78
Imperial-Yuma Production Credit Ass'n v. Shields, App.	198	P.2d	951
Industrial Acc. Commission; Industrial Indem. Co. v., App.	198	P.2d	309
Industrial Acc. Commission; Industrial Indem. Exchange v., App.	197	P.2d	75
Industrial Indem. Co. v. Industrial Acc. Commission, App.	198	P.2d	309
Industrial Indem. Exchange v. Industrial Acc. Commission, App.	197	P.2d	75
Jew Fun Him v. Occidental Life Ins. Co., App.	198	P.2d	711
Johnson v. Banta, App.	198	P.2d	100
Johnson; Lippold v., Sup.	197	P.2d	161
Jones; Engasser v., App.	198	P.2d	546

	Vol.		Page
Jones v. Heinze, App.	198	P.2d	520
Kan v. Tsang, App.	197	P.2d	378
Karas; Kay v., App.	197	P.2d	396
Kay v. Karas, App.	197	P.2d	396
Kaye v. Melzer, App.	197	P.2d	50
Kennedy's Estate, In re, App.	197	P.2d	844
Kenney v. Wolff, App.	198	P.2d	582
Kilgore; Stark v., App.	197	P.2d	795
King v. Stanley, Sup.	197	P.2d	321
Klett; Vieth v., App.	198	P.2d	314
Klor; People v., Sup.	197	P.2d	705
Knapp v. Rose, Sup.	197	P.2d	7
Koebrich v. Simpson, App.	197	P.2d	820
Krog v. Krog, Sup.	198	P.2d	510
Kuhn v. Ferry & Hensler, App.	197	P.2d	792
Lampton; Howard v., App.	197	P.2d	69
Landfield v. Garner, App.	198	P.2d	717
Leake; Sweeley v., App.	197	P.2d	401
Lindstrom v. Haglund, App.	197	P.2d	844
Lippold v. Johnson, Sup.	197	P.2d	161
Lippold; Perez v., Sup.	198	P.2d	17
Looper; Merriweather v., Sup.	197	P.2d	161
Lopez; People v., Sup.	197	P.2d	757
Lopez; People v., App.	197	P.2d	196
Los Angeles County; Dalzell v., App.	198	P.2d	554
Love v. Gulyas, App.	197	P.2d	405
Luis v. Cavin, App.	198	P.2d	563
Lunt v. Boris, App.	197	P.2d	568
McCabe; Burwell v., App.	197	P.2d	35
McCabe's Estate, In re, App.	197	P.2d	35
McCoy v. Yellow Cab Co. of Cal., App.	198	P.2d	371
McElroy v. McElroy, Sup.	198	P.2d	683
McFarland v. Superior Court in and for Merced County, App.	198	P.2d	318
Machabie; People v., Sup.	198	P.2d	681
McWilliams; People v., App.	197	P.2d	216
Maddox; De Pier v., App.	197	P.2d	87
Magee v. San Francisco Bar Pilots Benev. & Protective Ass'n, App.	198	P.2d	933
Mangan; People v., App.	197	P.2d	781
Martin; People v., App.	197	P.2d	379
Mashburn v. Bedell, App.	197	P.2d	98
Mastrantuono; People v., App.	198	P.2d	574
Matich; Camp v., App.	197	P.2d	345
Matthews v. Andrade, App.	198	P.2d	66
Mayer v. Robinson, Sup.	197	P.2d	161
Mazzenga v. Rosso, App.	197	P.2d	770
Means; Fischer v., App.	198	P.2d	389
Mehaffey; People v., Sup.	197	P.2d	12
Melzer; Kaye v., App.	197	P.2d	50
Merriweather v. Fleming, Sup.	197	P.2d	161
Merriweather v. Looper, Sup.	197	P.2d	161
Metropolitan Water Dist. of Southern Cal. v. Adams, Sup.	197	P.2d	543
Mitchell; Nichols v., Sup.	197	P.2d	550
Moffat v. Smith, App.	197	P.2d	798
Moore v. Mosher, App.	198	P.2d	714
Moore; People v., App.	197	P.2d	835
Moranda; People v., App.	197	P.2d	394
Morgan; People v., App.	197	P.2d	413
Morin v. Crane, Sup.	197	P.2d	162

	Vol.		Page
Mosher; Moore v., App.	198	P.2d	714
Municipal Court of City and County of San Francisco; Downing v., App.	198	P.2d	923
Murr v. Murr, App.	197	P.2d	369
Nelson v. California Trust Co., App.	198	P.2d	66
Nelson v. Reilly, App.	198	P.2d	694
Nemanick v. Christensen, App.	197	P.2d	785
Niagara Duplicator Co.; Willson v., App.	198	P.2d	362
Nichols v. Drew, App.	198	P.2d	707
Nichols v. Mitchell, Sup.	197	P.2d	550
Nichols; People v., App.	198	P.2d	538
Nolan; Elbert, Limited, v., Sup.	197	P.2d	537
Northrop Aircraft v. California Employment Stabilization Commission, Sup.	198	P.2d	898
Occidental Life Ins. Co.; Jew Fun Him v., App.	198	P.2d	711
Ogier; Davy v., App.	198	P.2d	92
O'Laverty v. O'Laverty, App.	197	P.2d	212
O'Neill; Yurkas v., App.	198	P.2d	103
Orcalles; People v., Sup.	197	P.2d	26
Ormes; People v., App.	198	P.2d	690
Parrish; People v., App.	197	P.2d	804
Pasadena Tournament of Roses Ass'n; Weaver v., Sup.	198	P.2d	514
Pearce v. Crocker, Sup.	197	P.2d	161
Peebler v. Danziger, App.	198	P.2d	719
People v. Anderson, App.	197	P.2d	839
People v. Bean, App.	198	P.2d	379
People v. Boyce, App.	197	P.2d	842
People v. Bundte, App.	197	P.2d	823
People v. Byrd, App.	198	P.2d	561
People v. Cornett, Sup.	198	P.2d	877
People v. Dabb, Sup.	197	P.2d	1
People v. Dawson, App.	198	P.2d	338
People v. Fields, App.	198	P.2d	104
People v. Frazier, App.	198	P.2d	325
People v. Gonzales, App.	198	P.2d	81
People v. Gryszkiewicz, App.	198	P.2d	585
People v. Hamilton, Sup.	198	P.2d	873
People v. Hamilton, App.	198	P.2d	907
People v. Hardy, Sup.	198	P.2d	865
People v. Harris, App.	198	P.2d	60
People v. Hearn, App.	198	P.2d	305
People v. Higgins, Super.	197	P.2d	417
People v. Holt, App.	198	P.2d	58
People v. Houston, App.	198	P.2d	53
People v. Klor, Sup.	197	P.2d	705
People v. Lopez, Sup.	197	P.2d	757
People v. Lopez, App.	197	P.2d	196
People v. Machabie, Sup.	198	P.2d	681
People v. McWilliams, App.	197	P.2d	216
People v. Mangan, App.	197	P.2d	781
People v. Martin, App.	197	P.2d	379
People v. Mastrantuono, App.	198	P.2d	574
People v. Mehaffey, Sup.	197	P.2d	12
People v. Moore, App.	197	P.2d	835
People v. Moranda, App.	197	P.2d	394
People v. Morgan, App.	197	P.2d	413
People v. Nichols, App.	198	P.2d	538
People v. Orcalles, Sup.	197	P.2d	26
People v. Ormes, App.	198	P.2d	690

	Vol.		Page
People v. Parrish, App.	197	P.2d	804
People v. Perkin, App.	197	P.2d	39
People v. Reingold, App.	197	P.2d	175
People v. Robinson, App.	197	P.2d	776
People v. Shorts, Sup.	197	P.2d	330
People v. Silver, App.	197	P.2d	90
People v. Tucker, App.	198	P.2d	941
People v. Tuthill, Sup.	198	P.2d	505
People v. Walker, App.	198	P.2d	534
People v. Wallin, Sup.	197	P.2d	734
People v. Young, App.	198	P.2d	384
People v. Zook, Super.	197	P.2d	851
People ex rel. Wagner v. City of Pomona, App.	198	P.2d	959
Perez v. Lippold, Sup.	198	P.2d	17
Perkin; People v., App.	197	P.2d	39
Peterson; Franklin v., App.	197	P.2d	788
Placer County Bank; Gilmore v., App.	198	P.2d	910
Porikos; Hodges v., App.	198	P.2d	577
Prytz v. Associated Farms, App.	198	P.2d	110
Reed v. Cortez, App.	198	P.2d	911
Reid v. Gillespie, App.	197	P.2d	566
Reilly; Nelson v., App.	198	P.2d	694
Reingold; People v., App.	197	P.2d	175
Riverside Rancho Corp. v. Cowan, App.	198	P.2d	526
Robinson; Mayer v., Sup.	197	P.2d	161
Robinson; People v., App.	197	P.2d	776
Rosa v. Rosa, App.	197	P.2d	85
Rose; Knapp v., Sup.	197	P.2d	7
Rosso; Mazzenga v., App.	197	P.2d	770
Ryan v. Welte, App.	198	P.2d	351
Ryan v. Welte, App.	198	P.2d	357
Sampsell v. Superior Court in and for Los Angeles County, Sup.	197	P.2d	739
Sanders, In re, App.	198	P.2d	523
San Francisco Bar Pilots Benev. & Protective Ass'n; Magee v., App.	198	P.2d	933
Schwartz v. Schwartz, App.	197	P.2d	223
Schwartz' Estate, In re, App.	197	P.2d	223
Schwebel; Carlesimo v., App.	197	P.2d	167
Schwenger v. Gaither, App.	198	P.2d	108
Second Baptist Church of Los Angeles; Brewer v., Sup.	197	P.2d	713
Security-First Nat. Bank of Los Angeles v. Wellslager, App.	198	P.2d	700
Shields; Imperial-Yuma Production Credit Ass'n v., App.	198	P.2d	951
Shorts; People v., Sup.	197	P.2d	330
Silberman; Hensgen v., App.	197	P.2d	356
Silva v. City and County of San Francisco, App.	198	P.2d	78
Silver; People v., App.	197	P.2d	90
Simpson; Koebrich v., App.	197	P.2d	820
Simpson's Guardianship, In re, App.	197	P.2d	820
Sluss; Free v., Super.	197	P.2d	854
Smith; Moffat v., App.	197	P.2d	798
Snidow v. Hill, App.	197	P.2d	801
Sparling; Hunter v., App.	197	P.2d	807
Spencer's Estate, In re, App.	197	P.2d	351
Spendrup; Abila v., Sup.	197	P.2d	10
Stafford v. Clinard, App.	197	P.2d	84
Stanley; King v., Sup.	197	P.2d	321
Stark v. Kilgore, App.	197	P.2d	795
State; Downs v., App.	198	P.2d	51
State; Gregory v., Sup.	197	P.2d	728
State Bar of Cal.; Townsend v., Sup.	197	P.2d	326

	Vol.		Page
State Bd. of Dry Cleaners; French Art Cleaners v., App.	198	P.2d	91
State Bd. of Equalization; Harem Corp. v., App.	198	P.2d	48
Stearns; Bastanchury v., App.	198	P.2d	919
Stoehr v. Superior Court in and for Los Angeles County, App.	197	P.2d	779
Stone, Ex parte, App.	197	P.2d	847
Stratton v. Superior Court in and for Los Angeles County, App.	197	P.2d	821
Strom v. Union Oil Co., App.	198	P.2d	347
Superior Court in and for Contra Costa County; Hughes v., Sup.	198	P.2d	885
Superior Court in and for Los Angeles County; Sampsell v., Sup.	197	P.2d	739
Superior Court in and for Los Angeles County; Stoehr v., App.	197	P.2d	779
Superior Court in and for Los Angeles County; Stratton v., App.	197	P.2d	821
Superior Court in and for Merced County; McFarland v., App.	198	P.2d	318
Superior Court, Los Angeles County; Howard Greer Custom Originals v., App.	197	P.2d	768
Svetina v. Burelli, App.	197	P.2d	562
Swars v. Council of City of Vallejo, App.	198	P.2d	955
Sweeley v. Leake, App.	197	P.2d	401
Taylor; Cunningham v., App.	197	P.2d	565
Thompson v. Clarke, Sup.	197	P.2d	161
Tom; Abellera v., App.	198	P.2d	324
Torresan; Broderick v., App.	198	P.2d	75
Townsend v. State Bar of Cal., Sup.	197	P.2d	326
Tsang v. Butterworth, App.	197	P.2d	378
Tsang; Kan v., App.	197	P.2d	378
Tucker; People v., App.	198	P.2d	941
Tuthill; People v., Sup.	198	P.2d	505
Tyra v. Board of Police and Fire Pension Com'rs of City of Long Beach, Sup.	197	P.2d	710
Union Oil Co.; Strom v., App.	198	P.2d	347
Union Pac. R. Co. v. Zimmer, App.	197	P.2d	363
Vieth v. Klett, App.	198	P.2d	314
Vitz; Emden v., App.	198	P.2d	696
Vorlander; Benard v., App.	197	P.2d	42
Wagner, People ex rel., v. City of Pomona, App.	198	P.2d	959
Walker; People v., App.	198	P.2d	534
Wallin; People v., Sup.	197	P.2d	734
Washer v. Bank of America Nat. Trust & Sav. Ass'n, two cases, App.	197	P.2d	202
Weaver v. Pasadena Tournament of Roses Ass'n, Sup.	198	P.2d	514
Wellslager; Security-First Nat. Bank of Los Angeles v., App.	198	P.2d	700
Welte; Ryan v., App.	198	P.2d	351
Welte; Ryan v., App.	198	P.2d	357
Whelan v. Whelan, App.	197	P.2d	361
Whitaker; Worley v., App.	197	P.2d	773
Wilkins; Clayton v., Sup.	197	P.2d	162
Williams v. Duffy, Sup.	197	P.2d	341
Willson v. Niagara Duplicator Co., App.	198	P.2d	362
Wilson v. Wilson, App.	198	P.2d	916
Wolff; Cotter v., App.	198	P.2d	950
Wolff; Kenney v., App.	198	P.2d	582
Wolfsen v. Hathaway, Sup.	198	P.2d	1
Worley v. Whitaker, App.	197	P.2d	773
Worley's Estate, In re, App.	197	P.2d	773
Yellow Cab Co. of Cal.; McCoy v., App.	198	P.2d	371
Young; Back v., Sup.	197	P.2d	161
Young v. Bank of Cal., App.	198	P.2d	543
Young; People v., App.	198	P.2d	384
Yurkas v. O'Neill, App.	198	P.2d	103
Zimmer; Union Pac. R. Co. v., App.	197	P.2d	363
Zook; People v., Super.	197	P.2d	851

CALIFORNIA REPORTER

197 PACIFIC REPORTER

SECOND SERIES

---

32 Cal.2d 491

PEOPLE v. DABB et al.

Cr. 4847, 4848.

Supreme Court of California, in Bank.
Aug. 30, 1948.

1. Homicide 🔑**253(1)**
Robbery 🔑**24(1)**

Evidence sustained conviction of murder and robbery in the first degree.

2. Criminal law 🔑**531**

The prosecution must lay the foundation for introduction of a confession by preliminary proof that it was made voluntarily without any previous inducement, promise or offer of leniency, and without duress, intimidation or threat.

3. Criminal law 🔑**736(2)**

Conflicting testimony of police officers and defendants as to whether oral and written confessions were voluntarily given was for jury.

4. Criminal law 🔑**519(9)**

That defendants were questioned intermittently for approximately five hours, commencing at 11 p. m., without use of force or abusive language, being permitted to be seated and to use restroom when requested, did not require rejection of oral confessions made within one or two hours after questioning began or written statements made late the following morning after defendants had slept the remainder of night.

5. Criminal law 🔑**531(3)**

Under the evidence jury was justified in concluding that oral and written confessions were voluntarily given.

6. Criminal law 🔑**444**

Sound motion picture of re-enactment by defendants of robbery and murder was admissible upon preliminary showing as to circumstances surrounding the filming, including method of determining where camera should be set up, that film was the identical one which had been exposed while crime was being re-enacted and that it accurately portrayed what took place at that time.

7. Criminal law 🔑**438**

A motion picture of the artificial recreation of an event should be received with caution, since it may unduly accentuate certain phases of the happening and because of the forceful impression made upon minds of jurors by such evidence.

8. Criminal law 🔑**438**

Brief absence of sound due to temporary defect in microphone while sound motion picture of re-enactment by defendants of crime was being shown to jury did not render such evidence inadmissible, where defendants, though given an opportunity to do so, did not show what was said during period of silence or that they were in any way prejudiced thereby.

9. Criminal law 🔑**1169(5)**

Where jury was admonished several times in prosecution for robbery and murder of liquor store proprietor that evidence of robbery of cab driver by two of the defendants four hours later and shooting of police officers by same two defendants two weeks later could not be considered against third defendant who was in no way connected with such offenses, it must be assumed that third defendant was not prejudiced by such evidence.

10. Criminal law 🔑**369(2)**

While a defendant in criminal action cannot be required to defend himself against the charge of any crime other than that for which he is on trial, evidence which is relevant in establishing guilt of the crime charged is admissible, though it tends to connect defendant with an offense not included in the charge.

11. Criminal law ⚿338(1), 369(2)

The general test of "relevancy" is whether the evidence tends logically, naturally and by reasonable inference to establish any fact material for the people or to overcome any material matter sought to be proved by defense and evidence which does so is admissible, though it embraces the commission of another offense, and regardless of whether the other offense is similar.

See Words and Phrases, Permanent Edition, for all other definitions of "Relevancy".

12. Criminal law ⚿369(2)

The relevancy of evidence that proves crimes other than that charged must be examined with care due to prejudicial nature of such evidence and it should not be admitted simply on the showing that some part of such transaction is relevant to the case.

13. Criminal law ⚿369(2)

The possibility of severing relevant from irrelevant portions of evidence that proves crimes other than that charged should be considered in order to protect defendant against reference to other crimes where such reference has no tendency to establish facts pertinent to proof of crime charged.

14. Criminal law ⚿673(5)

Permitting cab driver to testify fully concerning robbery by defendants near scene of and four hours after robbery and murder of liquor store proprietor for which defendants were on trial, without limiting such testimony to proof of fact that defendants were together near scene of murder four hours after its commission and possessed the means of committing the murder, was not error, since thus limiting cab driver's testimony would have prevented jury from viewing the essential facts in their true perspective and properly evaluating the weight of such evidence.

15. Criminal law ⚿369(2), 370

Evidence that defendants shot police officers in order to avoid apprehension and questioning two weeks after robbery and murder for which they were on trial was admissible as showing consciousness of guilt, the association of defendants and their possession of the means of committing the murder, though such evidence showed commission of another offense.

16. Criminal law ⚿438, 1169(1)

Sound motion pictures of re-enactment by defendants of robbery of cab driver and shooting of police officers four hours and two weeks respectively after commission of robbery and murder for which defendants were on trial unduly emphasized the facts of such subsequent occurrences, though evidence thereof was admissible to show association of the defendants, their possession of the means of committing the murder, and consciousness of guilt, but admission of such motion pictures in evidence was not reversible error in view of the clear proof of guilt of defendants.

◆

Appeal from Superior Court, Los Angeles County; Harold B. Landreth, Judge.

James Dabb, Jr., Joel Harrison and Clayburne Campbell were convicted of murder and robbery in the first degree, and they appeal.

Affirmed.

Walter L. Gordon, Jr., Philip S. Schutz and Alexander Oster, all of Los Angeles, for appellants.

Fred N. Howser, Atty. Gen., and James A. Doherty, Deputy Atty. Gen., for respondent.

GIBSON, Chief Justice.

Defendants James Dabb, Joel Harrison, and Clayburne Campbell were each charged by indictment with the murder and robbery of Louie DiCioda while armed with a deadly weapon, and the jury found them guilty of murder and robbery in the first degree. They were sentenced under the robbery count to the state prison for the term prescribed by law. Under the murder count Dabb was sentenced for the term of his natural life, and Harrison and Campbell were sentenced to suffer the death penalty. Dabb filed a notice of appeal from the judgment of conviction and from the order denying his motion for a new trial. The appeals of Harrison and Campbell are automatic under section 1239(b) of the Penal Code.

DiCioda was fatally shot on the night of March 1, 1947, at his liquor store in Los Angeles. With him at the time was Mrs. La von Britson, who testified that she saw Campbell point a gun at DiCioda and heard him say "This is a stickup." Immediately thereafter a shot was fired, and she saw DiCioda slump to the floor. A few seconds later she heard another shot and saw Harrison standing just inside the store. He pointed a gun at her and she stepped behind some liquor cases. Campbell said to Harrison, "You get that," and Mrs. Britson, looking over the top of the cases, saw Harrison leap on a case which was close to the cash register. She heard the cash register ring open, but did not see Harrison take any money from it. When police officers arrived a few minutes later the cash register was open and empty, and some nickels and dimes were found on the floor nearby.

About four hours later a cab driver was held up not far from the scene of the murder, and he later identified Dabb and Harrison as the men who robbed him. About two weeks after the murder occurred two policemen saw Dabb and Harrison coming out of a restaurant, and one of the officers said to them, "Just a minute, fellows, I want to talk to you." Harrison started shooting immediately, and both men escaped. The police officers were seriously wounded.

The defendants were arrested about six weeks after the murder, and shortly thereafter made oral and written statements implicating themselves in the homicide. They also reenacted the crime, and their actions were recorded by the use of sound motion pictures. The statements were received in evidence, and the jury viewed the motion picture film in which defendants admitted that they had committed the crime in the manner there depicted. According to this evidence, defendants, pursuant to a prearranged plan, went to the store together. Dabb remained across the street to act as the "lookout" while the others entered the store for the purpose of "looking it over," pretending to be prospective customers. After having, by agreement, a pretended argument as to what they would purchase, Campbell and Harrison left the store, retiring to a nearby building where they could watch Dabb. Shortly thereafter Dabb signaled that the way was clear, and Campbell and Harrison reentered the store. Campbell said to decedent "This is a stickup," and then grappled with him and shot him. Harrison also shot at DiCioda. He took approximately $75 from the cash register in the store, and the defendants met later and divided the money.

The confessions were repudiated by defendants at the trial, and each defendant claimed that he was elsewhere when the crime was committed.

[1] The evidence was clearly sufficient to sustain the judgments. Defendants contend, however, that the confessions were inadmissible against them because they assertedly were obtained by force and fear, that the court erred in allowing the sound motion pictures to be viewed by the jury, and that it was also error to admit evidence of the robbery of the cab driver and the shooting of the police officers by Dabb and Harrison.

[2] The rule is elementary that to be admissible a confession must be shown to have been made freely and voluntarily, without any previous inducement, promise or offer of leniency, and without duress, intimidation or threat. People v. Williams, 20 Cal.2d 273, 125 P.2d 9; People v. Borello, 161 Cal. 367, 119 P. 500, 37 L.R.A.,N.S., 434. It is incumbent upon the prosecution to lay the foundation for its introduction by preliminary proof that it was voluntarily made. People v. Jones, 24 Cal.2d 601, 150 P.2d 801. Such a preliminary showing was made in this case before each confession was admitted.

The police officer who heard the oral confessions testified that the statements were made voluntarily without force or threat of force and without offer of reward or promise of immunity. As to the written confessions, another officer testified that the three defendants were together when they voluntarily made the statements which the officer wrote as related to him. A separate statement was written for each defendant, and each of them read and signed not only his own statement but those of the other two as well, and said at the time that they were true. A third officer testified that defendants were asked if they would assist in making a motion picture reenactment of the killing, and each answered in the affirmative; that they freely and voluntarily participated in the reenactment; and that no force, threat of force, promise or offer of reward was used to induce them to do so.

The claim that the confessions were obtained by force and fear was first made after they had been admitted in evidence and during the presentation of defendants' case. They related a long story of police brutality beginning at the time of arrest and continuing until, as a result of fear thus engendered, the confessions were given. This testimony was categorically denied by the police officers who obtained the confessions. Although it appears that defendants were questioned intermittently for approximately five hours, commencing at 11:00 o'clock at night, they made statements implicating themselves in the crime within one or two hours after the questioning began, and the remainder of the time was spent in securing detailed information concerning the crime. They were together during substantially the entire period and were permitted to be seated and to use the restroom whenever a request was made. No force or abusive language was used by the police officers. At the end of the questioning defendants were taken to separate cells, where they slept the remainder of the night. The statements that were reduced to writing were made late on the following morning.

[3-5] It was the function of the jury to weigh the testimony of the defendants and that of the police officers in determining whether the confessions were voluntarily given (People v. Perry, 195 Cal. 623, 636, 234 P. 890), and the verdict of guilty shows that the conflict was resolved by the jury against the defendants. The manner in which the defendants were questioned did not require a rejection of their confessions, and under all the evidence the jury was justified in concluding that the confessions were freely and voluntarily given.

The next question concerns the admissibility of three sound motion pictures. The first was a reenactment of the crime by defendants, with one of the police officers acting as decedent. The other two showed the reenactment by Dabb and Harrison of the robbery of the cab driver and the shooting of the police officers. There was first a rehearsal of each incident, at which the defendants were asked to show what they had done. From this it was determined where the camera should be set up in order to embrace all of the action, and the entire scene was then photographed, with the sound and the pictures being simultaneously recorded on the same strip of film. All of these pictures, with the sound, were exhibited to the jury.

A sound motion picture of a confession was held admissible, upon proper foundation, in People v. Hayes, 21 Cal.App.2d 320, 71 P.2d 321, and in the only other discovered case where this means was adopted to prove a confession, the admission of the picture was likewise sustained. Commonwealth v. Roller, 100 Pa.Super. 125. Motion pictures have also heen held admissible in other types of cases. Harmon v. San Joaquin Light & Power Corp., 37 Cal.App.2d 169, 98 P.2d 1064; Heiman v. Market Street Ry. Co., 21 Cal.App.2d 311, 69 P.2d 178; Kortz v. Guardian Life Ins. Co., 10 Cir., 144 F.2d 676, 679; Metropolitan Life Ins. Co. v. Wright, 190 Miss. 53, 199 So. 289; Boyarski v. G. A. Zimmerman Corp., 240 App.Div. 361, 270 N.Y.S. 134; Rogers v. Detriot, 289 Mich., 86, 286 N.W. 167; McGoorty v. Benhart, 305 Ill. 458, 27 N.E.2d 289; Owens v. Hagenbeck-Wallace Shows Co., 58 R.I. 162, 192 A. 158, 112 A.L.R. 113; Philippi v. New York C. & St. L. R. Co., Mo.App., 136 S.W.2d 339; Denison v. Omaha & C. B. St. Ry. Co., 135 Neb. 307, 280 N.W. 905; Gulf Life Ins. Co. v. Stossel 131 Fla. 268, 175 So. 804 and Id., 131 Fla. 127, 179 So. 163; see also notes in 129 A.L.R. 361 and in 83 A.L.R. 1315; but cf. Gibson v. Gunn, 206 App.Div. 464, 202 N.Y.S. 19.

In a number of other cases the courts have recognized the admissibility of motion pictures generally but have held that the evidence was properly rejected either because no sufficient foundation was laid or because the fact sought to be shown by the pictures was not relevant to the issues of the case. State to Use of Chima v. United R'ways & Elec. Co., 162 Md. 404, 159 A. 916, 83 A.L.R. 1307; Pandolfo v. United States, 7 Cir., 286 F. 8; De Camp v. United States, 56 App.D.C. 119, 10 F.2d 984; Massachusetts Bonding & Ins. Co. v. Worthy, Tex.Civ.App. 9 S.W.2d 388; Sprinkle v. Davis, 4 Cir., 111 F.2d 925, 128 A.L.R. 1101; Baker v. United States, 8 Cir., 115 F.2d 533; Pacific Mut. Life Ins. Co. v. Marks, 230 Ala. 417, 161 So. 543; Morris v. E. I. Du Pont de Nemours & Co., 346 Mo. 126, 139 S.W.2d 984, 129 A.L.R. 352; Appleby v. State, 221 Ind. 544, 49 N.E.2d 533.

[6] It is argued that a motion picture is susceptible of fabrication, but the same objection has been made to still photographs, which have long been used as evidence, and no valid ground for distinction between still and sound motion pictures presents itself. Protection against falsification or misrepresentation lies in the requirement of preliminary proof that the picture is an accurate reproduction of the scene or event which it depicts, and in the opportunity for cross-examination of the witnesses making such proof. In the present case, before introducing the film in evidence, several persons testified to the circumstances surrounding the filming, including the method of determining where the camera should be set up and operated. There was testimony that the film to be shown to the jury was the identical one which had been exposed while the crimes were being reenacted, and that it accurately portrayed what took place at that time. It is difficult to conceive of a more satisfactory foundation preliminary to the admission of a sound motion picture.

[7] A motion picture of the artificial re-creation of an event may unduly accentuate certain phases of the happening, and because of the forceful impression made upon the minds of the jurors by this kind of evidence, it should be received with caution. As pointed out by Wigmore, such a portrayal of an event is apt to cause a person to forget that "it is merely what certain witnesses say was the thing that happened" and may "impress the jury with the convincing impartiality of Nature herself." (3 Wigmore, Evidence [3rd ed.], § 798a, p. 203.) However, when the events which are being photographed consist of a voluntary reenactment by the accused of what occurred, there is little, if any, danger of misleading emphasis which is unfavorable to him. Moreover, as a method of presenting confessions, sound motion pictures appear to have a unique advantage in that, while presenting the admission of guilt, they simultaneously testify to facts relevant to the issue of volition.

[8] For a few moments while the picture was being shown to the jury there was no accompanying sound, and defendants complain that the picture should have been rejected unless all of the sound was reproduced. However, it does not appear that defendants were in any way prejudiced by this brief absence of sound, which was explained as resulting from a temporary defect in the microphone, which was immediately repaired. They had an opportunity to show what was said during the silent portion, but they did not do so, and there is no support in the record for the claim, made here for the first time, that during the silent interval one of the defendants had said that he was being forced to participate.

[9] Defendants next contend that it was improper to admit evidence of the robbery of the cab driver and the shooting of the police officers by Dabb and Harrison. Campbell was in no way connected with these offenses, and the jury was admonished on a number of occasions that evidence relating thereto could not be considered against him. It must be assumed that these instructions were followed and that he was not prejudiced by such evidence. The trial court also cautioned the jury that the testimony was admissible for the limited purpose of showing the association between Dabb and Harrison and their possession of the means of committing the murder of DiCioda, and with respect to the shooting of the police officers the jury was instructed that the evidence was also admissible to show consciousness of guilt on the part of Dabb and Harrison.

[10] A defendant in a criminal action cannot be required to defend himself against

the charge of any crime other than that for which he is on trial, but this rule does not exclude evidence which incidentally discloses the commission of another offense. Evidence which is relevant in establishing guilt of the crime charged is admissible notwithstanding the fact that it tends to connect the accused with an offense not included in the charge. People v. Peete, 28 Cal.2d 306, 314, 315, 169 P.2d 924; People v. McMonigle, 29 Cal.2d 730, 741, 177 P.2d 745. As stated in People v. Peete, supra, 28 Cal.2d at page 315, 169 P.2d at page 930, quoting from People v. Walters, 98 Cal. 138, 141, 32 P. 864, "whenever the case is such that proof of one crime tends to prove any fact material in the trial of another, such proof is admissible, and the fact that it may tend to prejudice the defendant in the minds of the jurors is no ground for its exclusion."

[11–13] The general test of relevancy is whether the evidence tends logically, naturally, and by reasonable inference to establish any fact material for the people or to overcome any material matter sought to be proved by the defense. If it does, then the evidence is admissible whether or not it embraces the commission of another offense and whether the other crime be similar or dissimilar. People v. Peete, 28 Cal.2d 306, 315, 169 P.2d 924. The relevancy of evidence that proves crimes other than that charged must, of course, be examined with care, due to the prejudicial nature of all such evidence, and it should not be admitted simply on the showing that some part of that transaction is relevant to the case. The possibility of severing relevant from irrelevant portions should, in every case, be considered, thereby protecting the defendant against reference to other crimes where it has no tendency to establish facts pertinent to the proof of the crime charged.

[14] There can be no question that the facts that Dabb and Harrison were together near the scene of the murder four hours after its commission and that each had in his possession the means of committing that crime were relevant, but it is argued that the evidence should have been limited to the bare proof of those facts without reference to the surrounding circumstances which disclosed the commission of another crime. It is clear, however, that if the testimony of the cab driver had been so restricted, the jury would have been unable to view the essential facts in their true perspective and thereby properly evaluate the weight of the evidence. Under such circumstances it was not error to allow the witness to relate the entire occurrence. See People v. Simeone, 26 Cal.2d 795, 804, 805, 161 P.2d 369; People v. Nakis, 184 Cal. 105, 114, 193 P. 92; People v. McGilver, 67 Cal. 55, 7 P. 49; People v. Cato, 13 Cal.App.2d 391, 394, 56 P.2d 1245.

[15] Evidence of the actions of Dabb and Harrison in their efforts to avoid questioning by the police was admissible even though it showed the commission of another offense. Its relevancy lay in the fact that a consciousness of guilt may be inferred from an attempt to avoid apprehension, especially where, as here, violence is used. People v. Arnold, 199 Cal. 471, 250 P. 168; People v. Ellis, 188 Cal. 682, 206 P. 753; People v. Flannelly, 128 Cal. 83, 87, 60 P. 670; People v. Hawkins, 127 Cal. 372, 59 P. 697; People v. Oakleaf, 66 Cal.App. 314, 226 P. 24. While remote as to time, the evidence also possessed some value as tending to show the association of Dabb and Harrison and their possession of the means of committing the murder.

[16] It would appear, however, that the facts relating to the robbery of the cab driver and the shooting of the police officers were unduly emphasized by the introduction of the sound motion pictures, and that unjustified importance was given to these incidents by placing them before the jury in such a compelling manner. As before stated, evidence of this kind should be received with caution because of the forceful impression which it makes upon the minds of jurors, but in view of the clear proof of the guilt of the defendants we cannot say that the admission of the motion pictures of the subsequent offenses resulted in a miscarriage of justice.

The judgments and the orders denying defendants' motions for a new trial are affirmed.

SHENK, EDMONDS, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

CARTER, Justice.

I concur in the judgment of affirmance because I am convinced from an examination of the record that there can be no doubt as to the guilt of the defendants. I do not, however, agree with the statement in the majority opinion that so far as California is concerned the rule is that: "A defendant in a criminal action cannot be required to defend himself against the charge of any crime other than that for which he is on trial, but this rule does not exclude evidence which incidentally discloses the commission of another offense."

I am convinced that the last quoted statement is no longer the law in California and that the rule is now that evidence of other crimes committed by the defendant is admissible regardless of its relevancy to the offense for which he is being tried. This conclusion is clearly demonstrated by the holdings in recent decisions of this Court including the one in the case at bar. See People v. Peete, 28 Cal.2d 306, 169 P.2d 924; People v. Westek, 31 Cal.2d 469, 190 P.2d 9. In the face of these decisions the above quoted statement has all of the characteristics of "a sounding brass, or a tinkling cymbal".

32 Cal.2d 530

KNAPP et al. v. ROSE et al.

L. A. 20052.

Supreme Court of California, in Bank.

Sept. 2, 1948.

Rehearing Denied Sept. 30, 1948.

1. Judgment 🔑855(1)

Where writ, though denominated a writ of enforcement, recited the fact that a judgment had been entered ordering sale of certain realty and a copy of judgment was attached to the writ, sale of the realty thereunder was not void on ground that judgment was for money and could be enforced only by writ of execution. Code Civ.Proc. § 684.

2. Judicial sales 🔑45

Any objections of judgment debtors to issuance of certificate of sale and deed to realty sold under writ of enforcement should be raised by motion to set aside the sale, and not by separate proceeding for that purpose.

3. Fraudulent conveyances 🔑317

Where judgment directed grantee of realty conveyed in fraud of creditors to deliver it to sheriff to be sold in satisfaction of judgment, grantee, by satisfying judgment against her for costs, did not become a stranger to the action entitled to attack sale under the judgment in separate proceeding instead of by motion in the action in which realty was ordered sold.

4. Judicial sales 🔑47

Sale of realty pursuant to judgment directing such sale in satisfaction of judgment was not subject to collateral attack on ground that writ under which sale was made did not bear the correct title. Code Civ.Proc. § 684.

◆

Appeal from Superior Court, Los Angeles County; Alfred L. Bartlett, Judge.

Action by June Knapp and another against Maurice Rose, individually, and doing business as Golden State Finance Company, and others, to annul a writ of enforcement and all acts done pursuant thereto. From an adverse judgment, defendant Maurice Rose, individually and doing business as Golden State Finance Company, and others appeal.

Judgment reversed with directions to enter a dismissal of the action.

Prior opinion 187 P.2d 88.

A. J. Weiss, of Hollywood, and Alexander L. Oster and Marion P. Betty, both of Los Angeles, for appellants.

S. V. O. Prichard, Oliver O. Clark, and Robert A. Smith, all of Los Angeles, for respondents.

EDMONDS, Justice.

About three years after the sale of certain real property under a writ of enforcement, June Knapp and E. W. Knapp, the judgment debtors, sued to set it aside upon the ground that the judgment was one for money and could only be carried into effect by a writ of execution. The appeal from the judgment in their favor presents for decision procedural questions arising out of litigation commenced almost twenty years ago.

In 1929, Lorn Betty recovered a judgment against Ellen Crowder and her son, E. W. Knapp, for $3,000 and costs. After the judgment became final, numerous executions were issued and returned unsatisfied. Betty then discovered that certain property standing in the name of Ellen Crowder but owned by her and E. W. Knapp had been conveyed to Knapp's wife, June Knapp. He then filed an action for declaratory relief and in his first cause of action stated that the conveyance to June Knapp had been made to defraud creditors. In the second cause of action, he alleged the entry of judgment for $3,000 and costs and that Mrs. Crowder and E. W. Knapp had taken an appeal and secured a release of the lien of the judgment by filing a bond. The appeal was later dismissed and he recovered judgment against the sureties who were then insolvent. Other allegations were that the plaintiff "desires to obtain a new judgment in order that an abstract of same may be recorded in the County Recorder's office of Los Angeles County, and thereby enable the plaintiff to secure a new judgment lien upon the property described in said deed."

The prayer of the complaint was: (1) That June Knapp be required to deliver up the conveyance of the property and that it be canceled and declared null and void; (2) that the defendants be enjoined from disposing of or encumbering the property; (3) "That an alias execution be issued out of this Court directed to the Sheriff * * * empowering him and commanding him to sell said real estate to satisfy said judgment, or so much thereof as may be necessary to satisfy the same"; (4) "For a judgment against the defendants, Ellen B. Crowder and E. W. Knapp, [in] the sum of $3,000 principal," with interest, and certain costs; and (5) "That the Court decree that a judgment lien in favor of the plaintiff, exist upon the property described in the deed" to June Knapp.

The judgment in plaintiff's favor, after reciting that the conveyance to June Knapp was to defraud creditors and void, provided: "that the plaintiff do have a judgment lien upon the property * * * for the full amount of his judgment and costs in [the first] action * * * that an alias execution be issued out of this court directed to the Sheriff * * * empowering him and commanding him to sell said real estate described in said deed, or so much thereof as may be necessary to satisfy plaintiff's judgment in [the first] action * * * that plaintiff have judgment against the defendants Ellen B. Crowder and E. W. Knapp in the sum of three thousand dollars ($3,000.00) principal, together with costs. * * * that the plaintiff in this action may proceed upon his execution heretofore issued, or upon an alias execution, upon the judgment in his favor mentioned in the complaint herein and that the said defendants * * * deliver to the Sheriff, upon any such execution, said property, * * * to be sold and the proceeds applied to the satisfaction of said judgment and interest, and also the costs of this action, * * *." Upon appeal, the judgment was affirmed. Betty v. Knapp, 5 Cal.App.2d 512, 43 P.2d 325.

Thereafter execution issued on this judgment. Upon execution sale, Betty, the judgment creditor, bought the property for the full amount of the judgment and it was satisfied of record. Thereafter it was found that the property was subject to a prior declaration of homestead, and Betty was unable to obtain either title or possession of the property. These facts were presented to the court and it granted his motion to revive the judgment upon the ground that the sheriff's sale was void.

Several writs of execution and writs of enforcement of the revived judgment were recalled because of irregularities in connection with their issuance. The judgment was then assigned to defendant Rose who obtained an alias writ of enforcement which included a copy of the judgment. Notice was published and posted and June Knapp and E. W. Knapp, the present plaintiffs, and Ellen B. Crowder were personally served. The property was sold at public auction. E. W. Knapp purchased one of the parcels and the respondent Rose bought the remainder.

In the present suit the judgment debtors allege "That said alias writ of enforcement at the time of its issuance, * * * was, and at all times since has been and now is, invalid and of no force or effect whatsoever for the reason, among others, that the judgment upon which [it] * * * was issued * * *, was a judgment for money; and that the only appropriate writ under the laws of the State of California for the enforcement of said judgment was a writ of execution." The court found that the sale and deed executed thereunder were void and as a conclusion of law declared that the revised judgment "does not authorize or support the issuance of any writ of enforcement in said action, * * * [and] by its terms limits the processes of the court which may thereafter be issued or used in the enforcement of the rights of the plaintiffs as determined in * * * [the second] action * * *, to the execution theretofore issued in * * * [the first] action * * *, or to an alias execution to be thereafter issued upon the said judgment in * * * [the first] action. * * *" The certificate of sale and the deed issued thereunder were canceled.

Upon the appeal, it is urged, among other points, that the judgment debtors cannot collaterally attack the proceedings and sale under the writ of enforcement. The respondents maintain that where an order or judgment is void on its face, it may be stricken from the record at any time, and the present action is a proper one for that purpose. The theory of the judgment debtors is that only a writ of execution could properly issue upon the second judgment, and because Rose, the assignee, obtained a writ of enforcement, the subsequent certificate of sale and deed are void.

[1] Section 684 of the Code of Civil Procedure provides that where the judgment is for money, it is enforced by a writ of execution; but "when the judgment requires the sale of property, the same may be enforced by a writ reciting such judgment, or the material parts thereof * * *." The writ which is the basis of the present controversy was denominated a "writ of enforcement" and recited the fact that a second judgment had been entered which ordered certain property to be sold, and a copy of the judgment was attached to the writ. It is, therefore, immaterial whether the writ was entitled a "writ of enforcement," "writ of execution," or "order of sale," as long as the substance of it was sufficient and in conformance with the statute. The writ obtained by Rose fulfilled these requirements.

[2, 3] Any objections which the judgment debtors had to the issuance of the certificate of sale and deed should have been raised by motion to set aside the sale. "At the outset it may be stated as a general rule supported by many authorities that a proceeding to set aside a sale under execution, excepting where some special facts are alleged which may create jurisdiction in a court of equity, the proper procedure is by motion to vacate the sale in the action under which it is claimed any irregularities occurred." Colver v. W. B. Scarborough Co., 73 Cal.App. 441, 444, 238 P. 1104, 1105; Mitchell v. Alpha Hardware & Supply Co., 7 Cal.App.2d 52, 56, 45 P.2d 442. But the Knapps, conceding that this is the usual rule, contend that this case falls within a "well defined exception." It is claimed that equitable relief is proper where a stranger to the record is involved because a stranger may not assail a void judgment or order by motion, and the only other remedy is an action in equity. It is argued that June Knapp, although originally a defendant in the second case, ceased to be a party when the judgment was satisfied as to her. The cases cited by the respondents hold that a stranger to an action may not make a motion in it (Difani v. Riverside County Oil Co., 201 Cal. 210, 256 P. 210; Estate of Aveline, 53 Cal. 259; Lavaysse v. Superior Court, 63 Cal.App.2d 223, 146 P.2d 686), but no authority is cited to the effect that a party changes his position by satisfaction of the judgment. Furthermore, the only portion of the judgment satisfied against June Knapp is the amount awarded for costs; however, it also specifically orders her to deliver the property to the sheriff.

[4] For many years, by a series of obstructive delays and procedural mishaps, the judgment debtors have succeeded in avoiding the payment of the amount which they owe and they do not suggest, much less assert, that Rose is not entitled to enforce his claim against them. They seek to set aside the sale of the real estate for the sole reason that the writ under which the sale was made did not bear the correct title. This is no ground for relief in a collateral attack upon deeds made pursuant to the order of the court.

The judgment is reversed with directions to the trial court to enter a dismissal of the action.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

---

32 Cal.2d 559

In re ABILA'S ESTATE.

ABILA v. SPENDRUP.

L. A. 20063.

Supreme Court of California, in Bank.
Sept. 7, 1948.
Rehearing Denied Sept. 30, 1948.

1. Descent and distribution 🔑63

An estate may not be set aside to a widow who, because of her desertion, was not entitled to the support of her husband at the time of his death. Probate Code, § 640.

2. Divorce 🔑315

Though an interlocutory divorce decree does not dissolve the marriage it terminates the husband's obligation to support the wife, in absence of a provision for support.

3. Descent and distribution 🔑63

Where interlocutory divorce decree obtained by husband made no provision for wife's support, wife was not on husband's death, entitled to have a husband's entire estate assigned to her unless it could be established that she had resumed marital relations with husband so as to revive his obligation. Probate Code, § 640.

4. Divorce 🔑156, 315

Where parties become reconciled after an interlocutory divorce decree and live together as husband and wife, the right to a final decree is destroyed, and they are entitled to such rights as arise from the legal relation of husband and wife.

5. Divorce 🔑156

The circumstances of alleged reconciliation of parties after an interlocutory divorce decree, must show that the parties intended to reunite as husband and wife, and reconciliation is not established alone by occasional cohabitation.

6. Descent and distribution 🔑63

Evidence was insufficient to establish a resumption of marital relations by husband and wife after interlocutory divorce decree with intent of the parties to reunite, and was insufficient to revive husband's obligation to support wife so as to entitle wife to have husband's entire estate set aside after his death to wife as surviving spouse. Probate Code, §§ 640, 1080.

Appeal from Superior Court, Los Angeles County; Newcomb Condee, Judge.

Proceeding in the matter of the estate of Jose Maria Abila, deceased, on the petition of Emelina V. Abila, also known as Emelina V. Moser, to be decreed to be the deceased's widow and to have his estate assigned to her, which petition was opposed by M. V. Spendrup. From an adverse judgment, the petitioner appeals.

Judgment affirmed.

For prior opinion see 190 P.2d 237.

Jesse Bach Porter, of Los Angeles, for appellant.

Macdonald, Wallace, Cashin and Arrington and W. W. Wallace, all of Los Angeles, for respondent.

TRAYNOR, Justice.

Jose Maria Abila died in December, 1943, leaving a will that was duly admitted to probate. Emelina V. Abila, who was not mentioned in the will, filed a petition to determine heirship under section 1080 of the Probate Code, alleging that she is the widow of decedent. She also alleged that the entire estate was less than $2500.00 and prayed that it be set aside to her as surviving spouse under section 640 of the Probate Code.

Petitioner married Paul Ortega in 1897, but this marriage was subsequently annulled. She married decedent in March, 1910. They separated in September, 1911, and decedent obtained an interlocutory decree of divorce in March, 1913, on the ground of desertion. The final decree, however, has never been entered. Petitioner entered into a marriage ceremony with Gustave Moser in 1915, and lived with him for eleven years. She obtained an interlocutory decree of divorce from Moser in May, 1929, and the final decree was entered a year thereafter. The trial court found that petitioner was not the widow of decedent at the time of his death, but was the divorced wife of Moser, and held that she was not entitled to have the entire estate set aside to her. Petitioner appeals.

[1] Petitioner contends that the interlocutory decree of divorce did not dissolve her marriage with decedent, since no final decree was entered, and that the subsequent marriage with Moser was therefore void. Even if it is assumed, however, that petitioner is the widow of decedent, it does not follow that she is entitled to have the entire estate set aside to her. It is settled that an estate may not be set aside to a widow who, because of her desertion, was not entitled to the support of her husband at the time of his death. In re Estate of Bose, 158 Cal. 428, 429, 111 P. 258; In re Estate of Miller, 158 Cal. 420, 423, 111 P. 255; In re Estate of Boeson, 201 Cal. 36, 41, 255 P. 800; see In re Estate of Brooks, 28 Cal.2d 748, 171 P.2d 724; In re Estate of Fulton, 15 Cal.App.2d 202, 204, 59 P.2d 508.

[2, 3] The question, therefore, is whether at the time of decedent's death petitioner was entitled to his support. Although an interlocutory decree of divorce does not dissolve the marriage (Deyoe v. Superior Court, 140 Cal. 476, 74 P. 28, 98 Am.St.Rep. 73; Pereira v. Pereira, 156 Cal. 1, 10, 103 P. 488, 23 L.R.A.,N.S., 880, 134 Am.St.Rep. 107; In re Estate of Dargie, 162 Cal. 51, 53, 121 P. 320), it terminates the obligation of support in the absence of a provision therefor. London Guarantee & Accident Co. v. Ind. Acc. Comm., 181 Cal. 460, 184 P. 864; McClure v. McClure, 4 Cal.2d 356, 359, 360, 49 P.2d 584, 100 A.L.R. 1257. The interlocutory decree, which was granted to decedent in 1913 on the ground of petitioner's desertion, made no provision for her support. Petitioner is therefore not entitled to have the entire estate assigned to her unless it can be established that she had resumed marital relations with decedent so as to revive his obligation of support.

[4–6] Petitioner introduced evidence, including her own testimony, that she had resumed marital relations with decedent several years after she obtained a divorce from Moser. She and her daughter testified that he had lived with her at her home on weekends during the five years immediately preceding his death. This evidence, however, was contradicted by the testimony of two witnesses, in addition to the affidavits of several neighbors of decedent, which show that decedent had lived alone for many years preceding his death, and that he spent his weekends for the most part with friends on a ranch; there was also testimony that petitioner had never visited the home of decedent, and that he had frequently stated to friends that he was single. When parties become reconciled after an interlocutory decree and live together as husband and wife, the right to a final decree is destroyed (Olson v. Superior Court, 175 Cal. 250, 252, 165 P. 706, 1 A.L.R. 1589; Nelson v. Nelson, 7 Cal.2d 449, 60 P.2d 982), and they are entitled to such rights as arise from the legal relation of husband and wife. In re Estate of Dargie, supra, 162 Cal. 54, 121 P. 320; Rickards v. Noonan, 40 Cal.App.2d 266, 104 P.2d 839. The circumstances of reconciliation, however, must show that the parties intended to reunite as husband and wife; occasional cohabitation does not alone establish a reconciliation. Keller v. Keller, 122 Cal.App. 712, 715, 10 P.2d 541; Ruggles v. Bailey, 15 Cal.App.2d 555, 556, 59 P.2d 837. "The problem is one of whether the parties have become so reconciled as to have fully resumed relations as man and wife with intention that they be permanent, obviating the necessity or desire for termination of marriage and making its continuance a matter of social propriety and probable success." (Nelson on Divorce and Annulment [2d ed. V 3], 135.) The evidence does not establish such a resumption of marital relations in this case. It cannot be held, therefore, that the obligation of support has been revived.

The judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, SCHAUER, and SPENCE, JJ., concur.

32 Cal.2d 535

PEOPLE v. MEHAFFEY.

Cr. 4884.

Supreme Court of California, in Banc.
Sept. 3, 1948.

1. Criminal law 🔑535(2)

In murder prosecution, the corpus delicti must be proved by evidence outside of the extrajudicial declarations and statements of defendant.

2. Criminal law 🔑414

Only slight or prima facie proof of the corpus delicti is necessary to authorize introduction in evidence of a defendant's extrajudicial declarations and statements, and the evidence need not be direct or positive but may be circumstantial, and evidence need not connect defendant with perpetration of murder.

3. Criminal law 🔑414

In murder prosecution, evidence of the corpus delicti exclusive of defendant's purported confessions and admissions sufficiently proved the corpus delicti to authorize introduction in evidence of extrajudicial declarations and statements of defendant.

4. Criminal law 🔑661

In murder prosecution, where brother of deceased positively identified the body by a tattoo mark on arm of deceased, prosecution in proving the identity of deceased was not required to include dentures removed from mouth of deceased in the identifying proof, since such evidence would only be cumulative.

5. Criminal law 🔑535(2)

In a murder prosecution, the corpus delicti may be proved by best evidence which is capable of being adduced, if it is sufficient for the purpose, and no universal or unvariable rule can be laid down in regard to proof of corpus delicti, but each case depends upon its own peculiar circumstances.

6. Criminal law 🔑1168(2)

Where corpus delicti was finally established, admission in evidence of defendant's extrajudicial declarations and statements before establishment of corpus delicti would not be prejudicial.

7. Criminal law 🔑517(1)

In murder prosecution, before a confession is admissible in evidence, prosecution must show that confession was voluntary and made without any previous inducement or by reason of any intimidation or threat.

8. Criminal law 🔑532(2)

In murder prosecution, whether a confession is voluntary and made without any previous inducement or by reason of any intimidation or threat, so as to be admissible in evidence, is a preliminary question addressed to the trial court who will be allowed a considerable measure of discretion in determining it.

9. Criminal law 🔑519(4)

In murder prosecution, the fact that confession of defendant was made to a police officer and other officers of the law while defendant was under arrest did not render confession involuntary and inadmissible in evidence.

10. Criminal law 🔑519(9)

The fact that defendant in murder prosecution had previously been interrogated many hours by police officer did not render the extrajudicial declarations and statements of defendant involuntary so as to preclude their admission in evidence.

11. Criminal law ⚷736(2)

In murder prosecution, whether confessions of defendant were freely and voluntarily made, and therefore admissible in evidence, was a question of fact for trial court to determine in first instance from the evidence.

12. Criminal law ⚷1158(4)

Where trial court preliminarily determined upon conflicting evidence that confessions of defendant were freely and voluntarily made and therefore admissible in evidence, and jury reached same conclusion under instruction requiring jury to disregard the confessions unless jury concluded confessions were voluntarily made, issue as so resolved against defendant would not be disturbed on appeal.

13. Criminal law ⚷444

In homicide prosecution, generally photographs are admissible in evidence when it is shown that they are correct reproductions of what they purport to show, and such showing may be made by the testimony of anyone who knows that the picture correctly depicts what it purports to represent.

14. Criminal law ⚷444

In murder prosecution wherein defendant claimed not to have been in locale where decedent's body was found, evidence establishing source of film and the authenticity of what picture purported to show was sufficient to render admissible in evidence a picture showing a cabin where defendant and deceased allegedly stayed together a few days immediately preceding decedent's disappearance, and showing defendant standing in foreground.

15. Evidence ⚷147

Generally, negative evidence lacking in probative value is properly excluded as too speculative in nature.

16. Criminal law ⚷1186(4)

In prosecution for murder of a man who disappeared four months before discovery of a body in a wash drain in desert terrain, negative evidence to the effect that persons living in vicinity and passing along nearby highway had not detected presence of body through sense of sight or smell would not have been of sufficient weight to overcome inference that body was that of person identified in proof of corpus delicti as being person who had been with defendant in that locale before disappearance, and exclusion of the negative evidence was not prejudicial to defendant. Const. art. 6, § 4½.

17. Criminal law ⚷407(1)

In murder prosecution, accusatory statements made in presence of defendant would only be admissible as evidence of conduct of defendant in the face of such accusations.

18. Criminal law ⚷366(2)

In proseution for murder allegedly occurring when defendant shot decedent and drove away with automobile which decedent had purchased a short time before, wherein defendant claimed not to have been in locality at time of murder, testimony of friends of decedent relating to conversations with decedent in locality where body was found when decedent mentioned camping and intent to buy automobile, of seller of automobile to decedent shortly before decedent's conduct of negotiations, and of banker who assisted in financing transaction, all of whom testified that defendant was present on the enumerated occasions, was admissible in evidence as part of the res gestae.

19. Criminal law ⚷1186(4)

Where defendant's attorney at no time during closing argument assigned remarks of district attorney as prejudicial and did not request instruction that remarks be disregarded, statement of district attorney referring to statements in summation of case by defendant's attorney as being without the evidence, when in fact statements of defendant's attorney were no more than recital of details contained in defendant's several confessions as introduced by prosecution, was not prejudicial, as improperly intimating that defendant had made a confession not before court and that defendant's counsel was improperly trying to bring parts thereof before jury. Const. art. 6, § 4½.

◆

Appeal from Superior Court, San Bernardino County; Stanley Mussell, Judge.

Robert F. Mehaffey was convicted of murder in the first degree, and he appeals. Affirmed.

Richard J. Weller and James R. LeGallez, both of San Bernardino, for appellant.

Fred N. Howser, Atty. Gen., and Henry A. Dietz, Deputy Atty. Gen., for respondent.

SPENCE, Justice.

Defendant was charged by information with the murder of Lewis David Edds on or about April 11, 1947, in the county of San Bernardino. He entered the dual pleas of not guilty and not guilty by reason of insanity, but then withdrew the latter plea following the report of the appointed medical examiners stating their findings and conclusions that defendant was "sane at the * * * time" of their examination and likewise "was sane at the time of the commission of the alleged crime." Thereafter defendant was tried and the jury returned a verdict of guilty of murder in the first degree, without recommendation. In due course a motion for a new trial was interposed by defendant and denied, whereupon judgment of death was pronounced upon him. The appeal is automatic under the provisions of subdivision (b), section 1239, of the Penal Code.

As grounds for reversal, defendant makes the following contentions: (1) That his confessions and extrajudicial statements were admitted without establishment of the corpus delicti; (2) that there was no showing of the voluntariness of his confessions; (3) that a certain photograph, identifying him with particular surroundings, was introduced as an exhibit without authentication; (4) that negative evidence offered by him with regard to the failure to make earlier discovery of the deceased's body was improperly excluded; (5) that hearsay testimony—as to oral declarations made by the deceased and others in the presence of defendant—was received in evidence over his objections; and (6) that the district attorney was guilty of misconduct in his closing argument to the jury. Careful examination of the entire record, with especial attention to the various issues raised by defendant and their consideration in the light of applicable principles of law, compels the conclusion that defendant's assignments of error are without merit. A general statement of the facts and circumstances in evidence will suffice before discussing defendant's contentions as above enumerated.

On April 11, 1947, Lewis David Edds disappeared. Following arrest almost four months thereafter and confession of the crime here charged, defendant on August 18, 1947, led a searching party—as will be discussed hereinafter—to a body (identified later as Lewis David Edds) in a wash drain in desert terrain about forty-two feet north of the road known as the Victorville-Palmdale cut-off, some two and a half miles west of Highway 66, in the county of San Bernardino. Some brush and twigs partially obstructed the view of the body from the roadway. The autopsy performed that day revealed that the body was badly decomposed in consequence of protracted exposure to the desert sun and weather, and that death had resulted from several bullets having pierced the bony structure of the deceased's chest.

The sequence of events material to the charge against defendant appears from the record to be as follows: On April 7, 1947, defendant was hitch-hiking from Los Angeles along Highway 66. About 11:00 o'clock in the morning, when he was some fifteen or twenty miles east of San Bernardino, he was picked up by the deceased, who was driving alone in his Plymouth sedan. The deceased was planning a vacation trip on the desert, where he had gone in previous years and knew many persons, and the back seat of his car was packed with camping equipment and other belongings, including a loaded six-cartridge gun in a holster. At approximately noon that day the deceased and defendant reached the town of Ludlow, where they stopped because the deceased was having trouble with his car. After several hours' delay waiting for the repairs to be completed, they drove some eight miles south to the Bagdad-Chase Mine, arriving before dusk. Friends of the deceased, Mr. and Mrs. Donald Love, operated the mine and maintained cabins there, one of which was assigned to the deceased and defendant. After a few days there, with a considerable part of the time spent in visiting at the Love's home, the deceased and defendant, about 8:30 or 9:00 o'clock on the morning of April 11, left the mine and drove to Barstow, arriving about noon. There they visited an automobile agency, where the deceased spoke about his car trouble to one of the employees, Gustav Harris, and arranged for the purchase of a used 1941 DeSoto sedan in exchange for his Plymouth and $1,500 cash, which sum—plus $100 for vacation expense—the deceased withdrew from the Barstow bank after proper identification was made. Upon advice of the bank's assistant cashier handling the matter, Stewart Davidson, a bill of sale was then prepared, signed by Harris, and given to the deceased; a copy of which document was introduced in evidence. Defendant was present with the deceased on all these occasions and witnessed the various transactions involved.

Defendant helped the deceased pack the back seat of the DeSoto car with the latter's belongings transferred from the Plymouth sedan, and then they drove some twelve miles in the late afternoon to the town of Calico. There they stopped at the home of Larry Coke, a friend of the deceased, and had several drinks of whiskey mixed with coca cola, defendant taking but one to the others' three because "he was doing the driving." Coke testified that in the course of their conversation, the deceased stated that "they were going to camp" on the desert for some "six or eight days," and that as the deceased and defendant left about 5:30 o'clock that afternoon on their way "to Yermo to eat," the deceased added "I will see you after while," but that he never saw the deceased again.

After having dinner at Yermo, the deceased and defendant started to return to Calico. En route they became aware of "a gasoline odor somewhere in the car," and they "stopped to try to locate" it. In the course of their investigation on the road, defendant suddenly took the deceased's gun from the back of the car and shot the deceased "once from the back" and "two or three" times from the side-front as the deceased was falling to the ground. It was then about 8:00 or 9:00 o'clock in the evening. Defendant wrapped the body in a pair of old pants so as not to get blood on the car, placed it in the front seat, and after driving down various roads looking for a suitable place of concealment, he finally deposited the body where it was later found in the wash drain off the Victorville-Palmdale cut-off as above recited. Before abandoning the body, defendant took the deceased's watch, ring, and wallet, and then placed some brush and weeds over the remains as a partial cover.

Thereupon defendant drove the deceased's car to Los Angeles and registered at a hotel for the night. The following morning, April 12, he pawned the deceased's watch at a jewelry shop, under the name of "L. D. Edds." That night he drove to San Francisco, where he stayed for several days. He spent a considerable part of the time in various bars on Third Street, where he introduced himself as Lewis D. Edds, showing certain documents and papers which he had found among the deceased's belongings, including the latter's bankbook, gun permit, credential card from the Bethlehem Steel Company stating the deceased to be a guard there, and a number of $25 war bonds "made out to L. D. Edds." Most of the bonds defendant cashed during his stay in San Francisco. Defendant also disposed of the deceased's diamond ring at one of the bars for $100 worth of drinks, and he pawned a rifle that he had found among the deceased's effects. In addition, defendant sold the deceased's car for $1,100 to one Julius Weinrob. The bill of sale covering the latter transaction was introduced in evidence, showing defendant's execution of that document as "L. D. Edds." Weinrob took possession of the car and paid defendant $100 to bind the sale, with the balance due on receipt of the ownership certificate, which then was in transit to Sacramento in consequence of the deceased's purchase negotiations at Barstow as above mentioned. The camping equipment, gun holster, and a camera were left in the car upon its sale to Weinrob and were never reclaimed by defendant. Both the gun holster and the camera were identified at the trial as belonging to the deceased, and they were introduced as exhibits.

About April 19, defendant left San Francisco by bus and proceeded to Nebraska and Texas, visiting relatives at various places along the way. At one of his stops in Nebraska he sold the gun with which he had allegedly shot the deceased, and disposed of the last two war bonds. In early August a bank in Lampasas, Texas, on defendant's order, sent in a draft together with the deceased's bankbook to the Los Angeles bank where the account was kept, in an effort to secure certain money there on deposit. The draft was returned "unpaid." Finally on August 6, 1947, defendant was arrested at Dallas, Texas, by a Secret Service Agent for having forged the deceased's name on the war savings bonds that he had cashed—some thirty or thirty-two in all. On August 9, two deputy sheriffs from San Bernardino County—Officers Manning and English—arrived at Dallas, Texas, and interviewed defendant in the sheriff's office there. At first defendant denied any knowledge of the crime, stating that he had obtained the deceased's property—the war bonds, watch, car, and other personal effects—as the result of a "strong-arm" robbery in Los Angeles, but after some preliminary questioning defendant admitted his guilt of the homicide and made a confession of the details thereof substantially in accord with the above outline. Defendant was then returned to California in the company of the two officers and incarcerated in the jail at Barstow. The following days defendant spent traveling about the desert with the officers searching for the body of the deceased, and finally in the morning of August 18, 1947, it was discovered in a wash drain off the Victorville-Palmdale cut-off as above noted.

Thereafter defendant made further statements acknowledging his commission of the crime: One in the afternoon of August 18 in the presence of the district attorney of San Bernardino County and the two officers charged with his custody; another in giving testimony on August 21 at his preliminary hearing and arraignment in the Justice's Court of Yermo; and still another on the occasion of his examination by a secret service agent on August 28 relative to the forgery of the deceased's bonds. These three last mentioned statements, together with the confession made by defendant on August 9 in Texas, were admitted in evidence, and they all agree in their essential detail of chronology with the sequence of events as heretofore outlined. In so confessing to the homicide, defendant gave robbery as his sole motive, his desire to gain possession of the deceased's belongings, the value of which he had learned from their association and conversation during their four days together on the desert, April 7 to 11. Defendant, who was thirty-seven years old, had suffered previous criminal convictions: in Kansas for grand theft and forgery; and in this state for petty theft, with a prior conviction, for which he was sentenced to serve a term in the state penitentiary.

At the trial defendant's association with the deceased on the desert between April 7 and 11 was described at length by the several persons above noted as having seen them together in that interim on various occasions—business and social—and these respective contacts were similarly identified by defendant in the course of his repeated confessions and statements to the law enforcing authorities. However, defendant completely repudiated that phase of his previous narrative when he took the witness stand on his own behalf, maintaining that he had not been outside of Los Angeles County at any time between April 7 and 12, 1947, and that he had no knowledge whatever of the homicide in question. In line with such change of position, defendant testified to this chronology: On April 7 he was in Glendale at the home of his future wife and her family; April 8, and 9 and 10 he spent in Los Angeles going to various bars, attending picture shows, and "knocking about" town in general; on April 11 he borrowed a dollar from a certain bar attendant, Fred Shaw, and with that money he went to Long Beach, where he visited a friend, Wylie Moffett, who operated a bar there, and then returned to Los Angeles in the late afternoon. In the evening of April 11 he went to Gus' Bar, where he met two "casual acquaintances," one of whom he had known at Folsom, and at their suggestion he agreed to help "roll" a man—about thirty or thiry-five years old—who was then standing at the bar and was "pretty intoxicated." They carried through their plan when their intended victim went to the rest room, knocking him unconscious and then taking all his personal effects—including his wallet, watch, "everything that was in his pockets," car keys and parking ticket. They got the victim's automobile—a 1941 DeSoto—from the parking lot, found in the back of the car his bankbook and war bonds bearing the name "Lewis D. Edds," and then they "split up" for the night, defendant taking the car with him. The next morning they met again, defendant pawned the watch using the name of Edds, and then they drove to San Francisco, arriving about 7:00 or 8:00 o'clock in the morning of April 13. They registered at different hotels, and after defendant cashed some of the bonds the next day and divided the proceeds with his partners, he never saw them again. From that point defendant's account at the trial coincided in the main with the above recital of succeeding events after arrival in San Francisco on April 13 until his arrest in Dallas, Texas, on August 6.

On behalf of defendant, there was somewhat vague and confused testimony from the Los Angeles hotel clerk and his wife as to defendant's presence on the premises between April 5 and 12; from defendant's future in-laws as to the time he allegedly spent at their home in Glendale on April 7; from the bar attendant, Fred Shaw, from whom defendant claimed to have borrowed the dollar for his trip April 11 to Long Beach, and from the bar owner, Wylie Moffett, whom he assertedly visited that afternoon. Defendant's purported two companions on the occasion of the related robbery in Gus' Bar during the evening of April 11 were not called as witnesses to substantiate that happening, and the proprietor of the bar testified that no such disturbance occurred on the premises during that day or night. Confronted with this sharp conflict in the evidence as to defendant's whereabouts and activities during the critical period of April 7 to 11, the jury, in finding defendant guilty of the murder charge in question, apparently accredited the sequence of events for that interval as outlined in defendant's successive confessions and corroborated by the prosecution's witnesses pertinent to that branch of the case.

[1-3] (1) As his first ground for reversal, the defendant contends that the corpus delicti was not proved, and that therefore evidence of his confessions and extrajudicial statements was erroneously admitted. Specifically he challenges the sufficiency of the proof—"exclusive of [his] purported confessions and admissions"—to establish (a) the identity of the body found as Lewis David Edds and (b) the cause of death as the criminal act of another. To this point he properly refers to the settled rule that the corpus delicti must be proved by evidence outside of the extrajudicial declarations and statements of a defendant. 8 Cal.Jur., Criminal Law, sec. 248, p. 167; People v. Kaye, 43 Cal. App.2d 802, 809, 111 P.2d 679; People v. Seymour, 54 Cal.App.2d 266, 275, 128 P.2d 726. But it is likewise well settled that to authorize their reception in evidence and consideration by the jury, the prosecution is not required to establish the corpus delicti by proof as clear and convincing as is necessary to establish the fact of guilt; rather slight or prima facie proof is sufficient for such purpose. 8 Cal.Jur., Criminal Law, sec. 303, p. 234; People v. Bollinger, 196 Cal. 191, 200, 237 P. 25; People v. Selby, 198 Cal. 426, 437, 245 P. 426; People v. Ives, 17 Cal.2d 459, 463, 110 P. 2d 408; People v. McMonigle, 29 Cal.2d 730, 738, 177 P.2d 745. It may be proved by circumstantial evidence and by inferences reasonably drawn therefrom. 8 Cal. Jur., Criminal Law, sec. 248, p. 167; People v. Vicunia, 105 Cal.App. 145, 147, 286 P. 1061. Direct or positive evidence is not essential (People v. Wilkins, 158 Cal. 530, 536, 111 P. 612; People v. Peete, 54 Cal. App. 333, 347, 202 P. 51; People v. Clark, 70 Cal.App. 531, 545, 233 P. 980), nor is it necessary at this point to connect the de-

fendant with the perpetration of the offense (13 Cal.Jur., Homicide, sec. 68, p. 676; People v. Meyers, 7 Cal.App.2d 351, 354, 46 P.2d 282; People v. Cowan, 38 Cal. App.2d 231, 240, 101 P.2d 125; People v. Wade, 71 Cal.App.2d 646, 654, 163 P.2d 59). Tested by these principles, the sufficiency of the proof of the corpus delicti here is not open to dispute.

As above stated, the body of the deceased was found on the morning of August 18, 1947, in a wash drain near the Victorville-Palmdale cut-off by a searching party which included defendant and the two mentioned deputy sheriffs having charge of his custody—Officers Manning and English. Upon being notified of the discovery, the deputy coroner, Edward P. Doyle, and the autopsy surgeon, Dr. Chauncey Baird, proceeded to the place on the road where the body was located and a preliminary examination of the remains was there made that day. The autopsy revealed that the body, which was fully clad as found, had probably lain exposed to the desert sun for a considerable period of time. The clothing was "markedly bleached," and putrefaction had affected the remains. There was decomposed flesh and skin on the body, but "the bony structures were all intact and in position." The "internal organs," "blood," "eyes," and "soft tissues" of the body "were largely destroyed, presumably [by] the insects and weather" as the result of the prolonged desert exposure. Upon removal of the clothing, "the skin on the front of the chest" from "the neck * * * down to the waistline" was found to be comparatively well preserved.

In giving his findings with respect to the condition of the body, Dr. Baird testified as follows: That "a round hole" located "on the left side of the front of the chest" —"very sharply outlined" and "quite different that the other holes that had been produced by insects or weather"—and a corresponding hole "on the back" slightly "below the tip of the right shoulder blade," with "the splintering of [the] rib *outward*" between those points, indicated the rib fracture to have been caused "by some object passing through it from the interior to the exterior"; that immediately under this area in the back there was another "sharp round hole the same size as the one * * * found in the front of the body" except in that instance "the splintering of the rib was *directly inward*," showing that the penetrating object that broke that rib passed "from the outside inward," and cut a groove along the right side of the spine at the level of the broken rib, but that no point of exit in such line of travel was located; that in his opinion such perforations in the skin and rib fractures had "the characteristics of a bullet injury"; that a lead bullet from the left chest and a portion of the skin thereof, "including the [bullet] opening [there] found," were removed and delivered by him to the deputy coroner (each of which specimens was introduced in evidence as exhibits by the prosecution); that from his examination it appeared that one of the bullets could have passed "through the chamber of the heart" or "through the right lung," necessarily resulting in a "very severe hemorrhage," and causing death; that from his experience, it was possible for a person to shoot himself more than once "if the first wound was not fatal," but that he had never seen a case of a man putting a gun in his back and shooting himself through the spinal column, as one of the bullets here appears to have been directed.

After completion of the autopsy, the body of the deceased was removed to a mortuary in San Bernardino. The next day, August 19, Edward R. Edds went to the funeral parlors to view the remains. In the presence of the deputy coroner, Mr. Doyle, he positively identified the body as that of his brother, Lewis David Edds, a man sixty-one years old, upon recognizing a tattoo mark on the deceased's right forearm—"an emblem of a pick and shovel." At the trial he testified that it was some "35 years ago," when he was "about the age of 16 or 17," that he first saw the tattoo mark on his brother's arm, that the "outlines [were] clearly visible" to him, that he was "looking for that particular mark" when he identified the deceased, and that he was "positive and sure" that the body he so saw at the mortuary was his "brother, Lewis David Edds." The deputy coroner corroborated this testimony as to the existence of the tattoo mark on the deceased's right forearm, describing the outline as "faint" but "distinguishable," though he could not detect exactly "what was represented" until "told what it was supposed to be."

[4] Defendant complains that the prosecution "glozed" over many possible identifying features, such as considerations of the clothing, teeth, hair, height, approximate build, fingerprints, and blood type tests of the deceased. But the evidence showed that the remains were badly deteriorated in many respects, that there was but little hair remaining on the head, that the blood was gone, and there was general disfigurement as the result of putrefaction and decomposition of large areas of the skin. While some dentures were removed from the deceased's mouth, the prosecution could not be required to include them in the identifying proof, since showing would only constitute cumulative evidence to the ample identification of the body made by the brother's "positive" recognition of the tattoo mark on the deceased's arm. Cf. People v. Peete, supra, 54 Cal.App. 333, 346, 347, 202 P. 51. As was said in People v. Clark, supra, 70 Cal.App. 531, at page 542, 233 P. 980, at page 984: "No universal and unvariable rule can be laid down in regard to the proof of the corpus delicti. Each case depends upon its own peculiar circumstances. The body of the crime may be proved by the best evidence which is capable of being adduced, if it is sufficient for the purpose."

[5, 6] To prove a prima facie case of the corpus delicti here, all that was necessary was to show a reasonable probability that the deceased was the man alleged to have been killed—Lewis David Edds—and that he met his death by means of the unlawful act of another. The evidence above reviewed on this point readily supports such conclusion to "the exclusion of every other reasonable hypothesis" (People v. Clark, supra, 70 Cal.App. 531, 542, 233 P. 980), and since such evidence was introduced prior to the admission of defendant's confessions and extrajudicial statements, the trial court justifiably viewed it as ample in quantity and quality to meet the most exacting requirements of the law for establishment of the corpus delicti. But irrespective of this fact of preliminary showing of the essential elements of the corpus delicti, "there would have been no error since order of proof is discretionary with the court and, where corpus delicti is finally established, a mere variation in the order of proof cannot be said to result in any prejudice to the defendant's rights." People v. Seymour, supra, 54 Cal.App.2d 266, 275, 128 P.2d 726, 731.

[7-9] (2) Nor does it appear, as defendant vigorously urges, that there was an absence of a showing of the voluntariness of his confessions as a foundation for their admission in evidence. The rule is well settled that "before a confession is admissible it must be shown by the prosecution that it was voluntary, and made without any previous inducement or by reason of any intimidation or threat." People v. Jones, 24 Cal.2d 601, 608, 150 P.2d 801, 804. But whether a confession is of that character is a preliminary question addressed to the trial court (People v. Castello, 194 Cal. 595, 599, 229 P. 855; People v. Lisenba, 14 Cal.2d 403, 421, 94 P.2d 569; People v. Triplett, 70 Cal.App.2d 534, 538, 161 P.2d 397), and a considerable measure of discretion must be allowed that court in determining it. People v. Ellis, 33 Cal.App.2d 616, 621, 92 P.2d 431; People v. Sourisseau, 62 Cal.App.2d 917, 930, 145 P.2d 916. The mere fact that the confession was made to a police officer or other officer of the law while the accused was under arrest does not necessarily render it involuntary and inadmissible. People v. Gonzales, 24 Cal.2d 870, 875, 151 P.2d 251; People v. McEvers, 53 Cal.App.2d 448, 451, 128 P.2d 93. Application of these principles negatives the force of defendant's objections to the admission of his confessions.

As above narrated, defendant was arrested on August 6, 1947, in Dallas, Texas. The record reveals that four written confessions were obtained from defendant: The first on August 9 at the Dallas County Jail before police officers from both California and Texas; the second on August 18 in the district attorney's office in San Bernardino following the discovery of the body on the dessert; the third on August 21 at the preliminary hearing in the Justice's Court of Yermo Township with respect to the charges filed against defendant; and the fourth on August 28 in the San Bernardino County Jail in response to questioning of a secret service agent relative to defendant's forgery and negotiation of the war savings bonds registered to the deceased. Claiming that these confessions were not freely or voluntarily made but were the result of extortion, punishment, physical torture and abuse, defendant took the witness stand at the trial and testified at length. In particular, he maintained that at the time of his first interview with the officers on the evening of August 9, he was questioned for several hours as to his commission of the alleged murder; that he steadfastly denied any knowledge of such homicide but did admit that he "and two other fellows in Los Angeles robbed a man in a bar"; that upon his continued disavowals of their charge, the officers "beat" and "kicked" him "in the back," "knocked him from one to another," causing him to become "unconscious several times"—when Officer Manning would grind the heels of his boots into defendant's throat after he fell to the floor and then upon his being "picked up and put in a chair," Deputy District Attorney Krumm (one of prosecution counsel herein) would hold defendant's hair while Manning "struck him" in the face "until he lost consciousness" again; that they kept "pounding questions" at him, saying that "they already had the body" and "evidence" as to many of the details establishing his guilt but they "wanted his story"; that after he "could take no more" of such inhuman treatment, he said "You ask the questions and I will say 'yes' to all of them"; that when "they had the necessary answers Mr. Krumm left the office and came back with a confession typed for him to sign," which after "read[ing] it over * * * he did." Defendant further testified that as the result of such beating by the officers, he "received two partially cracked ribs, a partially cracked shoulder blade, and bruises on his back and shins" as well as a "heel mark on his throat" from Manning's boots and "cuts" on his forehead; that during his trip from Texas to California in the custody of Officers Manning and English, he was frequently queried about various phases of the alleged murder and warned that he could "make it rough" or "make it easy" for himself, depending on the type of story he chose to tell after he arrived in California; that after he was placed in the Barstow jail on August 14, he was told that he would get "no cigarettes or water until the body was found," and that he was then "taken to different localities" on the dessert "for search"; that when he was taken to the district attorney's office in San Bernardino on August 18 following the discovery of the body, "he was told by Manning to make the same statement he had made before or what he got in Texas wouldn't be anything to what he would get if he didn't"; that because of these threats and the fear engendered in him as the result of the described Texas beatings, he made the three subsequent purported confessions—August 18 before the district attorney at the latter's office, August 21 before the committing magistrate at the preliminary hearing in the Yermo Justice's Court, and August 28 before the secret service agent in the local jail—although on none of these three occasions did he suffer any abusive treatment.

To corroborate his story of the physical beatings he had experienced in the Texas grilling, defendant produced these witnesses at the trial: (a) Two fellow prisoners in the San Bernardino County Jail, one of whom said that on "August 21" he saw "a bruise over [defendant's] eye" and "black and blue marks" on his legs and back, and the other said that "sometime between August 20 and 30," when he "saw * * * defendant in [the prison] tank," his face appeared to be "all right" but that there were some "skinned places and bruises on his legs from the knees down"; (b) a photographer, who allegedly took pictures of defendant's body on August 30 at the jail and who stated that "there were bruise marks on the body both front and back" but that he could not detail their appearance; and (c) defendant's sister-in-law, who stated that when she visited defendant at the jail in August, she saw "a skinned place across his forehead" and "some bruised places on his leg."

It is obvious that if the foregoing testimony on behalf of defendant stood uncontradicted in the record, it would have been error to have admitted in evidence his several confessions. But such recital is sharply refuted by those present at the taking of the successive statements from defendant—in particular by the officers in question, who specifically testified that at no time were any threats, promises or mistreatment of any kind used in obtaining the enumerated confessions—as well as by other evidence material to the consideration of the various points in issue. Officer Manning expressly testified that on no occasion—either in Texas, en route to California, or while defendant was in his custody after arrival here—did he, or any one in his presence, strike, beat, kick, or otherwise commit any bodily injury on defendant; that at no time did he advise defendant to continue to tell "the same story * * * that he told in Texas [or] he could expect the same treatment, or words to that effect"; that on August 18 after he had brought defendant's breakfast to the jail, and they were preparing again to undertake another trip to locate the body on the desert after several days already spent in fruitless search, defendant said: "Art [Manning], there ain't no use of horsing you around any more, I thought maybe if I horsed around when you took me to San Bernardino I could get an attorney and get out on a Writ, but I might as well go and show you where the body is"; that after the body was found later that morning, defendant voluntarily, and without threats of any kind, made his confession in the afternoon to the district attorney; that on their way "back to Barstow," he said to defendant, "Bob, why don't you go ahead and have the whole thing over?" and defendant replied "it was a good idea, he would have the preliminary trial and arraignment"; that thereafter, and without any inducement, coercion or intimidation, defendant freely testified before the committing magistrate in the Yermo Justice's Court; and that at the coroner's inquest, which was held later, defendant did not take the stand and he was not urged to do so. Officer Manning further testified that on the occasion of defendant's first confession in Dallas, the questioning consumed "approximately an hour," that he [Manning] was wearing "cowboy boots" but at no time did he grind his "boot heel on [defendant's] throat," nor did he then tell defendant that they "had already found the body" or "would produce one."

[10] Sheriff Fred Mason of Lampasas County, Texas, who was present at the taking of defendant's first confession in Dallas, testified that at the outset of the interview, Officer Manning confronted defendant with various details of incriminating evidence as to his disposition of the deceased's automobile and other property at different places in California; that defendant at first denied knowing "anything in particular about the set-up," but after being shown a photograph of himself standing in front of one of the cabins, allegedly taken while defendant and the deceased were staying at the Bagdad-Chase Mine between April 7 and 11, and remarking, "That is a poor picture of me," defendant said, "Well I will tell you where the body is"; that defendant then made his confession, that neither Officer Manning nor any one else in the room subjected defendant to any mistreatment, and after signing his statement, defendant left "in the same condition physically as when he came in the room." Officer English, who was also present at the Dallas questioning of defendant on August 9, corroborated the other two officers in all particulars as to the fair conduct of that interview. While he did admit that he "probably" reported "by phone" sometime that evening to the "[San Bernardino] Sheriff's office" that "the accused after several hours of severe grilling had broken down and signed a confession," such statement would be open to interpretation and would not, as defendant argues, necessarily signify the use of "third degree" methods in extracting the confession. On the contrary, as was said in People v. McEvers, supra, 53 Cal.App.2d 448, at page 451, 128 P.2d 93 at page 95, the fact "that the accused ha[s] been interrogated many hours does not render his statements involuntary." In so confessing after his initial grilling, defendant may well have decided that "the officers already had possession of [many of] the facts and he could gain noth-

ing by refusing to" admit the charges. People v. Gonzales, supra, 24 Cal.2d 870, 874, 151 P.2d 251, 253, see, also, People v. Triplett, supra, 70 Cal.App.2d 534, 538, 161 P.2d 397.

The Texas confession purports to have been "freely and voluntarily made," upon advice that "any statement" therein made could "be used in evidence against" defendant "on the trial," and it details defendant's commission of the crime as outlined in the forepart of this opinion. Defendant's confession on August 18 before the district attorney after the discovery of the body likewise purports to have been made "of [defendant's] own free will and accord," and after full information as to his "constitutional right" not to be a witness against himself. The same observations prevail with respect to the full and complete advice of "his rights" given to defendant on the occasion of his preliminary hearing on August 21 and his subsequent confession on August 28 as to his forgery and negotiation of the deceased's war savings bonds. Photographs taken of defendant at various overnight prison stops from Texas en route to California were introduced in evidence to show that defendant had no bruises or scratches on his throat or forehead, as he claimed to have sustained during the Texas interview as above related. Of similar import are the recitals of the district attorney of San Bernardino County as to his observation of defendant on August 18 and the secret service agent as to August 28—that at these respective times defendant had no visible bruise marks and made "no complaints" as to the treatment that had been accorded him. Also material to this issue is the testimony of an officer of the "Bureau of Identification," who was in the room at the above mentioned taking of the photograph of defendant on August 30 during his imprisonment in the local jail—that he saw no bruises or discolorations on defendant's body at that date other than a red mark on his back left by the buckle of a safety belt which prisoners wear, and that the person who claimed at the trial on behalf of defendant that he had taken the photograph of defendant's body on the day in question, and had noticed "bruise marks on the body both front and back," was in fact not present on that occasion, but that another photographer had taken the pictures.

[11, 12] From this review of the pertinent portions of the record, it is manifest that the matter was fully developed in the trial court, with defendant having every opportunity to present his position, and that the question whether the written confessions were freely and voluntarily made became one of fact for the trial court to determine in the first instance from considerations of evidence which sharply differed on practically every point. People v. Castello, supra, 194 Cal. 595, 600, 229 P. 855; People v. Black, 73 Cal.App. 13, 17, 18, 238 P. 374; People v. Sourisseau, supra, 62 Cal.App.2d 917, 931, 145 P.2d 916. As an added factor there is the alleged oral admission of guilt made by defendant to one Elmer Leake, a truck driver, who was a member of the searching party of August 18. After identifying various photographs that were taken of the scene of location of the body as found that day in consequence of checking various "washes" because defendant had said that "he knew it was a spot something like [that] where the body was laying," Leake testified that upon the party's return to the "Sheriff's office in Victorville," he and defendant sat alone in the car while Officers Manning and English "went to make a phone call." At that time he stated that he asked defendant "if he killed Edds at Calico, then rode him in the car, took him clear over there, and he said, yes, he did, that he didn't know why he carried him so far as that, but he guessed he was scared and in a hurry and he guessed he wanted to get away from the scene as quick as he could and get shed of him." While at the trial defendant claimed that he talked to Leake only about his truck-driving job, the latter expressly stated that the conversation was not so limited. Thus again it was a question for the trial court to determine which testimony to accept, and apparently defendant's recital was not accredited so that his oral as well as written confessions became correlating evidentiary considerations in the case. Coincident with these observations is the testimony of the various witnesses above mentioned on behalf of the prosecution as to

the continued association of defendant and the deceased on the desert between April 7 and 11, all dovetailing with the detailed account of the sequence of events outlined in the several written confessions given by defendant. Moreover, in addition to this independent proof of defendant's presence at the scene of the crime, the jury was carefully instructed that "although the court [had] admitted evidence tending to show that defendant made a confession," such circumstance must be disregarded entirely "unless you, yourselves, by your own weighing of all the evidence, your own judging of the credibility of witnesses, and your own reasonable deductions, conclude that the alleged confession not only was made, but was voluntary"; and that a confession is not of such character "when it has been obtained by any kind or degree of violence, abuse or threat, or by any direct or implied promises of immunity, leniency or other benefit." Thus, not only did the trial court upon conflicting evidence determine in the first instance the matter of the free and voluntary nature of defendant's several confessions, but the jury in its deliberations likewise reached the same result in its final analysis of the question under the court's charge, and the issue as so resolved against defendant will not be disturbed on appeal. People v. McEvers, supra, 53 Cal.App.2d 448, 451, 128 P.2d 93; People v. Sourisseau, supra, 62 Cal.App.2d 917, 931, 145 P.2d 916.

(3) Defendant next contends that the trial court admitted in evidence a certain photograph without authentication, but the record does not sustain his position. According to the testimony of Mr. and Mrs. Donald Love, who operated the Bagdad-Chase Mine and maintained living accommodations there, the photograph portrayed one of their cabins where defendant and the deceased allegedly stayed on the desert from April 7 to 11. Defendant was purportedly shown standing in the foreground. It appears that the photograph was part of the roll of undeveloped film found in a partly loaded camera discovered among other personal effects of the deceased in the back of the car which Weinrob purchased from defendant in San Francisco as above related. Weinrob so identified the camera and related its delivery to a San Francisco police inspector in the course of the latter's examination of the trunk of the car as a link in the incriminating evidence against defendant. In corroboration thereof, the police officer at the trial, after fixing the time of his so obtaining the camera as "near the end of August, 1947," stated that "under his supervision and control," the "film was developed and printed in the police laboratory," and that the photograph in question was "one [thus] developed." It further appears that defendant in his confession of August 18 before the district attorney of San Bernardino County, when questioned about this particular photograph, stated that "it was taken at the Bagdad Mine" on "the second day" he and the deceased "were there," that he remembered that he "stood there and the old man [the deceased] took [his] picture," and "when [he] sold the car in San Francisco [he] forgot about the picture being in the camera." Furthermore, as above recited, the Texas sheriff who was present on the occasion of the interview of defendant at Dallas, Texas, on August 9, testified that defendant, when confronted with this photograph by the investigating officers, said "That is a poor picture of me," and following this admission, defendant made his confession.

[13, 14] In this state of the record establishing the source of the film and the authenticity of the representation, there can be no doubt as to the sufficiency of the foundation for the admission of the photograph in evidence. As was stated in People v. Doggett, 83 Cal.App.2d 405, at page 409, 188 P.2d 792, at page 794: "The general rule is that photographs are admissible when it is shown that they are correct reproductions of what they purport to show. This is usually shown by the testimony of the one who took the picture. However, this is not necessary and it is well settled that the showing may be made by the testimony of anyone who knows that the picture correctly depicts what it purports to represent." See, also, Berkovitz v. American River Gravel Company, 191 Cal. 195, 201, 202, 215 P. 675.

[15, 16] (4) Likewise without merit is defendant's complaint that the trial court committed prejudicial error in its exclusion of "negative evidence" to the effect that persons living in the vicinity and passing along the highway near where the body was found, partly decomposed after alleged exposure on the desert for some four months, had neither through their sense of sight or smell detected its presence. The record discloses that the court excluded such line of testimony from witnesses on behalf of defendant on the ground that the fact one "driving down the highway" did not observe the body located a distance therefrom, and concealed at least in part by bushes and twigs, "doesn't prove it wasn't there"; that such situation is "different" from one where the proffered testimony would establish that the "witness had been down there and inspected the spot and it [the body] wasn't there." The distinction so drawn by the court coincides with the general rule that negative evidence lacking in probative value is properly excluded as too speculative in nature. 31 C.J.S., Evidence, § 165, page 875; 1 Jones' Commentaries on Evidence, 2nd Ed., secs. 20–22, pp. 33–39; State v. Smith, Mo.Sup., 222 S.W. 455, 459; People v. Kennedy, 267 Mich. 430, 255 N.W. 405, 407. So pertinent in support of the court's ruling is the argument advanced by the prosecution that "odd odors on a country road do not normally" provoke an "investigation" and the photographs in evidence, showing the locale involved, indicate the "area of road was isolated, open," conducive to "[automobile] travel at high speed" and containing "nothing * * * which would necessarily invite attention to a spot some 40 feet from the road itself where the body laid."

But recognizing that objections to such class of evidence ordinarily go to its weight rather than to its competency (8 Cal.Jur., Criminal Law, sec. 177, p. 76; 32 C.J.S., Evidence, § 1037, page 1079 et seq.; 2 Jones' Commentaries on Evidence, 2nd Ed., sec. 601, p. 1112), and assuming that the negative testimony here in question was admissible though of slight importance (2 Wigmore on Evidence, 3rd Ed., sec. 664, p. 777; People v. Crespi, 115 Cal. 50, 56, 46 P. 863), its exclusion could not reasonably have affected the jury's consideration of any issue of guilt against defendant. Such negative testimony is relevant only as determined by the surrounding circumstances and where, as the record here indicates, the fact of the deceased's long exposure on the desert may well have occurred though unperceived by the ordinary passerby, who, not having his attention directed to the matter, in all likelihood would be concerned with other affairs, its probative force would be practically nil. In any event, such proffered testimony on behalf of defendant certainly would not, as he maintains, be of sufficient weight to overcome the inference that the body found on August 18, 1947, was that of the deceased Edds as so positively identified in proof of the corpus delicti, and its exclusion is in nowise classifiable as "prejudicial error denying to the accused his right to a fair trial." See Cal.Const., art. VI, sec. 4½.

[17, 18] (5) Nor may defendant prevail in his objection to the trial court's admission of declarations made by the deceased and others in his presence prior to the time of the alleged murder. At this point defendant specifically complains of testimony adduced by the prosecution from the following witnesses: (a) Mr. and Mrs. Donald Love, and Larry Coke—all friends of the deceased—who related various conversations they respectively had with the deceased between April 7 and 11, 1947, at the time he allegedly was on the desert, when he mentioned his immediate camping plans and his intent to purchase a new automobile; (b) Gustav Harris, who was the seller of the 1941 DeSoto car to the deceased and who related the latter's conduct of negotiations in the matter; and (c) Stewart Davidson, who was the banker assisting in the financing of the car transaction and who related different phases of the deceased's participation in that arrangement. Each of these witnesses testified that defendant was present on the enumerated occasions. Defendant objects to such testimony as constituting "hearsay," and likens it to "accusatory statements," which, though made in his presence, would only be admissible as "evidence of the conduct of the accused in the face of such accusations." People v. White, 44 Cal.App.2d 183, 186, 112 P.2d

60, 61; see, also, People v. Philbon, 138 Cal. 530, 532, 71 P. 650. But manifestly since this challenged testimony concerned statements and declarations made prior to the alleged homicide, it cannot be correlated with any accusations of guilt against defendant, and the quoted rule on that type of proffered evidence is not in point. Rather these considerations suggest themselves in support of the admission of the testimony in question: (a) To show defendant's association with the deceased and his knowledge of various matters handled by the deceased during their stay on the desert from April 7 to 11, as opposed to defendant's alibi testimony that he was never in that locale during that period; (b) to show further the identity of defendant as the man the witnesses saw in the deceased's company; and (c) to show the deceased's purpose with respect to purchase of a car, having the intent to make a certain camping trip and then return—all as part of the res gestae reflecting the course of material events. (8 Cal.Jur., Criminal Law, sec. 190, p. 92; Anno. 113 A.L.R. 268, at p. 275, and cases cited; People v. Fong Sing, 38 Cal.App. 253, 257–259, 175 P. 911; People v. Shannon, 28 Cal.App.2d 677, 680, 83 P.2d 302. Accordingly, the propriety of the court's admission of the testimony in question is not open to dispute.

[19] (6) Finally to be considered is defendant's claim of misconduct on the part of the district attorney in his closing argument, which, it is urged, was so grave as to prejudice defendant in the eyes of the jury and operated "to deny to him a fair trial." Defendant's charge is without substantial basis. It appears that in his closing remarks, the district attorney referred to certain statements made by defendant's counsel in the latter's summation of the case before the jury as being without the evidence when, in fact, such observations were no more than the recital of details contained in defendant's several confessions as introduced by the prosecution. Defendant argues that by so incorrectly alluding to defendant's counsel as being in possession of facts which were not embraced in the record, the district attorney intimated that defendant had made a confession, not before the court, and that his counsel was improperly trying to bring parts thereof before the jury. While the argument of defendant's counsel is not reported, apparently from the text of his closing remarks the district attorney was merely reiterating evidentiary points made by defendant's counsel and confusedly queried "where did he [defendant's counsel] get his information."

Presumably the jury knew the contents of defendant's several confessions as contained in the record, and the district attorney's momentary failure to recall their full scope demonstrated no more than a slip of memory on his part and could not reasonably be regarded as an attempt to mislead or confuse the jury as to the source of the recited evidentiary details. Such harmless error would certainly constitute no ground for reversal (Cal.Const., art. VI, sec. 4½), and irrespective of the impropriety of defendant's argument here, in view of the fact that at no time in the course of the district attorney's closing argument did he assign the now challenged remarks as prejudicial or request an instruction that they be disregarded. 8 Cal. Jur., Criminal Law, sec. 521, p. 508; People v. Marvich, 44 Cal.App.2d 858, 863, 113 P.2d 223; People v. Gray, 52 Cal.App.2d 620, 658, 659, 127 P.2d 72; People v. Shack, 55 Cal. App.2d 16, 22, 130 P.2d 197. The situation in nowise parallels that prevailing in People v. Podwys, 6 Cal.App.2d 71, 75, 76, 44 P.2d 377, 379, where the objectionable remarks were of such character that their effect "could not have been obviated by any instructions to the jury," or in People v. Westcott, 86 Cal.App. 298, 319, 260 P. 901, 910, where the district attorney indulged in argument showing "a persistent disregard * * * of the directions and admonitions of the court" and manifesting "a complete departure from the spirit of fairness which should animate the conduct of [such] officer." On the contrary, here it appears that defendant was fairly tried and under the evidence was justly convicted.

The judgment and the order denying the motion for a new trial are affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concur.

32 Cal.2d 562

PEOPLE v. ORCALLES.

Cr. 4870.

Supreme Court of California, in Bank.
Sept. 7, 1948.
Rehearing Denied Sept. 30, 1948.

1. Homicide 🔑282½

Where jury finds from all the evidence to moral certainty and beyond reasonable doubt that defendant is guilty of first-degree murder, jury must exercise its discretion to determine whether defendant shall be punished by death or by imprisonment, and in exercising such discretion jury should weigh all the facts attending commission of alleged offense.

2. Criminal law 🔑720(1), 730(8)

Witness' extrajudicial statements that defendant stated to witness on morning before killing that defendant was going to kill deceased, and that witness had a "feeling" prior to killing that killing would occur, were admissible merely for purpose of impeachment, and prosecuting attorney's reliance on such statements as "evidence" in closing argument and trial judge's inadequate instruction, in response to request for instruction as to purpose of admission of such statements, that jury were sole judges of evidence, were reversible error, where death penalty was inflicted.

3. Criminal law 🔑419(1), 1169(5)

Improper admission of extrajudicial statements of witness who was not present at killing as to circumstances of killing was reversible error, notwithstanding that statements were struck and that jury was instructed to disregard statements, where death penalty was inflicted.

4. Witnesses 🔑397

A witness' contradictory statements on former occasion are admissible only for purpose of testing credibility of witness, and not for purpose of proving truth of what witness said on former occasion.

EDMONDS, SHENK, and SPENCE, JJ., dissenting.

◆

Appeal from Superior Court, Sacramento County; Raymond T. Coughlin, Judge.

Louis Orcalles was found guilty of murder of the first degree. From the judgment of conviction and an order denying his motion for a new trial, he appeals.

Judgment and order reversed.

Adon V. Panattoni and John Harley Paine, both of Sacramento, for appellant.

Fred N. Howser, Atty. Gen., and Doris H. Maier, Deputy Atty. Gen., for respondent.

SCHAUER, Justice.

Defendant, Louis Orcalles, was charged with the murder of Benny Padilla and with assaulting Nick Gundran with a deadly weapon with intent to commit murder. He pleaded not guilty and not guilty by reason of insanity. A jury found him guilty of murder of the first degree and imposed the death penalty. They failed to return a verdict on the count which charged the crime of assault and on motion of the People such count was dismissed. The issue raised by defendant's plea of not guilty by reason of insanity was then tried before the same jury and they found that he was sane at the time of the homicide. His motion for new trial was denied. On this appeal he complains of certain errors which occurred on the trial of the issues raised by his plea of not guilty. We have concluded, after examination of the entire cause, that by virtue of these errors defendant was not afforded a proper trial of the questions of the degree of the murder and of the penalty to be imposed.

Defendant had been acquainted with his victims for approximately two years before August 17, 1947, the date of the homicide. In July, 1947, defendant met Phyllis Padilla. Phyllis was the wife of Benny Padilla but was separated from him and was living with Nick Gundran as the latter's wife. On August 4 defendant began "going with" Phyllis, and she and Nick "broke up." Defendant and Phyllis thereafter discussed the possibility of her obtaining a divorce from Benny and about August 12 defendant bought her a wedding ring. On the evening of August 16 defendant encountered Benny and Nick on the street. Defendant said, "I want to smooth things, Benny, and I don't want any trouble at all. * * * Please forgive me as you have forgiven Nicky." Benny replied, "You are like a dog. * * * If I will see you going with my wife I don't know what I am going to do with you." Benny then "called Ramon Rivera to help him * * * threaten [defendant]. * * * When Ramon came Benny grabbed" defendant's tie. Defendant freed himself from Benny's grasp. Benny "run for his car"; Ramon told defendant "to run" and defendant "knew then that he [Benny] goes up there for a knife or a gun"; defendant, not wanting trouble and having no weapon at hand, ran away.

The next morning, August 17, defendant called upon Phyllis. According to his testimony, "I told her that I am not going to take her to [a christening party which they had planned to attend on the afternoon of the 17th, because] * * * 'Your husband warn me that if I even go with you and see you any place any time he would do something.' * * * I told her that I am going to the party, but I am not going there to look for trouble. * * * I told her that in case they tried to threaten me in the party and I get cornered then I will have to do something to protect my life." Defendant left Phyllis and went to the ranch where he had been employed in order to get his hunting knife. He armed himself with the hunting knife, which he placed on his left side between his shirt and his trousers (as well as with a pocket spring knife which he carried, as he often did, in his right pocket) because "I felt more secure with it because they [Benny and Nick] were threaten my life—to lessen my fear for them."

In the afternoon of August 17 defendant attended the christening party. At about 4 p. m., while he was in the dance hall, Benny and Nick arrived, stood at a distance from defendant, talked together, and looked at defendant in an "unfriendly" manner. During the next two hours they did not approach or speak to defendant. At about 6 p. m., when defendant left the hall where the party was in progress, he met Nick and Benny. They stood with their hands in their pockets and closely watched defendant, particularly his right pocket. Defendant admitted that neither Nick nor Benny made any threatening move or spoke any abusive or threatening words, except that Benny said in a "very rough voice * * * that I was looking for trouble. * * * I was scared and confused. * * * Everything went dark." Without saying a word defendant "came immediately stabbing." He stabbed Benny twice with the hunting knife, then stabbed Nick twice. Nick fled and defendant pursued him. Defendant stumbled and fell. A crowd of guests had come from the hall. One of them took defendant's hunting knife from him. Defendant got up, returned to the place where Benny had fallen, took out his spring knife, and stabbed Benny approximately thirty times, saying "I am veteran; I am not afraid to kill people. I kill lots of Japs, and I am not afraid." According to the autopsy surgeon, "several" of the stab wounds "could have produced death but one in particular [which punctured the aorta] * * * is the immediate cause of death." Defendant then cut off the nose and ears of Padilla. He ordered a bottle of beer, drank part of it, poured part of it on Benny's mouth, and said, "This is a toast on you." [Defendant testified as follows in explanation of this conduct: "I thought I was fighting the Japs. * * * I drink the beer, part of the beer, and pour part of it to Benny's mouth and I said, 'This is a toast on you.' I should have said, 'Son of Hirohito,' but I realized then that he was not a Jap. * * * I did practically the same thing to a Jap that I killed in New Guinea. I cut the Jap's nose and ears with the intention of keeping it for a souvenir, but my squad leader told me not to do so.")

According to one Murial Abrescy, a guest at the party, immediately after the killing defendant approached her, showed her his bloody hands, said "that he killed Benny because the day before * * * they were after him, so before they could get him he killed them"; defendant also showed her a picture of Phyllis which he carried in his wallet. Thereafter he waited quietly until police officers arrived and placed him under arrest.

In the evening after his arrest defendant said, when an officer told him that "Nick Gundran was in bad shape," that he hoped that Nick would die. He was then asked, "Did you really intend to kill both these men?" and replied, "I did." Later that evening at an interview with a deputy district attorney defendant thus described the killing: "they [Nick and Benny] say, 'I think you are looking for trouble,' and so I didn't wait, I just give them all they deserve. * * * [T]hey get hands like that in pocket. (Indicating) * * * I * * * don't know if they had anything in their pockets * * * but I don't want to take chance, because two men against one. * * * I stabbed him [Benny] many times * * * I want to make sure he is dead." Defendant was asked, "When did you decide to kill him?" and replied, "I ain't got no decision to kill him unless he was trying to start something." He was asked, "Are you glad he is out of the way now?" and answered, "Yes, because I kill him I have nothing to worry about being on the spot because I can't sleep when in danger. I know I am in danger because he warn me, he said, 'If I see you with my wife.' "

It is clear from the above summarized evidence that the triers of fact could rationally have found that defendant, even before he went to the christening party, had premeditated and formed a deliberate and fixed intention to kill; but they might also very reasonably have found that defendant's original intention, which he endeavored to express to Phyllis on the morning of the killing, was neither to avoid nor to seek out Nick and Benny, but to be prepared to defend himself if they should attack him, and that the actual killing was done in anger and terror which would render the crime murder of the second, rather than of the first, degree. The answers which the defendant made, shortly after the homicide, to questions addressed to him by investigating and prosecuting officers, as related by these officers, indicate naivete in recounting the facts, subjective as well as objective, and inartificiality in his use of the English language. The entire record establishes, with no substantial contradiction, that defendant's account of the quarrel with Nick and Benny, and of the stabbings, is in the main true; it also suggests that defendant was not an experienced criminal, wise in the niceties of the law of homicide but, rather, that he was a veteran of war, trained and experienced in legal killing in defense of his country.

[1] The jury in their determination of the degree of the offense and the imposition of penalty were guided by correct instructions.[1] But by virtue of misconduct

---

[1] As to fixing the penalty they were told:

"It is provided by the law of this state that every person convicted of murder of the first degree shall suffer death or confinement in the state prison for life at the discretion of the jury trying the same. You will observe, therefore, that if you find from all the evidence in the case to a moral certainty and beyond a reasonable doubt that the defendant is guilty of murder * * * of the first degree, then, upon such finding, the discretion is vested in you of determining, and it is your duty to determine what the punishment shall be, namely, whether the defendant found guilty of murder of the first degree shall be punished by death or imprisonment for life. * * *

"If you should find the defendant guilty of the crime of murder of the first degree, as charged in the Information, then it is for you, in your discretion, to fix the punishment as I have explained to you, that is to say, whether or not such defendant whom you have found guilty of murder of the first degree, shall suffer death or confinement in the State Prison for life, and in fixing such punishment, it is your right and duty to consider and weigh all the facts and circumstances attending the commission of the alleged offenses, and from these and such reasons as may appear to you upon consideration of the whole situation, to determine whether in the exercise of your discretion life imprisonment or the death penalty shall be imposed. If in the exercise of such discretion you decide that the defendant should suffer death, the form of your verdict in such case should be:

" 'We, the Jury in the above entitled cause, find the Defendant, guilty of the crime of Murder, as charged in the Information of the first degree and fix the penalty of death.'

"However, before you can return such verdict, all twelve of you must fix the of the prosecuting attorney, accentuated rather than corrected by the trial court, it is impossible to determine whether the finding as to the degree of the homicide was based on improperly admitted evidence and improper inferences from questions asked and comments made by the prosecuting attorney, and whether the death penalty was arrived at by the jury in the exercise of a sound discretion based upon the facts of the case or was inflicted because of passion aroused by such misconduct.

Phyllis Padilla, during the two months between the date of the killing and the time of trial, was under the control of the People, held in jail as a material witness. She testified briefly as a prosecution witness, merely identifying pictures of the deceased as being of her husband. As a defense witness she testified concerning the relations among herself, defendant, Benny and Nick. During his cross-examination of Phyllis the prosecuting attorney asked, "Didn't Louis Orcalles [on the morning of August 17] come over to your house and tell you he was going to kill your husband?" Phyllis testified, "No, he told me * * * that if Benny ever drew a knife on him something would happen, but he did not say he would kill him or anything like that." Thereupon the prosecuting attorney laid the usual foundation for introduction of evidence of a prior contradictory statement. He asked whether the witness recalled a conversation on August 22, 1947, with two deputy district attorneys. Phyllis replied that she did. The prosecuting attorney then produced a transcript of shorthand notes of the conversation, and proceeded to ask Phyllis at some length (28 pages of the Reporter's Transcript) whether she had made certain statements which he read or paraphrased from the transcript. He repeatedly asked whether Phyllis had said to the deputy district attorneys that defendant "had told you he was going to kill Benny." The following excerpts from the reporter's transcript typify her examination on this subject: "No. * * * I don't remember that I made it [the statement] like that. * * * I didn't say he would kill him * * * I don't think I did. I am pretty sure I didn't.

"The Court: * * * did he tell you he was going to kill him? A. No. * * *

"Mr. Scalora [prosecuting attorney]: Q. You say that Louis Orcalles did not tell that to you, is that correct? A. He told me like I told you a while ago that if Benny ever drew a knife on him, that something would happen, but that is all * * * I didn't say [to the deputy district attorneys] he was going to kill him. * * * I just don't remember. * * *

"Q. What did Louis tell you he was going to kill Benny if he did what? * * * A. He didn't tell me he was going to kill him. That morning he told me if Benny drew a knife on me something would happen, but he didn't say he was going to kill him. * * * I don't remember saying that Louis said he would kill Benny in any part of that. I don't remember saying he would * * *

"Q. What was the plan that you had with Louis? Was it to kill Benny? A. We didn't have a plan.

"Q. But, you discussed the fact with Louis about killing Benny, didn't you? A. No, we didn't. * * *

"Q. You deny now that you ever discussed with Louis Orcalles the question of killing your husband? A. We never discussed that, no. * * *"

[2] Thereafter the People introduced evidence that on August 22 Phyllis had said to the deputy district attorneys that defendant "told me he was going to kill Benny if Benny pulled a knife on him." We may assume for the purposes of this discussion that the procedure was proper for the purpose of impeachment. Howev-

---

penalty at death. But if, on the other hand, in the exercise of such discretion you fix the punishment at confinement in the State Prison for life, then you will specify the same in your verdict, and the form of verdict in such case should be:

"'We, the Jury in the above entitled cause, find the Defendant, guilty of the crime of Murder, as charged in the Information, of the first degree and fix the punishment at imprisonment in the State Prison for the term of his natural life.'

"However, before you can return such verdict, all twelve of you must fix the penalty at life imprisonment."

er, in his closing argument the prosecuting attorney said, "Now, don't forget, Louis Orcalles, on the morning before the killing, went to see the wife of the deceased and told her, 'I am going to kill Benny.'" Defendant's counsel pointed out that there was no competent evidence of the fact that defendant had made such statement. The trial court, instead of clearly explaining to the jury the purpose of admitting evidence of Phyllis' asserted statement of August 22, made the inadequate and inaccurate statement, "The jury will understand that you are the judges of the evidence. * * * you are the ones who are to determine what evidence has been presented."

In two other respects the People's use of evidence of Phyllis' asserted statements of August 22 was improper. She was asked whether on August 22 she had said that on the day of the homicide she "had a feeling" that defendant would kill Benny. She denied using the word "kill." The trial court erroneously overruled defendant's objection and denied his motion to strike, made on the ground that "the feeling as described in that statement has no relevancy to this matter whatsoever," and the People were allowed to introduce in evidence the portion of an asserted statement tending to prove that on August 22 she had said that on the day of the homicide she had had a "feeling * * * [t]hat Louis would kill Benny." In closing argument the People referred to and relied on this evidence and the trial court, in response to the request of defendant's counsel that the jury "be instructed that this statement was admitted merely for purposes of impeachment and is not evidence of the truth of the facts stated outside of this courtroom," gave the inadequate instruction, "The Jury will understand that they are the sole judges of all the evidence admitted in this case." The fact that Phyllis after the killing made an extrajudicial statement that prior to the killing she had a "feeling" that it would occur, is not competent evidence of any issue in the case and such fact should not have been used as "evidence" by the People or referred to and relied upon in argument.

The People were also allowed, on cross-examination of Phyllis, over repeated and proper objection, to question her as to the following matter:

"Q. Now, in the conversation on Friday, August 22nd, in which you were questioned by Mr. Mundt and Mr. Williamson in the District Attorney's office, did you tell Mr. Mundt and Mr. Williamson that your husband never had a chance on August 17, 1947?

"Mr. Panattoni [defendant's counsel]: I object to that and cite it as prejudicial. This defendant wasn't there and this is an attempt to introduce that before the Jury improperly and it is highly prejudicial.

"The Court: Overruled.

"Mr. Scalora [prosecuting attorney]: Did you tell Mr. Mundt and Mr. Williamson that you didn't think Benny ever had a chance on that deal on August 17, 1947?

"Mr. Panattoni: That is again objected to on the same grounds.

"The Court: Objection overruled to the admissibility of this line of testimony, but sustained to the particular form of this particular question. * * *

"Mr. Scalora: Q. In relation to the conversation you had with Louis Orcalles concerning what he has said to you, did you in relation to those facts express to Mr. Mundt that in your opinion your husband, Benny, didn't have a chance?

"Mr. Panattoni: I object to it on the same grounds.

"The Court: Overrule the objection. Why don't you present the questions and answers, if you are referring to this conversation? Ask her if she said these things. You are getting a lot of conclusions in there. Ask her if she said these things. This all dates back as to whether or not she told Mr. Mundt and Mr. Williamson that he said he was going to kill the deceased. That is the only reason why it is admissible. * * *

"Mr. Scalora: * * * Q. Were you asked this question: 'Question: I don't think Benny ever had a chance in this deal. Answer: No, I don't either.'

"Mr. Panattoni: I cite this as prejudicial misconduct. It purports to be a statement of an opinion and conclusion of the witness which has no bearing in this matter.

"The Court: It all goes back to her testimony.

"Mr. Panattoni: That is not the purpose. It is only or would only be admissible for impeachment, and there is no impeachment here.

"The Court: Overruled.

"Mr. Scalora: Q. Were you asked that question in that conversation, and did you give that answer?

"Witness: Read it again.

"Q. 'Question: I don't think Benny ever had a chance in this deal. Answer: No, I don't either.' Do you remember saying that? * * *

"The Court: I don't know what you can interpret that to mean.

"Mr. Scalora: Well, following that were you asked this question: 'Question: I don't think he had a thing with which to defend himself. Answer: He had the baby with him too.' A. I was told he had the baby with him when he died. That's all I know,—and I told him that.

"Mr. Panattoni: I object to this line. It isn't by way of impeachment. It is trying to put something in here indirectly which is objectionable. This testimony is all irrelevant, immaterial and prejudicial.

"Mr. Scalora: This witness has given testimony in this case.

"The Court: Proceed.

"Mr. Scalora: Q. 'Answer: He had the baby with him too.' You gave that answer in that conversation? A. No, I didn't tell him that the girls told me the baby was there.

"Q. Do you deny that you were asked that question and gave that answer? A. No, I answered it like that.

"Q. What did you mean by your answer that you didn't think 'Benny ever had a chance.' A. I didn't know because I wasn't there, only what the girls came up and told me outside, and that was in the County Jail.

"Mr. Panattoni: And I move to strike all the testimony of this witness as to this particular matter as incompetent, irrelevant and immaterial; hearsay. Cite it as prejudicial.

"The Court: I think I will grant the motion. All the testimony with regard to this witness stating that she didn't think Benny had a chance will be stricken from the record, and the jurors are instructed to disregard it. You asked her why and she told you that somebody else told her that; she didn't know."

[3] The People's efforts to introduce this evidence were highly improper. Its only possible purpose could be to prejudice the jury against the defendant. It had already been established that Phyllis was not at the christening party and therefore could not testify as to the circumstances of the killing. A criminal prosecution should not be defiled to the status of a sordid game in which the People attempt by trick and device to get inadmissible, prejudicial evidence before the jury. Striking out a portion of the wrongfully admitted evidence and instructing the jury to disregard that portion stricken out, as shown above, is not likely, in a case such as this, to repair the damage done.

The erroneous use of evidence above discussed is not explainable as an occurrence in the heat of trial, an unexpected development on cross-examination of a hostile witness. The written record of the extrajudicial statements of Phyllis had long been in the possession of the prosecuting attorneys; it was used deliberately, with full knowledge of its inadmissible contents. The prosecuting lawyer who resorts to such practice is twice answerable: For the honor of his profession as a lawyer; for the integrity of the State in the proceeding he conducts.

[4] Also, there reposed on the trial court a clear duty to be alert to prevent, if reasonably possible, and, if not prevented, to cure, if possible, by prompt and vigorous denouncement and instruction, such misconduct and errors as have been shown. But, as hereinabove shown, the trial court refused to caution the jury as requested by defendant when the prosecuting attorney in argument relied upon the evidence of Phyllis' statements of August 22 and improperly indicated that there was compe-

tent evidence that defendant on the morning of the homicide said, "I am going to kill Benny." The court also erroneously refused defendant's requested instruction that "In respect to any attempt to impeach a witness by showing that on some former occasion he made a statement or statements that are contradictory of his testimony here, you are instructed that the evidence of any such contradictory statement is not received for the purpose of proving the truth of what then was said, but only for the purpose of testing the credibility of the witness; you are permitted to consider such evidence only for that purpose, and you are the exclusive judges of the effect of such evidence on the witness's credibility" (CALJIC (1946 Ed.), Form 54–A); and not only was such proper instruction refused but the jury were affirmatively admonished, at the request of the People, that "The degree of passion and provocation and whether malice and premeditation or malice alone, exists in the mind of the slayer or the absence of both * * * are all questions of fact for the jury to determine *from all of the evidence which has been admitted by the Court.*" (Italics added.) This last instruction, while it might be entirely proper under other circumstances, serves here to aggravate the error of refusing to limit the applicability of the impeaching evidence.

However reprehensible the conduct of an accused, he is entitled to have its legal consequences determined from competent evidence by a jury properly instructed. Here, we cannot fairly say that, had improper evidence improperly used not been before the jury, unadvised of its impropriety, the verdict and sentence would have been the same.

For the reasons above stated the judgment and order appealed from are reversed.

GIBSON, C. J., and CARTER and TRAYNOR, JJ., concur.

EDMONDS, Justice (dissenting).

This case was tried on two theories, the proof of either of which would be sufficient to support a verdict of first degree murder. People v. Eggers, 30 Cal.2d 676, 185 P.2d 1. In reaching its decision, the court has considered but one of these theories, and the determination that the judgment should be reversed is based upon the conduct of the district attorney in connection with testimony presented in proof of premeditation and deliberation in connection with the homicide.

In addition, however, there is evidence that Orcalles cut off the ears and nose of Padilla while the latter was still alive but after several stab wounds, at least one of which later caused death. As to this issue, Orcalles argues that the evidence does not justify a verdict of murder in the first degree as committed in perpetration of mayhem because the acts constituting mayhem followed the infliction of fatal wounds. It follows, therefore, he argues, that the act of mayhem was a mere afterthought, and incidental to the homicide which had been accomplished. Furthermore, says Orcalles, "from the standpoint of logic, ethics, and abstract justice," and the wording of the statute, second degree murder cannot become a more grievous public offense the moment wounds are inflicted on the ears and nose.

But it is the nature of the crime of mayhem which makes the resultant death first degree murder without the need for proof of deliberation or premeditation. The Legislature, by including mayhem among the enumerated felonies of Penal Code, Sec. 189, recognized that the act is a brutal one attributable to a malicious and vicious disposition. If the appellant's contention is correct, the only logical conclusion is that the first blow struck in an affray determines the nature of the crime committed.

Of course, if an act defined as mayhem is committed upon a person after his death, that crime has not been committed, for the severance denounced by the statute must be a part of the body of a human being. Penal Code, Sec. 203.

The record shows that after Orcalles met Padilla and Gundran outside of the Old Jap Church, he stabbed Padilla numerout times and then stabbed Gundran twice. Gundran ran away, chased by Orcalles, who tripped during the chase. While he was down, one of the witnesses took his knife away from him. Orcalles then got up, returned to where Padilla was lying on the ground, took another knife from his pocket and proceeded to stab Padilla again, cut off his ears, part of his nose and ripped him from his stomach to his throat. There was evidence that Padilla was still alive at the time that his ears and nose were slit for "his stomach was moving and he was breathing" and afterwards "there was a lot of blood in the vicinity of his nose and ear." After these acts of mayhem Orcalles poured beer on Padilla's body.

Certainly if, while Padilla was still alive, but after the mortal wound had been inflicted, Orcalles had committed acts amounting to torture, the crime would amount to first degree murder. The defendant's act need not be the sole cause of the death, provided it is a proximate cause. People v. Lewis, 124 Cal. 551, 57 P. 470, 45 L.R.A. 783. So here, if the first mortal wound had been inflicted by another person and Orcalles, afterwards coming upon the victim while he was still alive, had cut off his ears and nose and slit him from his stomach to his throat, he would have committed a homicide, which by its nature would amount to first degree murder even though he merely accelerated a death which was bound to occur without his interference. People v. Ah Fat, 48 Cal. 61. The crime cannot be any the less heinous because Orcalles inflicted the first mortal wound.

Only two cases have been discovered in which there was evidence that the defendant had caused two injuries, both of which were probably fatal. Both decisions rely on the later acts as being sufficient to support the verdict of guilty. In the first of these, Jackson v. Commonwealth, 100 Ky. 239, 38 S.W. 422, 1091, the evidence showed that the defendant had administered poison to a woman in Ohio. The poison was in sufficient quantity to cause death eventually. Defendant then took her into Kentucky, and there, while she was still alive, but thought by the defendant to be dead, he cut off her head. Upon rehearing, after affirmance of the conviction, the defendant argued that he was punishable neither in Ohio nor in Kentucky. His argument was that the Ohio courts were without jurisdiction to punish him for murder, for the attempt there was not successful; and the Kentucky courts were without jurisdiction to impose punishment for murder because the act done in that state, which accomplished and completed the actual killing, was done upon the supposition that the murder had already been accomplished, and so there was no intent to kill when the head was decapitated. The court, in deciding that Kentucky had jurisdiction to punish him for murder, said: "We see no good reason why we should not consider the motive which inspired an attempted crime in another sovereignty, and the circumstances of the attempt, with the view to determine the character, criminal or not, of the ultimate fact which took place in this sovereignty." 38 S.W. at page 1092.

A case more closely analogous to that presented by the facts of the present record was recently decided by the Supreme Court of Nevada. State v. Sala, Nev., 169 P.2d 524. The defendant Sala and Edward McCollum were driving through Nevada in the automobile of McCollum. Sala testified that McCollum made improper advances to him, which he resisted. He then fell asleep and when he awakened, the car had stopped. McCollum was standing on Sala's side of the car and was making advances again. Sala told the deceased to get away, and when he did not do so, Sala started to get out of the car. As he did so he grabbed a ball pein hammer which was in the open glove compartment and hit McCollum across the face with the head of it. Sala hit him several more times with his fists and the hammer, until McCollum fell down. There was evidence that these injuries were sufficient to cause death. Sala then dragged McCollum over to the side of the road, and started to get into the car, intending to drive it to Salt Lake City. He noticed, however, that McCollum got up and started coming toward him. Sala reached into the glove compartment again, found a monkey wrench, and hit McCollum in the face and on the head several more times. McCollum fell down, and Sala drove away in the car.

Sala was convicted of first degree murder. Upon appeal he contended that both the first and second beatings were continuous and were due entirely to uncontrollable passion aroused in him by improper advances of McCollum toward him; that there was a lack of intention to kill McCollum; and that if the death resulted from the beatings, the killing was not wilful and premeditated, and at most, was second degree murder. The court held, however, that the second beating occurred to overcome or prevent resistance to the taking of the car, and that "all the elements of a malicious and intentional killing of the deceased by the appellant, in the perpetration of robbery, were proven." 169 P.2d at page 534.

In reaching its decision the Nevada court reasoned: "As to the element of the cause of death, it was sufficient if, from the evidence, it was proven that the injuries inflicted by the second series of beatings were of such a nature that, in their natural and probable consequence, they would produce death, or at least materially contribute to and accelerate same.

"As stated in 26 Am.Jur., sec. 49, p. 192:

"'The law declares that one who inflicts an injury on another and thereby accelerates his death shall be held criminally responsible therefor. It is said in this connection that if any life at all is left in a human body, even the least spark, the extinguishment of it is as much homicide as the killing of the most vital being.'" State v. Sala, supra, 169 P.2d at page 533, 534.

Just as in the Sala case, the second set of injuries here contributed materially to cause and probably accelerated the death of Padilla, and there is sufficient evidence to justify a verdict of murder in the first degree because committed in perpetration of mayhem. "[W]here there is substantial evidence in support of the jury's verdict, its determination must be upheld. (Citing cases.) Conversely, to justify the reversal of a judgment of conviction, the record must clearly show that the evidence could not be interpreted as supporting the verdict." People v. Eggers, supra, 30 Cal. 2d at page 685, 185 P.2d at page 6; cf. People v. Sanchez, 30 Cal.2d 560, 570, 184 P.2d 673.

Orcalles argues for the abolition of this rule and contends that he need not show the denial of a fair trial on both theories of the prosecution in order to justify a reversal. In support of this proposition he cites Stromberg v. California, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117, 73 A.L.R. 1484, and Haupt v. United States, 330 U.S. 631, 67 S.Ct. 874, 91 L.Ed. 1145. These decisions, however, are not here controlling. In the Stromberg case the defendant had been convicted under a statute denouncing three different types of conduct separately stated. The jury returned a general verdict of guilty without specifying the particular act upon which it was based. The judgment was reversed because the court found that the statute, in making one of the three types of conduct unlawful, was unconstitutional, and it could not be determined under which clause defendant had been convicted. The language relied upon by appellant in the Haupt case appears in a footnote appended to the statement of the court that it does "not reach the question whether the conviction could stand on some sufficiently proven acts, if others failed in proof." 330 U.S. at pages 640, 641, 67 S. Ct. at page 878, 91 L.Ed. 1145.

Moreover, for all that appears in the record, the intention to kill Padilla may have been coupled with the intention to cut off his nose and ears, or to kill him by means of cutting off these members of the body. I see no basis for limiting the inferences which legitimately might have been drawn by the jury from the testimony to the sole intention to kill Padilla by stabbing him. The fact that Padilla received wounds which would and did cause his death about 15 minutes after his nose and ears were cut off does not, of itself, excuse Orcalles from the consequences of a murder committed in the commission of mayhem.

For these reasons, I would affirm the judgment.

SHENK and SPENCE, JJ., concur.

Rehearing denied; SHENK, EDMONDS, and SPENCE, JJ., dissenting.

In re McCABE'S ESTATE.

BURWELL v. McCABE.

Civ. 3912.

District Court of Appeal, Fourth District, California.

Sept. 2, 1948.

Rehearing Denied Sept. 23, 1948.

Hearing Denied Oct. 29, 1948.

1. Wills ⚿684(10)

Where will confers discretion on trustee in determining whether particular items should be charged against income or corpus, exercise of such power will not be interfered with by courts even if court would have exercised the power conferred differently in absence of showing that trustees acted dishonestly or from an improper motive, or acted beyond bounds of reasonable judgment.

2. Trusts ⚿325

Trustees must support every item of their account, and wherever they fail to support correctness of a charge or credit by satisfactory evidence, item must be disallowed. Probate Code, § 1121.

3. Wills ⚿684(10)

Evidence supported finding that expenses for beneficiary's share of costs of trips together with amount charged for lodging, etc., and charges for beneficiary's share of maintaining family home including taxes, etc., were actually paid by trustee and incurred in good faith for maintenance, support and education of beneficiary, and expenditures so made were properly charged against beneficiary under will authorizing trustee to exercise absolute and uncontrolled discretion in expenditure of income and principal. Probate Code, § 1121.

4. Trusts ⚿325

In proceeding by beneficiary against trustee to compel accounting, where trustee admitted commingling personal funds with those of beneficiary and failed to keep full and accurate accounts, evidence was insufficient to support finding that sums for maintaining beneficiary in accustomed manner of living, for 15 years were actually paid by trustee and incurred in good faith for maintenance, support, and education, and such items were improperly charged against beneficiary. Probate Code, § 1121.

5. Trusts ⚿325

Trustees are under obligation to render to their beneficiaries a full account of all their dealings with the trust fund, and where there has been a negligent failure to keep true accounts, or a refusal to account, all presumption will be against the trustees upon settlement. Probate Code, § 1121.

6. Trusts ⚿325

In proceeding by beneficiary against trustee to compel accounting, burden of proof is not on beneficiary to point out particulars in which account is erroneous. Probate Code, § 1121.

◆

Appeal from Superior Court, San Diego County; Arthur L. Mundo, Judge.

Proceeding in the matter of the estate of Clarence Watson McCabe, deceased by Virginia Rose McCabe Burwell, beneficiary, against Violet M. McCabe, trustee, for an accounting. From the judgment, petitioner appeals.

Judgment affirmed in part, and reversed in part.

Joseph E. Daly, of San Diego, for appellant.

Monroe & McInnis, of San Diego, for respondent.

MUSSELL, Justice.

This appeal is taken from an order and judgment discharging Violet M. McCabe as trustee under the will of Clarence Watson McCabe, deceased, and approving her first and final account as such trustee. This proceeding was brought under section 1121 of the Probate Code to require respondent to render an account as trustee to appellant as beneficiary of the trust.

Clarence Watson McCabe died in San Diego on the 6th of February 1928. By the terms of his last will and testament the sum of $50,000 was left in trust for the use and benefit of his daughter, Virginia Rose McCabe, appellant herein. Respondent, as trustee, was authorized to use the net income of the trust estate and also such portion of the principal as she in her discretion might deem necessary for the proper care, support and education of appellant until she attained the age of eighteen years. The will also contained a provision that it was the wish and recommendation of the deceased that such amounts as might be deemed reasonable or proper, in the absolute and uncontested discretion of the trustee, should be used for the care, support and maintenance of appellant, out of said trust money, whether principal or interest, during the continuance of the trust. The testator also expressed the desire that appellant be given a good and thorough education.

The will provided that in the event appellant attained the age of twenty-one years the trust should terminate and all the trust estate, including increase and accumulations then in existence, should be paid to the appellant.

The decedent at the time of his death owned an automobile agency and the total assets of his estate amounted to approximately $500,000. Pursuant to the terms of the decree of distribution the respondent, Mrs. McCabe, received some $330,000 in addition to the $50,000 set aside for appellant, and a second trust fund of $50,000 distributed to Barbara Jean McCabe, another minor daughter.

Respondent established a bank account in which she deposited the two trust funds together with the amount received by her individually from the estate. Respondent withdrew funds from the account to maintain and support herself and two daughters, in addition to withdrawals for investment purposes. Respondent testified that out of the commingled funds she purchased for herself a participating life income insurance policy from the Penn Mutual Life Insurance Company in the principal sum of $170,000, with a yearly life income for her of $5100 commencing December 5, 1930.

Appellant attained the age of twenty-one years on July 23, 1942, and commenced this proceeding to require respondent as trustee to render an account.

The first and final account filed by respondent on November 12, 1947, contains her verified statement that she had expended on behalf of appellant, during the period beginning April 5, 1929, to the 10th of November, 1947, the sum of $54,065.34, and that there are no remaining assets for distribution under the trust.

The account, summarized, contains charges for appellant's proportionate share of the costs of trips to Honolulu, Yosemite Valley, Switzerland, Germany, Spain, Quebec, Banff, Lake Louise and elsewhere, together with amounts charged for board, lodging, supplies, dental and medical care, clothing, personal expenses and incidentals paid for appellant while attending schools in Europe and elsewhere, all amounting to the sum of	$23,050.74
For one-third of the cost of maintaining the family home in San Diego from 1928 to 1942, including taxes, insurance, water, lights, gas, telephone, termite and ant control service, repairs and house painting.....	$ 8,514.60
Reasonable average cost of maintaining appellant in her accustomed manner of living, including such items as clothing, laundry, cleaning, minor medical and dental care, money allowance, board, etc., $125.00 per month, or $1500.00 per year for fifteen years, 1928 to 1942, in the total amount of...........	$22,500.00

The trial court found that the expenses set forth in the first and final account and report of the trustee were actually paid by the trustee; that they were incurred in good faith for the use and benefit, and for the maintenance, support and education of appellant, and that the expenditures so made were proper and were properly charged against appellant.

The principal contention of appellant is that the evidence is insufficient to sustain this finding and to support the order and judgment settling the final account and discharging the trustee.

At the time of his death, the yearly living expenses of decedent and his family amounted to $25,000; an allowance of $600 per month was received by respondent for her personal expenses, and the family was accustomed to travel considerably. After decedent's death appellant was sent to the finest of schools, both here and abroad, and was taken on many vacation and travel tours by respondent. Most of the items of the account are for expenses occurred in attendance at such schools, and travel tours, together with cash advanced to appellant for incidental expenses. No books of account were kept by respondent; no vouchers showing the expenditures were presented to the court and the proof of the payment of the items in the account consisted of the testimony of respondent that the various sums had actually been paid by her, together with other evidence that appellant had actually attended the schools named and had visited the places described in the account.

In this connection it should be noted that the decedent, by the terms of his will, authorized respondent to exercise her "absolute and uncontrolled discretion" in the expenditures of the trust fund in the care, support and education of appellant.

[1] In Estate of Jacks, 80 Cal.App.2d 562, 567, 182 P.2d 605, the court, in considering the legal effect of a clause in a will conferring discretion on the trustee, in determining whether particular items should be charged against income or corpus, held that where such discretion is conferred upon trustees the exercise of such power will not be interfered with by the courts, even if the court would have exercised the power conferred differently, in the absence of a showing that the trustees acted dishonestly or from an improper motive, or acted beyond the bounds of a reasonable judgment.

Appellant contends that the account should not have been allowed because of the fact that no vouchers nor receipts for the expenditures from the trust funds were presented to the court and because of the failure of respondent to render a full account of her dealings with the trust funds.

[2] Our attention has not been directed to any statutory requirement that trustees must furnish written vouchers to support expenditures from trust moneys but it was held in Purdy v. Johnson, 174 Cal. 521, 531, 163 P. 893, that it is the duty of trustees to support every item of their account, and that wherever they fail to support the correctness of a charge or a credit by satisfactory evidence, the item must be disallowed.

An examination of the account discloses the fact that respondent charged appellant the sum of $8514.60 for a third of the expense of maintaining the family home in San Diego from 1929 to 1942. At the time the trust money was received by respondent, Virginia Rose McCabe was of the approximate age of 7½ years. She was not at the family home much of the time during the ensuing fifteen years. According to the account she was a student at an academy in San Diego during the years 1929 and 1930, and during 1931–33, attended a school in Switzerland for 27 months. During 1933–34 she attended a school in New York for nine months, and in 1934 entered an academy in New Jersey and remained there until June of 1937. From September 1937 to June 1938 we find her in the Bishop's School of La Jolla, California, and also in New Jersey again from September 1938 to June 1939. Appellant attended Saint Mary's College, Brentwood Heights, California, in September 1940 and remained there until the following June when she attended the University of Arizona for nine months. During all of these years appellant was charged with one-third of the amount of annual expense and upkeep of a home in San Diego.

[3] The evidence offered in support of the necessity for and in the proof of these amounts is questionable. However, there is some evidence to support the finding of the trial court in this respect. Had we been the trial judge a different result might have obtained on the evidence presented.

There is also some evidence in the record to support the finding of the trial court as to the charges made against appellant for expenses on the numerous vacation trips, and for the amounts paid for appellant while attending school.

[4] However, the item of the account which purports to charge appellant $22,500 for items such as clothing, laundry, cleaning, minor medical and dental care, money allowance, board, etc., $125 per month, of $1500 per year for fifteen years, 1928 to 1942, in our opinion should not be allowed and is not supported by sufficient evidence to overcome the presumptions against the trustee upon a settlement.

Respondent testified that she did not keep any detailed account of money spent for the incidentals making up the total of $22,500. She was asked the average cost to her of clothing, spending money, laundry, cleaning and minor medical and dental care during that time and stated that she "figured about $125.00 per month, some months more and some months less, it averaged that". Appellant, when but 7½ years of age, is charged at the rate of $125 per month for board, clothing, minor medical care and incidentals. Many such charges appear to be included in the amounts charged under school exenses and vacation trips. At best the testimony of respondent in this particular amounts to a mere guess or conjecture and falls far short of the degree of proof required.

In this connection is should be noted that respondent has admitted the commingling of her own funds with those of appellant. Section 2236 of the Civil Code provides:

"A trustee who willfully and unnecessarily mingles the trust property with his own, so as to constitute himself in appearance its absolute owner, is liable for its safety in all events, and for the value of its use." See, Matter of Bane, 120 Cal. 533, 52 P. 852, 65 Am.St.Rep. 197.

The good faith or intention of respondent is in no way involved in the question of her liability and we conclude that the mingling of her property with that of appellant constituted a breach of trust. Estate of Evans, 62 Cal.App.2d 249, 258, 144 P.2d 625. By her own admissions respondent has failed to comply with the obligation which rests upon all trustees to keep full and accurate accounts of the trust funds coming into their hands and to render an account thereof to their beneficiaries.

[5] In Purdy v. Johnson, supra, 174 Cal. at page 527, 163 P. at page 896, it is said:

"'Trustees are under an obligation to render to their beneficiaries a full account of all their dealings with the trust fund (3 Pomeroy's Equity Jurisprudence, § 1063; 28 Am. & Eng.Ency. of Law, [2d ed.], p. 1076), and where there has been a negligent failure to keep true accounts, or a refusal to account, all presumptions will be against the trustee upon a settlement. (Lupton v. White, 15 Ves.Jr. 432, 440 [33 Eng.Reprint 817]; Blauvelt v. Ackerman, 23 N.J.Eq. 495; Landis v. Scott, 32 Pa. 495).' Bone v. Hayes, 154 Cal. 759, 766, 99 P. 172."

[6] It was there held also that the burden of proof was not on the beneficiary to point out the particulars in which the account was erroneous.

In our opinion the evidence offered by respondent fails to support the order and judgment of the court approving the account as to the charges in the sum of $22,500 for alleged expenditures of $125 per month.

The judgment in so far as the allowance and approval of the item of $22,500 in the account is concerned, is reversed, and is affirmed as to the items of $23,050.74 and $8514.60. Appellant to recover costs on appeal.

BARNARD, P. J., and GRIFFIN, J., concur.

Hearing denied; CARTER, TRAYNOR, and SCHAUER, JJ., dissenting.

87 Cal.App.2d 365

PEOPLE v. PERKIN.

Cr. 712.

District Court of Appeal, Fourth District,
California.
Sept. 1, 1948.

Hearing Denied Sept. 30, 1948.

1. Criminal law ⚷1158(1)

Generally, an order granting a motion for new trial will be affirmed if any ground therefor exists regardless of reasons assigned by trial court, but rule is not applicable where order made discloses directly and clearly that insufficiency of evidence is excluded as a ground for granting the motion. Pen.Code, § 1181.

2. Criminal law ⚷1171(1)

In prosecution for asking and receiving a bribe, statements made by district attorney in closing argument in reply to question put to him by defendant's counsel as to whether district attorney would be willing to be convicted on testimony of self-confessed professional law violators were not prejudicial misconduct. Pen. Code, §§ 68, 337a, 1181.

3. Criminal law ⚷720½

In prosecution for asking and receiving a bribe, district attorney's statement that he would not prosecute any case if he did not believe in it followed by statement that he would not have anything to do with the particular case if he did not have faith in it, was nearer than a district attorney should come to expressing personal belief in guilt of a defendant. Pen.Code, §§ 68, 337a, 1181.

4. Criminal law ⚷922(3)

In prosecution for asking and receiving a bribe, where trial court believed an admitted error in one instruction was prejudicial and might have misled jury into believing that one witness had heard a purported telephone conversation when in fact such conversation had been overheard by another, granting motion for new trial was not error. Pen.Code, §§ 68, 337a, 1181.

5. Criminal law ⚷921

In prosecution for asking and receiving a bribe, where record disclosed admission of evidence of forbidden facts and cross-examination on important matters not covered in direct examination, grant of new trial was not an abuse of discretion. Pen.Code, §§ 68, 337a, 1181.

6. Criminal law ⚷911, 1156(1)

Question whether error is prejudicial is a question for determination of trial court in ruling upon motion for new trial, and trial court is allowed a wide discretion in making its determination and where there is error in the record and trial court grants a new trial because of such error its ruling should not be disturbed unless it clearly appears that trial court has abused its discretion. Pen.Code, § 1181.

◆

Appeal from Superior Court, San Diego County; Gordon Thompson, Judge.

Thomas H. Perkin was convicted of asking and receiving a bribe while chief of police, and from an order granting a new trial, the state appeals.

Affirmed.

Fred N. Howser, Atty. Gen., Frank Richards, Deputy Atty. Gen., James Don Keller, Dist. Atty. and Ronald Abernethy, Deputy Dist. Atty., both of San Diego, for appellant.

Edgar B. Hervey, of San Diego, and Henry F. Walker, of Los Angeles, for respondent.

BARNARD, Presiding Justice.

The defendant was accused, in each of seven counts, of the crime of asking and receiving a bribe in violation of section 68 of the Penal Code. It was charged that during the summer of 1947, while he was chief of police of the city of Escondido, he received seven $100 payments from two men upon agreements that he would permit these men, severally, to engage in acts prohibited by section 337a of the Penal Code.

After conviction by a jury, the defendant moved for a new trial on all of the grounds set forth in section 1181 of the Penal Code. Upon the presentation of this motion all of these grounds were urged, although misconduct of the district attorney and an error in one instruction were particularly stressed in the argument. In his remarks upon deciding the motion the trial judge dwelt mainly on the two matters which had thus been stressed but made some reference to the evidence, and remarked that anything which happens during a trial which might have a tendency to bolster up testimony should be carefully considered. He concluded his remarks by saying "The defendant's motion for a new trial is granted." The minute order which was entered reads as follows:

> "The defendant now presents his motion for a new trial on the grounds as stated under Section 1181 P.C. and said motion being submitted with argument of counsel, by the Court, said motion granted on the ground stated under Section 1181, division 5: when the court has misdirected the jury in a matter of law, or has erred in the decision of any question of law arising during the course of the trial, and when the District Attorney or other counsel prosecuting the case has been guilty of prejudicial misconduct during the trial thereof before a jury."

The People have appealed from the order thus made. It is contended that this order was based solely on the grounds of misconduct of the district attorney and an error in one instruction; that the court erred in holding that the prosecuting attorney was guilty of prejudicial misconduct in his closing argument; that the court erred in holding that the error in this instruction was prejudicial; and that since the order granting the new trial was thus limited no other ground, particularly insufficiency of the evidence, may be considered in passing upon the validity and effect of the order.

[1] The evidence was conflicting, and the order would necessarily be affirmed if considered as based, in part, upon the insufficiency of the evidence. While the usual rule is that such an order will be affirmed if any ground therefor exists, regardless of the reasons assigned by the trial court, this rule is not applicable where the order made discloses directly and clearly that the insufficiency of the evidence is excluded as a ground for granting the motion. People v. Mcgladdery, 40 Cal. App.2d 748, 106 P.2d 84.

[2] Both parties have ably briefed and argued the question as to whether, under the language here used, insufficiency of the evidence may be considered in support of this order. It is unnecessary to decide this question, under our view that the order must be sustained on one or more of the grounds expressly stated therein.

In his remarks before deciding the motion, the court stated that he was of the opinion that certain statements made by the district attorney in his closing argument, in reply to a question and challenge put to him by respondent's counsel, constituted prejudicial error. We are in complete accord with appellant's contention that this opinion was erroneous, and that no prejudicial misconduct appears in this connection which in any way justifies or supports the order granting a new trial.

It was contended at the hearing of the motion, and is contended here, that the district attorney was guilty of misconduct during his closing argument while answering the question referred to, in commenting on the character and reputation of the defendant by stating that the record was silent in that regard and contained nothing to show his good reputation and character. The situation in this regard may be briefly stated as follows. During his argument the defendant's counsel referred to the defendant as "a law enforcement officer, a man of family, a man of good reputation and character." He then repeated the effect of this statement at least six times before, during and after the asking of the question and the challenge to answer it, finally appealing to the jury not to take from the defendant his good name and not to permit him to be "robbed of his good name and reputation in this community." He then asked the district attorney, and challenged him to answer it in his closing argument, whether he would be willing to be convicted, when "not one other word can be said against you," on the testimony of two self-confessed professional law violators and whether he would feel secure in his official position if crooks could "get" officers on such evidence. The district attorney in his closing argument attempted to answer the question fairly and to state what he would do under the circumstances. He was interrupted several times, defendant's counsel assigning his remarks as misconduct and asking that the jury be instructed to disregard it. In each case the judge instructed the jury to disregard "that statement". When the district attorney stated there was nothing in the record to show the defendant's good reputation and character the court, upon request of defendant's counsel, instructed the jury to disregard it and instructed the district attorney to "refrain from that comment." We see nothing improper in the district attorney's attempted reply to the question and challenge made to him, under the circumstances here appearing. His remarks were made under the greatest provocation, and if there ever was a case where comment on the character and reputation of the defendant was invited this is that case.

[3] In another instance, however, the question of misconduct is a closer one. At that time the district attorney stated that he would not prosecute any case "if I didn't believe it." He then went on to say that he would not have anything to do with this case if he did not have faith in it. It must be conceded that he came nearer than he should to expressing his personal belief in the guilt of the defendant. It may be observed, however, that considerable provocation appears in certain remarks made by respondent's counsel during his argument.

[4] The appellant's contention that the court erred in holding that an admitted error in one instruction was prejudicial and might have misled the jury cannot be fully sustained. In this instruction, which was one telling the jury that certain evidence was received only for the purpose of showing intent, the court stated "Evidence was given in this case by the witness Starr of hearing a purported telephone conversation made by the defendant Perkin." This portion was added to the instruction by the judge and admittedly the word "telephone" should not have been included therein, as Starr had not testified concerning a telephone conversation. However, another witness, Baker, had testified to a telephone conversation between himself and the defendant and an effort had been made to impeach his testimony. The trial judge remarked that this error was important in that it may have led the jury to believe the evidence that the other telephone conversation had actually occurred, and may have misled the jury to the extent that it was prejudicial to the rights of the defendant. A trial judge has considerable discretion under such circumstances and the effect of such error is, of necessity, more of a question of fact than one of law.

[5] The order as entered clearly stated, as one of the grounds therefor, errors "in the decision of any question of law arising during the course of the trial." Several such errors here appear in connection with the admission of evidence. While the defendant was charged only with receiving bribes during the summer of 1947 a witness was permitted, over objection, to testify that in the summer of 1946 the defendant told him to go to a "bookie" and place a bet for the defendant in a certain race. The court had stated in the absence of the jury that he would permit testimony showing defendant's knowledge of book-making activities in Escondido in 1946, but that the question must be so framed as not to elicit the fact that the defendant had placed a bet with a bookmaker. Later, the evidence of the forbidden fact was admitted and the court refused to strike it or instruct the jury to disregard it. In two other instances the prosecution was allowed, over objection, to go into important matters on cross examination which had not been covered in the direct examination. While in one of these instances an attempt was made to correct the error by striking the answers from the record, the jury had heard the answers and it is at least doubtful whether their effect upon the jury could be removed.

[6] We are here considering an appeal from an order granting a new trial and not an appeal from the judgment. In this connection the court said, in People v. McCord, 15 Cal.App.2d 136, 59 P.2d 587, 589:

"The question of whether error is prejudicial is a question for the determination of the trial court in ruling upon the motion for new trial and the trial court is allowed a wide discretion in making its determination of this question where there is error in the record and the trial court grants a new trial because of such error, its ruling should not be disturbed unless it clearly appears that the trial court has abused its discretion. (Citing cases.)"

Many questions of fact are involved in deciding such a motion and a trial judge is necessarily in a better position to pass upon the effect which any errors may have had upon the jury than is an appellate court. Conceding that this motion could well have been decided the other way, the fact remains that it cannot be held that an abuse of discretion clearly appears, or that the order made is entirely without support in the record.

The order appealed from is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

---

87 Cal.App.2d 436

BENARD v. VORLANDER et al.

Civ. 7409.

District Court of Appeal, Third District, California.

Sept. 3, 1948.

Hearing Denied Oct. 28, 1948.

1. Electricity ⇨14(1)

One maintaining wires carrying electricity must exercise care that person of ordinary prudence would exercise under the circumstances.

2. Electricity ⇨16(2)

Wires carrying electricity must be carefully and properly insulated by those maintaining them at all places where there is a reasonable probability of injury to persons or property therefrom.

3. Electricity ⇨16(2, 5)

Those controlling wires carrying electricity must reasonably and properly inspect wires and appliances and be diligent therein, and, in places where there is a probability of injury, they must not only make wires safe by proper insulation but keep them so by vigilant oversight and repair.

4. Electricity ⇨19(5)

In action against power company selling electricity transmitted to facilities owned and maintained by others upon their property for injuries sustained by laborer of building being constructed immediately adjacent to power line, evidence was insufficient to have supported a finding that company either knew, or in exercise of ordinary care should have known, that workmen would inadvertently or otherwise extend steel rods from building so as to bring them into contact with wires. Pen.Code, § 385.

5. Electricity ⇨16(7)

Where laborer on building adjacent to power line was injured when he touched wire with metal rod of such length that accident would have occurred if power line had been built farther from building, fact that wires were closer than might be proper would not be deemed proximate cause of the accident. Pen.Code, § 385.

6. Electricity ⇨14(1)

One who maintains a dangerous instrumentality such as a highly charged electric wire need not anticipate, at his peril, every possible fortuitous circumstance under which some person might make a contact with such wire resulting in injury or even death, but reasonable care, not insurance against every possible accident, is the measure of his liability.

7. Negligence ⇨66(1)

One who places himself in way of an obvious and well-understood peril is guilty of contributory negligence which bars recovery for his injury or death.

8. Negligence ⇨59

Generally, although it is not necessary to preserve chain of causation from original negligence that precise nature of second negligent act should reasonably have been anticipated, it is necessary that some such negligence should have been anticipated as reasonably likely to follow as a natural and ordinary consequence of the situation created by the original negligent act.

9. Negligence ⚷136(25)

Generally, question whether original negligence is a proximate cause of injury is one of fact for the jury.

10. Electricity ⚷18(1)

Where workman, on wall being constructed close to electric line energized by company selling power and transmitting it through line and pole maintained by others upon their property, knew of line and that it might be carrying high-voltage electricity, that wires were uninsulated, and that, if he came too close with a steel rod, he would be injured by the current, but nevertheless permitted steel rod he was holding to strike the wire, workman's contributory negligence barred recovery from power company for injuries received irrespective of whether wires should have been farther from building or should have been insulated. Pen.Code, § 385.

◆

Appeal from Superior Court, Sacramento County; C. C. McDonald, Judge.

Action by Thomas Benard against C. E. Vorlander, an individual doing business as Reliable Elevator Works, and Pacific Gas & Electric Company, a corporation, to recover damages for personal injuries sustained when plaintiff contacted a high-voltage line. From a judgment notwithstanding the verdict, plaintiff appeals; and, from judgment entered on the jury's verdict for plaintiff, defendant corporation appeals.

Judgment notwithstanding verdict affirmed.

Robert G. Partridge, Henry Sanford and Leo M. Cook, Jr., all of San Francisco, for appellant.

Robert H. Gerdes and W. R. Dunn, both of San Francisco, for respondents.

ADAMS, Presiding Justice.

Plaintiff brought this action to recover damages for personal injuries, naming as defendants C. E. Vorlander, an individual doing business as Reliable Elevator Works, Pacific Gas & Electric Company, and certain fictitious persons. He alleged in his first amended complaint that on July 20, 1943, he was employed by MacDonald & Kahn as a steel worker, and was working upon a building being constructed by them for the United States government; that his injuries were sustained by reason of the negligence of said defendants who owned, operated and maintained a power line, and that they carelessly and negligently maintained same in a dangerous, defective and unsafe condition, and as a proximate result thereof a steel rod which plaintiff was moving during his work on said building came into contact with defendants' uninsulated high wires carrying 11,000 volts of electricity.

Defendant Pacific Gas & Electric Company filed an answer in which it denied negligence on its part, alleged that plaintiff was guilty of contributory negligence, and that he assumed the risk of injury.

The action came to trial before a jury. At the close of plaintiff's case a motion for a nonsuit made by defendant Vorlander was granted and plaintiff dismissed his action as to the fictitious defendants. At the conclusion of the testimony plaintiff amended his complaint to provide that at the time and place of the accident he was necessarily moving reinforcing steel rods, and that it became reasonably necessary for him and other workmen to move one of such rods from the north end of the form of the building under construction to the easterly wall thereof, and, in so doing, to swing said rod outward from the northerly wall and toward the wires maintained by defendants; that defendants and each of them well knew, or in the exercise of ordinary care should have known, of the necessary and reasonable manipulation and movement of said rod by said plaintiff and the other workmen in conjunction with him, in the performance of their duties on and upon said building, and knew, or in the exercise of ordinary care should have known, that said rod would be used, handled and moved in the manner in which said rod was being used, handled and moved by said plaintiff; that said defendants knew, or by the exercise of ordinary care should have known, that in the necessary and reasonable use and movement of said rod it could reasonably be expected to come in close proximity to or into contact with said wires and thereby allow current to pass from said wire to the body of the plaintiff; that at said time and place, while plaintiff, in conjunction with other workers, was moving and controlling said rod as hereinbefore described, it was inadvertently brought into contact with one of said wires by the actions of plaintiff and of his fellow workmen and while plaintiff was unmindful of the current in said wires; and that by reason of the negligence and carelessness of defendants and the proximity of the wires to the building and the scaffolding attached thereto and the careless and negligent manner in which defendant maintained, controlled and possessed said power line, the rod became charged with electricity which was transmitted to plaintiff, inflicting the injuries of which he complained.

It being stipulated that the new allegations in such amended complaint should be deemed denied, defendant Pacific Gas & Electric Company moved for a directed verdict in its favor, on the ground that the evidence showed no breach of duty on its part amounting to negligence, and that, on the contrary, it showed that the sole cause of the accident was negligence on the part of plaintiff. The motion was denied and the cause submitted to the jury which returned a verdict in plaintiff's favor for $17,500. Judgment thereon was entered November 22, 1946.

Defendant then moved for a judgment notwithstanding the verdict, or, in the alternative, for a new trial. Such judgment was at that time denied, the court stating that it preferred to consider defendant's argument in that behalf in connection with the motion for a new trial.

Defendant thereafter filed its notice of intention to move for a new trial on the grounds set forth in subdivisions 1, 5, 6 and 7 of section 657 of the Code of Civil Procedure, and after a hearing the court filed an opinion and entered judgment in favor of defendant, notwithstanding the verdict, on the ground that the evidence was insufficient to support the verdict. Appeal was taken from such judgment by plaintiff, and defendant appealed from the prior judgment entered November 22, 1946.

Two questions only are presented by said appeals, to wit, whether there is sufficient evidence to show negligence on the part of defendant Pacific Gas & Electric Company, and, if there is, whether the evidence shows that plaintiff was guilty of contributory negligence as matter of law.

The evidence shows that the power line through which defendant was transmitting electricity at the time of the accident had been constructed by defendant Vorlander for the United States Government, and that the poles, wires, transformers, etc. had all been placed in accordance with government specifications. Defendant Pacific Gas & Electric Company, at the request of the United States, had then energized the lines by connecting them with its transmission line outside the government's premises. The terms of the agreement between those parties do not appear. Construction of the building upon which plaintiff was working at the time of the accident was begun after the line had been fully constructed and energized. It was placed in such a position that the north end of same was approximately parallel to one of the pole lines which was 38 feet from the ground and about 9½ feet, horizontally, from the wall where the accident occurred. There was at that time a scaffolding along the north outside wall of the building, the outer edge of which scaffolding was about 3½ feet from the nearest of three wires strung on the pole line. When the scaffolding was erected does not appear, but it was very shortly before the accident. The wires were uninsulated and carried 11,000 volts. However, they carried five "High Voltage" signs near the building, which were plainly visible.

As regards the alleged negligence of defendant Pacific Gas & Electric Company, it cannot be said to have been negligent in the *construction* of said power line as it neither constructed nor owned it; nor does it appear that it had control over it or was obligated to *maintain* it (see Ray v. Pacific Gas & Electric Co., 3 Cal.App.2d 329, 337, 39 P.2d 812; Hill v. Pacific Gas & Electric Co., 22 Cal.App. 788, 790–792, 136 P. 492); and it is not contended that the line was in any respect in disrepair. Presumably at the time of its construction it was not considered a menace, and if it became such it was because of the subsequent construction of the building too close to it; and defendant cannot be said to have been negligent unless, knowing that the building was being constructed less than 10 feet distant from the wires, and knowing of the existence of the staging thereon and the use of long steel rods in its construction, it was its duty, under the conditions existing, to anticipate with reason that workmen might protrude a steel rod therefrom in the manner in which it was done by plaintiff and thus bring it into contact with such wires, and, so anticipating, to remove or insulate said wires, or to discontinue furnishing electric current through them on failure of the owners of the line to remove or insulate them.

[1-3] It is said in Polk v. City of Los Angeles, 26 Cal.2d 519, 525, 159 P.2d 931, 934, that the standard of care imposed upon those maintaining wires carrying electricity is "to exercise the care that a person of ordinary prudence would exercise under the circumstances. Among the circumstances are the well known dangerous character of electricity and the inherent risk of injury to persons or property if it escapes. Hence, the care used must be commensurate with and proportionate to that danger. * * * Specific application of that standard requires that wires carrying electricity must be carefully and properly insulated *by those maintaining them* at all places where there is a *reasonable probability* of injury to persons or property therefrom. * * * Upon *those controlling such instrumentality and force* is imposed the duty of reasonable and prompt inspection of the wires and appliances and to be diligent therein. * * * And, in the places where there is a *probability* of injury, they must not only make the wires safe by proper insulation, but as stated in Dow v. Sunset Telephone & Telegraph Co., 157 Cal. 182, 186, 106 P. 587, 589, 'keep them so by vigilant oversight and repair.'" (Italics added.)

However, as we have pointed out, defendant Pacific Gas & Electric Company was not the owner of the pole line or the wires with which the rod handled by plaintiff came in contact. The power line belonged to the government, and there is nothing in the record before us to show that, even if defendant could reasonably have anticipated the action of plaintiff which resulted in the injury which befell him, it had the authority to remove the pole line or that it, rather than the owner, had the obligation to insulate the wires. It is not contended that it was ever requested to move the wires, to insulate them or to turn off the power. In this respect this case differs from all of those relied upon by the appealing plaintiff.

In McCormick v. Great Western Power Co., 214 Cal. 658, 8 P.2d 145, 81 A.L.R. 678, which he quotes and relies upon, while the court said that persons controlling so dangerous and subtle an agency as electricity should use a high degree of care, the duty which it said was imposed was, either to insulate the wires or so locate them that they would be, comparatively speaking, harmless. We are cited to no case in which the duty has been imposed upon a company which is merely selling electric power which is being transmitted through facilities owned and maintained by others upon their own property, either to remove the lines, to insulate them, or, in the absence of a request to do so, to shut off its power because the owner of such property has commenced the construction of a building so close to the lines through which power is being transmitted as to endanger workmen engaged in such work.

The evidence shows that plaintiff had worked about three weeks upon the building under construction, which was being built of concrete, with walls about 10 inches thick, steel rods being put in the forms to reinforce them. At the time of the accident plaintiff, a Mr. Weaver, and a foreman named Saunders were working on the north wall, along the outside, as well as the inside of which there was scaffolding. Saunders had instructed the removal to the east wall of a steel rod which had been misplaced in the form along the north wall; and the three men, in carrying out this operation, first lifted the rod from the form to the top of the north wall, plaintiff and Saunders standing on the outer scaffold and Weaver on the inside. The rod was from 32 to 34 feet long, and had a hook on one end, which hook end they desired to keep at the northeast corner. Plaintiff testified that he did not remember the movement of the rod which followed after same was raised to a position along the north wall; but Weaver's testimony shows that after it was so raised, and they were in the process of turning it, the hook end of it was slid out over the outer staging near the northeast corner of the structure, so that it extended 12 or 15 feet from the outer edge of the outside scaffolding. Weaver, carrying the other end, then began to walk along the staging inside the east wall, there being no outside staging there. He had proceeded but a short distance when plaintiff started to step over the top of the form to the inside staging, and the extended end of the rod came into contact with the wires. Apparently he, himself, had contacted steel rods the ends of which protruded upward in the form, thus grounding the current.

[4, 5] Respondent says in his opening brief that the fact that defendant was maintaining uninsulated wires carrying 11,000 volts of electricity approximately 3 to 3½ feet from the scaffolding where the men were working and had a right to be, constituted substantial evidence that defendant owed plaintiff a duty to use due care toward him, which duty required defendant to see that the wires were "properly placed with reference to plaintiff's safety, and either insulated or otherwise guarded, or placed beyond the danger line of contact with him." But the evidence does not show that defendant was aware of the nearness of the scaffolding, or, in fact, of its existence; nor does it appear that it had been erected for a sufficient time to charge defendant with such knowledge.

It cannot be said that the fact that the wires were within six feet of the outer edge of the staging on the north end of the building was the proximate or any cause of the accident, for the evidence shows that the steel rod which was being handled by plaintiff and his fellow workmen was extended at least 16 feet from the wall; and if the power line had been at a greater distance from the staging, which was approximately six feet wide, the rod when extended would still have come in contact with the wire. Any negligence on the part of defendant Pacific Gas & Electric Company, then, must be premised upon failure to insulate the wire. Appellant alleged in his complaint that defendant knew or in the exercise of ordinary care should have known that workmen, including plaintiff, would use, handle, and move an instrument or instruments such as the rod being used by plaintiff at the time and place of the accident, and that said instrument or instruments would be used, handled, and moved in the manner in which said rod was being used, handled, and moved by said plaintiff at said time and place, and that as a result of said use, said instrument or instruments could reasonably be expected to come into contact with said wires, thereby allowing current to pass from the said wires to the body of the workmen using said instruments. But plaintiff apparently recognized the insufficiency of this allegation, for he amended his complaint to allege that he inadvertently moved the steel rod so that it contacted the wire while he was unmindful of the current therein. We find nothing in the evidence here to show that defendant either knew or in the exercise of ordinary care should have known that workmen would "inadvertently" or otherwise extend steel rods from such structure 16 or 17 feet and so bring them into contact with the wires. Orders 7–5050, 7–5050–a and 95 of the Industrial Accident Commission which were introduced in evidence, require that no person, firm or corporation shall require or permit any employee to perform any function in proximity to high-voltage lines, etc., unless and until danger from accidental contact with said high voltage lines has been effectively guarded against in the manner therein prescribed; and a 6 foot clearance from such lines is prescribed. But defendant was not the employer of plaintiff and owed him no duty under such orders. Section 385 of the Penal Code, though enacted in 1947 and after the occurrence of this accident, makes it a misdemeanor for any employee to move any tools, equipment, material, etc., within 6 feet of a high voltage overhead structure, and this enactment can be said to constitute a legislative recognition of a standard of conduct on the part of an employee as well as of an employer; and defendant may well be said to have safely assumed that plaintiff's employers would obey the aforesaid orders, and that plaintiff likewise would exercise due care not to bring equipment with which he was working within dangerous distance of such wires.

But whether or not defendant was chargeable with negligence under the circumstances of this case, it seems certain that plaintiff himself, and his fellow workers, were guilty of contributory negligence which bars his recovery.

[6] What the court said in Sweatman v. Los Angeles Gas & Electric Corporation, 101 Cal.App. 318, 281 P. 677, is opposite to the facts in this case. There a workman on the fifth floor of a building under construction extended a steel rod through a window, bringing it into contact with an uninsulated electric wire maintained by defendant some seven feet from the building. A demurrer to the complaint was sustained, and on appeal the court said, 101 Cal.App. at page 322, 281 P. at page 678: "The law does not require one who maintains even so dangerous an instrumentality as a highly charged electric wire to anticipate, at his peril, every possible fortuitous circumstance under which some person might make a contact with such wire, resulting in injury or even death. Reasonable care, not insurance against every possible accident, is the measure of his liability. * * * We do not think that the respondent here can be said to have had reasonable ground to suspect that someone would be apt to make contact with its wire by means of a metal bar extended from a fifth-story window of a neighboring building." It also said, 101 Cal.App. at pages 326, 327, 281 P. at page 680: "It cannot be said that the death of Sweatman was the natural consequence of the position of respondent's wire with respect either to the surface of the street or the building under process of erection, or to its lack of insulation. Obviously, he could not have touched the wire with his hand while standing on the fifth floor of the building. In other words, the position of the wire rendered it safe in its uninsulated condition under all ordinary circumstances. It was only when decedent interposed a new, independent cause, by swinging out from the wall of the building a metal rod which he was handling therein or drawing in through the window, that he was able to make contact with defendant's electric wire. The interposition of this new and independent cause could not have been anticipated by defendant. It does not occur, in the natural order of things, that workmen engaged in building operations in cities, adjacent to electric wires maintained in the streets by public service companies, are electrocuted by coming in contact therewith. The complaint set forth that it is the usual thing for such building operations to be conducted in Los Angeles in like proximity to similarly charged electric wires in the streets, but there is no allegation that any similar injury has ever resulted therefrom, and therefore no such injury was reasonably to be anticipated. As said in Oakland Bank of Savings v. Murfey, 68 Cal. 455, 9 P. 843, 847: 'If the wrong and resulting damages are not known by common experience to be usually and naturally in sequence, and the damage does not, according to the ordinary course of events, follow from the wrong, then the wrong and the damage are not sufficiently conjoined or concatenated, as cause and effect, to support the action.' And as stated in Polloni v. Ryland, 28 Cal. App. 51, 151 P. 296, 298: '"An injury that is not the natural consequence of negligence complained of, and that would not have resulted from it, but for the interposition of some new, independent cause that could not have been anticipated," is not actionable.'"

In Dresser v. Southern California Edison Co., Ltd., 28 Cal.App.2d 510, 82 P.2d 965, plaintiff and another workman were engaged in pulling a rod some 20 feet long from a well situated near a pump house to which ran an uninsulated high voltage wire belonging to defendant, about 5 feet from the center of the well and between 19 and

23 feet above the surface of the ground. The rod was extended to a height above the level of the wire, and when raised vibrated sufficiently to come into contact with the charged wires, with the result that plaintiff was severely injured. Evidence in the case showed that posted upon the pump house and a nearby pole were safety circulars issued by the railroad commission which warned of the high voltage wires, said circulars being printed in conspicuous type and easily visible to anyone entering or passing the pump house. Plaintiff testified that he saw the wires when he was raising the rod and supposed they had "juice" in them but did not know it. The court said, 28 Cal.App. at page 516, 82 P.2d at page 968: "Plaintiff was in no danger at all until he raised the rod to the height of the wires. He knew the wires were somewhere above him. He did not ascertain their exact location. He did not know if the wires were insulated. He could have determined this fact by simply looking at them. He did not look at what was in plain sight. This unfortunate young man simply 'took a chance' and was terribly injured." It was argued by plaintiff that the wires should have been at least 25 feet from the ground and that they should have been insulated, and that had they been so placed and conditioned the accident would not have happened, and that such acts of negligence were the sole and proximate cause of the accident; but the court said, 28 Cal.App. at page 516, 82 P.2d at page 969: "It is equally true that if plaintiff had not raised the limber rod into close proximity to the wires the accident would not have happened. We are not here particularly concerned with the negligence of defendant and have assumed its negligence. It is too well settled to need citation of authority that contributory negligence of a plaintiff bars his recovery even though a defendant is also negligent."

In Hauser v. Pacific Gas & Electric Co., 133 Cal.App. 222, 226, 23 P.2d 1068, 1070, the Sweatman case was cited, and this court quoted from 45 C.J., p. 931, as follows: "A prior and remote cause cannot be made the basis of an action if such remote cause did nothing more than furnish the condition or give rise to the occasion by which the injury was made possible, if there intervened between such prior or remote cause and the injury a distinct, successive, unrelated, and efficient cause of the injury, even though such injury would not have happened but for such condition or occasion. If no danger existed in the condition except because of the independent cause, such condition was not the proximate cause. And if an independent negligent act or defective condition sets into operation the circumstances which result in injury because of the prior effective condition, such subsequent act or condition is the proximate cause."

[7] In Andrews v. Valley Ice Co., 167 Cal. 11, 21, 138 P. 699, 704, the court, in reversing a judgment for plaintiff who had been electrocuted by bringing a ruler in his hand in contact with an electric wire, applied the well known rule that "one who places himself in the way of an obvious and well-understood peril is guilty of contributory negligence which bars recovery for his injury or death," citing numerous cases.

In Stackpole v. Pacific Gas & Electric Co., 181 Cal. 700, 186 P. 354, the court held that the proximate cause of the death of a workman caused by contact with a high-voltage wire was the negligence of the employer of said workman in moving a pile-driver upon which the deceased was working before defendant power company had complied with a request to set back its wires in order to permit the movement of the pile-driver. The court said, 181 Cal. at page 705, 186 P. at page 356: "It is perfectly apparent from the foregoing facts that the proximate cause of the decedent's death was not any negligence on the part of the defendant, but was the negligence of Price in moving in the piledriver before the wires had been set back so as to avoid danger. The fact that the defendant delayed setting back the wires, although it had promised to do so or even though we assume it was its duty to do so, is wholly immaterial. The utmost responsibility which would attach to the defendant for such delay would be to compensate Price for the consequent delay to his work. But it was not the delay in setting back the wires that killed the decedent, but the moving in of the piledriver, before they were set back and were safely out of the way."

[8, 9] In Stasulat v. Pacific Gas & Electric Co., 8 Cal.2d 631, 67 P.2d 678, where there was evidence that defendant's wires were sagging and had been in such condition for a sufficient length of time to charge defendant with knowledge of their defective condition and thus render it liable for the death of a workman who came in contact therewith, the court said that nevertheless its negligence was not the proximate cause of the accident where the chain of causation in the electric company's negligence was broken by an efficient intervening cause which did not follow as a natural consequence of the negligence of the company. It said, 8 Cal.2d at pages 637, 638, 67 P.2d at page 681:

"The rules for determining whether the independent force which acts upon the situation created by the original negligence is such an intervening cause that the original negligence is no longer a proximate cause of the injury are set forth in sections 442 to 453 of the Restatement of the Law of Torts and, as so reframed, lead to the conclusion that the appellant is not liable in the present case, even though it negligently allowed its wires to sag, if the realizable likelihood of the second negligent act is not one of the factors contributing to the negligent character of the first act; if a reasonable man, knowing the situation created by the first act, would regard it as highly extraordinary that the intervening act should have been done, or the act, although not an extraordinary response to the situation created by the original negligence, is done in an extraordinary negligent manner. See section 447 of the Restatement and comment thereon. Our own cases support these propositions by the statement of the more general rule that, although it is not necessary to preserve the chain of causation from the original negligence that the precise nature of the second negligent act should reasonably have been anticipated, it is necessary that some such negligence should have been anticipated as reasonably likely to follow as a natural and ordinary consequence of the situation created by the original negligent act. Sawyer v. Southern Cal. Gas Co., 206 Cal. 366, 274 P. 544; Schwartz v. California etc. Gas Co., 163 Cal. 398, 125 P. 1044; Hale v. Pacific Tel. & Tel. Co., 42 Cal.App. 55, 183 P. 280; Polloni v. Ryland, 28 Cal.App. 51, 151 P. 296. Although, as a general rule, the question whether the original negligence is a proximate cause of the injury is one of fact for the jury (Lacy v. Pacific G. & E. Co., 220 Cal. 97, 101, 29 P.2d 781), it must be said here that, as a matter of law, the issue of proximate cause was not proved. (Restatement of the Law of Torts, § 453.) There was no evidence upon which the jury could reasonably conclude that the lifting of the wires a foot and a half over the top of the pole and the crowding of the four wires into the J hook with such force as to break their insulation was an act which should reasonably have been foreseen and anticipated as a result of the sagged condition of the wires, or even that there was more than a remote and slight probability of the occurrence of any positive act which would bring the wires in contact with the telephone pole or its equipment, much less destroy the insulation."

Also see Hayden v. Paramount Productions, Inc., 33 Cal.App.2d 287, 292, 91 P.2d 231, citing Hauser v. Pacific Gas & Electric Co., Stackpole v. Pacific Gas & Electric Co., and Sweatman v. Los Angeles Gas & Electric Corporation, supra.

Appellant relies upon the decision of this court in Lozano v. Pacific Gas & Electric Company, 70 Cal.App.2d 415, 161 P.2d 74, but the facts in that case are essentially different. In the first place, defendant company there owned, maintained and operated the power line, it having been granted a right-of-way over the shipyard which was being constructed by Hickenbotham Bros. with whom defendant entered into a contract to furnish electric energy "for welding crane power and lights for steel shipbuilding." Furthermore, the record disclosed that both before and after the installation of the power line defendant's agents had notice or knowledge of the fact that large portable pieces of equipment such as mobile cranes (the contact of one of which with the wires brought death to workmen) and floodlights were to be used, and that defendants later saw same in use; also that defendant had been negligent in not making recent inspections of its line. It was held, accordingly, that the evidence established negligence on the part of defendant.

Appellant also relies upon McCormick v. Great Western Power Co., 214 Cal. 658, 8 P.2d 145, 81 A.L.R. 678, but in that case also the defendant owned, maintained and operated the power line, and the evidence showed that plaintiffs had gone to work on the job for the first time on the morning of the accident, that they had not been forewarned and did not know of the presence of the high voltage wires, and that such lines were not visible from the fifth floor where they were working, without going to the edge of the building and looking over.

[10] Here it is admitted that plaintiff had knowledge of the existence of the power line, that it might be carrying high voltage electricity, and that it was marked "High Voltage"; that he had noticed that the wires were uninsulated, and knew that if he came too close to them he would be hit by the "juice" and that a steel rod was a conductor of electricity. He alleged in his complaint that defendant knew, or in the exercise of ordinary care should have known that plaintiff would move a rod in the manner in which this one was being moved, and that as a result thereof said rod *could reasonably be expected to come into contact with said wires.* If this be true, then plaintiff, in the exercise of ordinary care, should have known the same thing; and it is apparent that he recognized that fact when he amended his complaint to allege that the rod was "inadvertently" brought into contact with the wire and while he was "unmindful" of the current in said wire. But the evidence does not show either of these things; and the trial court said in the opinion which it filed that, on the contrary, the uncontradicted evidence showed that plaintiff "knowingly, heedlessly, carelessly, recklessly and unnecessarily exposed himself to a notoriously open and obvious danger," and that by reason thereof he was guilty of contributory negligence as matter of law, which was a proximate cause of the accident. We agree with this conclusion.

The judgment notwithstanding the verdict is affirmed.

THOMPSON and PEEK, JJ., concur.

Hearing denied; CARTER, J., dissenting.

87 Cal.App.2d 299

KAYE et al. v. MELZER.

Civ. 13667.

District Court of Appeal, First District,
Division 1, California.
Aug. 30, 1948.

1. Appeal and error ⚷1010(1)

Trial court's findings, supported by substantial evidence, were binding on the District Court of Appeal.

2. Landlord and tenant ⚷22(2)

Evidence sustained trial court's finding that oral agreement breached by defendant was a present oral leasing and not a mere agreement to execute a lease.

3. Landlord and tenant ⚷22(2)

Fact that possession of shoe selling concession in store was given under oral agreement which was for a stated rent and a particularly designated term, indicated that it was the intention of the parties to make a present leasing and not a mere agreement to execute a lease.

4. Frauds, statute of ⚷126

Both an oral agreement to make a written lease and an oral lease with a further or incidental agreement that it shall be put in writing come within statute of frauds. Civ.Code, §§ 1091, 1624, subd. 4; Code Civ.Proc. § 1971.

5. Landlord and tenant ⚷128(1)

Defendant's breach of oral lease occurred when defendant caused plaintiffs to surrender possession, and not when defendant failed to execute a written lease.

6. Frauds, statute of ⚿144

Where lessee of store who orally leased shoe concession to sub-lessees, told sub-lessees to give up their positions in another city and to move their families to place where store was located, to buy merchandise, and to open up and do business, and sub-lessees, in reliance on such statements, did as requested by lessee, lessee was estopped to plead statute of frauds in action against him by sub-lessees for breach of the oral lease, even though sub-lessees were not misled into believing that a written lease was not necessary. Civ.Code, §§ 1091, 1624, subd. 4; Code Civ.Proc. § 1971.

7. Frauds, statute of ⚿144

A defendant will be estopped to set up the bar of the statute of frauds wherever he has represented, by his words or conduct, that he proposes to stand by oral agreement of the parties, and the plaintiff in reliance thereon, has changed his position. Civ.Code, §§ 1091, 1624, subd. 4; Code Civ.Proc. § 1971.

8. Landlord and tenant ⚿180(4)

In action by lessees for damages for breach of oral lease because of eviction of lessees by lessor, recovery was not required to be limited to the return of any benefits received by lessor.

9. Landlord and tenant ⚿129(4), 180(4)

In case of an agreement for a present leasing, where landlord has actively evicted the tenant, or has refused to give him possession, recovery may be had at once for the value of the unexpired period of the lease, that is, the difference between the promised rent and the rental value of the term, or the difference between the contract price and the market price.

10. Landlord and tenant ⚿180(4)

Where sub-lessees of space in store were induced to incur expense of moving from another city and of spending time in preparing for business in such space, and then sublessees were required to surrender possession, they were properly awarded damages for moving costs and for loss of earnings during time spent in preparing for business to be operated in such space.

11. Landlord and tenant ⚿180(3)

Evidence sustained finding that lessees were damaged in sum of $1,655.10 by lessor's breach of oral lease of shoe concession space in store from which lessor evicted lessees.

12. Appeal and error ⚿110

Order denying motion for new trial was nonappealable.

◆

Appeal from Superior Court, Contra Costa County; Harold Jacoby, Judge.

Action by William B. Kaye and Abe Miller against Max Melzer to recover damages for a breach of oral lease. From an adverse judgment and from an order denying defendant's motion for a new trial, the defendant appeals.

Judgment affirmed and appeal from order dismissed.

Stern & Grupp and Morris M. Grupp, all of San Francisco, for appellant.

Esmond Schapiro, of San Francisco, for respondents.

WARD, Justice.

Plaintiffs sued upon an oral contract, described in their complaint as follows: "That on or about the 18th day of February, 1946, plaintiffs and defendant entered into an oral agreement, whereby defendant agreed to give plaintiffs a sublease and concession of [a portion of No. 327 10th Street, Richmond, California] * * * for a period of three years from the 1st day of April, 1946, to and including the 30th day of March, 1949, and whereby plaintiffs were to have the sole and exclusive right to conduct a retail shoe business therein, selling shoes, slippers, rubbers and all other types of footwear, and also a retail hosiery and children's ready to wear business, and whereby plaintiffs agreed to pay to defendant as rental for said sublease and concession an amount equal to 10% of the gross sales to be made by plaintiffs therein during said term, but in no event less that $200.00 per month"; that defendant agreed that the concessions which were in said premises on February

18, 1946, would continue to be operated; that defendant promised that he would sign a written agreement containing the aforesaid terms. The complaint sets forth that in connection with the making of said agreement, plaintiffs informed defendant that if said agreement was made, they would have to resign their respective employments in Portland, Oregon, and move to Richmond, California, and one of the plaintiffs would have to go East to buy a stock of shoes and other goods, and the other of plaintiffs would prepare said premises, "and defendant, at the time said agreement was made and in connection with the making of said agreement, told plaintiffs to go ahead and carry out all of said plans and not to wait for the signing of the written agreement." It is alleged that plaintiffs did carry out the aforesaid plans, relying upon the agreement and defendant's statements; that they opened the store on April 8, 1946, paying defendant 10% of gross sales; and that on May 29, 1946, they received notice to quit as of June 30, 1946, pursuant to which they surrendered possession on July 6, 1946. The items of damage alleged in the complaint include the loss of one month's earnings; the expense of moving to Richmond, buying stock and fixing up the store; the loss of $49,300 over the thirty-four month period for which the lease would have run, and the expense in moving and improving another location in Richmond. These items totaled $55,705.00.

In addition to denying the above allegations, the answer set up among other defenses, Civil Code, sec. 1091. By his fifth separate defense, defendant alleged that the parties entered into an oral agreement under which defendant agreed to permit the plaintiffs to operate a shoe concession for so long a period of time as defendant occupied the premises; that when defendant served a notice to quit on May 28, 1946, plaintiffs claimed that defendant had breached his agreement with them; that it was agreed that plaintiffs "would release the defendant from all liability by virtue of any breach of the agreement referred to in plaintiffs' complaint provided he, the defendant, was instrumental in securing for the plaintiffs another fit location for them," and that defendant was instrumental in securing 1029 MacDonald Avenue which plaintiffs are now occupying.

The trial court found "That on or about the 18th day of February, 1946, plaintiffs and defendant entered into an oral agreement, whereby defendant agreed to give to plaintiffs the right to occupy for a period of three (3) years from April 1, 1946, to March 30, 1949, [the store described in the complaint] * * * and whereby plaintiffs agreed to pay to defendant as rental * * * 10% of the gross sales * * * but in no event less than $200.00 per month, and whereby defendant also agreed with plaintiffs to maintain and operate or cause to be operated during all of said period all of the concessions which were in said premises on said 18th day of February, 1946. That at said time and as a part of said agreement, defendant agreed to sign a written agreement containing the aforesaid terms, and that plaintiffs had such an agreement prepared but defendant failed and refused to sign the same * * * in connection with the negotiations between plaintiffs and defendant which resulted in said agreement, plaintiffs informed defendant that if said agreement were made they would have to resign their respective employments and would have to move with their families from Portland to Richmond, California, and plaintiff, William B. Kaye, would have to go East to buy a stock of shoes and other goods for said store, and plaintiff, Abe Miller, would have to perform such services as were necessary to get said portion of said store ready to open, and defendant at the time said agreement was made and in connection with the making of said agreement, told plaintiffs to go ahead and carry out all of said plans and that he would sign such written agreement later when it was prepared and submitted to him."

In accordance with the allegations of the complaint, it was found that by virtue of a notice to quit served on plaintiffs on May 29, 1946, they surrendered possession to defendant on July 6, 1946. The heretofore quoted allegations of the answer which set up an accord and satisfaction were found to be not true.

The court further found that plaintiff William B. Kaye was obliged to expend the sum of $227.00, and that plaintiff Abe Miller was obligated to expend the sum of $200.00, in moving their respective families from Portland to Richmond in order to put themselves in a position to occupy the premises; that plaintiff William B. Kaye spent one month, commencing about March 4, 1946, in making a trip East to buy stock and in moving his family, thereby being deprived of earnings in the sum of $700.00 for said month; that plaintiff Abe Miller spent one month, commencing about March 8, 1946, in moving and in fixing up the premises, thereby being deprived of earnings in the sum of $400.00 for said month, and that defendant had paid none of said sums, or any part thereof, to plaintiffs or either of them. It has been stipulated on this appeal that the sum of $128.10 covering plaintiff Abe Miller's expenses in moving furniture from Portland to Richmond which was allowed by the court may be deemed included in the findings.

The court concluded "That defendant breached said oral agreement between plaintiffs and defendant, and that defendant is estopped to plead the statute of frauds, and that solely by virtue of said breach plaintiffs have been damaged by defendant in the total sum of $1655.10, no part of which sum has been paid by defendant to plaintiffs, or either of them, and that plaintiffs are entitled to have judgment against defendant in said sum of $1655.10, together with interest thereon at the rate of 7% per annum from July 6, 1946, until paid, and for their costs of suit herein incurred." Judgment was entered accordingly. Defendant's motion for a new trial was denied, and this appeal was taken.

There is substantial evidence in support of the trial court's findings. Plaintiff Kaye testified that he met the defendant on January 29, 1946, at which time defendant told him he had a lease on No. 327 10th Street for around three years. At the time Kaye was earning $700.00 a month in Portland, Oregon. Kaye discussed the matter of a sublease with plaintiff Miller, who was then earning $400.00 a month in Portland, Oregon. After communicating with defendant by mail and by telephone, the plaintiffs traveled to Richmond, California, where they had a meeting with defendant on or about February 18, 1946. Plaintiff Kaye testified that defendant agreed that plaintiffs open the first of April, that "we had three years to go, and that we were to be a concession at 10% of the gross and $200.00 a month guarantee." Defendant agreed to sign a writing containing those terms. Plaintiff Miller similarly testified as to the terms agreed to by defendant. Plaintiffs returned to Portland where they discussed the matter with their wives. Kaye telephoned defendant from Miller's house to tell him they had decided to accept his offer and were mailing him a copy of the lease containing the above mentioned terms for him to sign. A copy of the lease and $200.00 were mailed to defendant. Plaintiffs also testified to a subsequent telephone call to defendant, on or about February 20, 1946, in which defendant assured them that they should go ahead with their plans to give up their positions in Portland around March 1, 1946, and for Kaye to start on a buying trip, as he would sign the agreement. Kaye testified that he began his trip by calling on defendant in Richmond and inquiring why the agreement had not been signed. Defendant told him, "don't worry about it; everything is all right." March 6, 1946, Miller arrived in Richmond to prepare the premises. About March 18, 1946, while Kaye was on his buying trip, defendant suggested to Miller that plaintiffs consider taking a lease of the entire premises, instead of the sublease previously considered. Kaye testified that when he returned from his buying trip he asked defendant about a rumor that defendant's lessor was planning to build on the property. Defendant replied that his lessor would not be able to build for two years—"You are worrying too much; open up and do business and everything will be all right." Kaye further testified that he asked defendant about the written agreement and about the absence of the concessionaires who had been there in February, to which defendant replied that the agreement "is somewheres in my store" and that he thought some of the concessionaires would be back. The store opened on or about April 6, 1946. About two weeks later, Kaye told defendant that since he was holding $1,200 to $1,500 a week as receipts, there was no use of his holding the $200 which had been mailed to him: hence defendant returned $200 to plaintiffs.

The fact that defendant did not intend to perform according to the terms of the oral agreement of February 18, 1946, is brought out by evidence—including defendant's testimony under Code of Civil Procedure section 2055—that defendant received $5,000 from his lessor upon the execution of an agreement entitled, "Cancellation of Lease and Mutual Release," dated April 17, 1946. Defendant subsequently told plaintiffs that he had taken $5,000 from his lessor "to get out of here." On May 29, 1946, defendant caused to be served on plaintiffs a notice to quit on June 31, 1946. Pursuant to this notice they vacated the premises in question on July 6, 1946.

[1-3] Defendant contends, as he did in the trial court, that plaintiffs' action is for breach of an oral agreement to execute a sublease. The trial court, however, found that defendant breached "an oral agreement, whereby defendant agreed to give to plaintiffs the right to occupy" for three years the premises described in the complaint, and "to sign a written agreement containing the aforesaid terms." As such findings are supported by substantial evidence, they are binding upon this court. Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689; Fackrell v. City of San Diego, 26 Cal.2d 196, 207, 157 P.2d 625, 158 A.L.R. 773; Barham v. Khoury, 78 Cal.App.2d 204, 211, 177 P.2d 579. The fact that possession was given under the agreement which was for a stated rent and a particularly designated term indicates that it was the intention of the parties to make a present leasing and not a mere agreement to execute a lease as defendant contends. Cheney v. Newberry & Co., 67 Cal. 126, 7 P. 445; Pacific Imp. Co. v. Jones, 164 Cal. 260, 128 P. 404.

[4, 5] Although both an oral agreement to make a written lease and an oral lease with a further or incidental agreement that it shall be put in writing come within the statute of frauds (I Tiffany on Landlord and Tenant, 383; Jones on Landlord and Tenant, 182–186; Civil Code, secs. 1091, 1624(4); Code Civil Procedure, sec. 1971), in the former case only the making of the writing can execute it, whereas in the latter the subject of the agreement is the act or fact of present leasing, and its subsequent reduction to writing is incidental only. (Jones on Landlord and Tenant, 199-200.) Hence, in the present case, defendant's breach of the oral agreement occurred when defendant caused plaintiffs to surrender possession, not when defendant failed to execute a written lease. The fact that the trial court ordered interest to run from July 6, 1946, is indicative of its determination that defendant's liability dated from the time plaintiffs surrendered possession.

[6, 7] There is no merit to defendant's contention that the lower court erred in concluding that he was estopped to plead the statute of frauds. Ever since the case of Seymour v. Oelrichs, 156 Cal. 782, 106 P. 88, 134 Am.St.Rep. 154, it has been the law in California that the equitable principle of estoppel applies to every case in which the statute of frauds is invoked. Keller v. Richbart, 130 Cal.App. 296, 20 P.2d 55; Beverly Hills Nat. Bank & Trust Co. v. Seres, 76 Cal.App.2d 255, 172 P.2d 895. Briefly stated, this principle provides that a defendant will be estopped to set up the bar of the statute wherever he has represented, by his words or conduct, that he proposes to stand by the oral agreement of the parties, and the plaintiff, in reliance thereon, has changed his position. Seymour v. Oelrichs, supra; Le Blond v. Wolfe, 83 Cal.App.2d 282, 286, 188 P.2d 278.

In the present case, after the making of the oral agreement on February 18, 1946, defendant repeatedly told plaintiffs to go ahead with their plan to give up their positions in Portland the first of March, to move their families to Richmond, to buy merchandise, and to "open up and do business and everything will be all right." Plaintiffs did so in reliance upon these statements. The fact that they were not misled into believing that a written lease was not necessary, as was the case in Vierra v. Pereira, 12 Cal.2d 629, 86 P.2d 816, is immaterial. They relied upon defendant's representations that he would abide by the terms of the oral agreement, hence he is estopped "from relying upon the statute of frauds to support a claim that no valid [3-year] lease had been entered into." Beverly Hills Nat. Bank v. Seres, supra, 76 Cal.App.2d at page 261, 172 P.2d at page 897.

Paul v. Layne & Bowler Corporation, 9 Cal.2d 561, 71 P.2d 817, upon which defendant relies, may be distinguished as involving an oral agreement to execute a lease, rather than an oral agreement for a present leasing. Upon the facts of that case, instead of invoking the doctrine of estoppel and awarding damages for the breach of the oral agreement to execute the lease, the Supreme Court limited recovery to the extent of the defendant's unjust enrichment.

[8-10] In the present case the trial court properly concluded that plaintiffs' recovery need not be limited to the return of any benefits received by the defendant. In the case of an agreement for a present leasing, "where the landlord has actively evicted the tenant, or refused to give him possession, recovery may be had at once for the value of the unexpired period of the lease, that is, the difference between the promised rent and the rental value of the term, or the difference between the contract price and the market price." (Williston on Contracts, Vol. 5, 3913.) Although such recovery was prayed for in the complaint herein, it was not allowed by the trial court. Damages were awarded in an amount equal to plaintiffs' moving costs plus one month's loss of earnings. Schnierow v. Boutagy, 33 Cal.App. 336, 164 P. 1132, and Douglass v. Guardian Holding Corporation, 132 Cal. App. 585, 23 P.2d 80, are authority for sustaining an award for "loss of time and expense of removal" where the lower court, as here, found that such items constitute a detriment proximately caused by defendant's breach of a leasing agreement. (See Jones on Landlord and Tenant, 174-175.)

[11] Defendant contends that because the evidence shows that plaintiffs' present location on MacDonald Avenue in Richmond is more profitable than that at the 10th Street store, it cannot be said that they suffered any damages in moving from Portland to Richmond and in devoting the month of March to preparing for doing business in Richmond. Plaintiffs' answer that the evidence also shows that defendant agreed to have all concessions in operation in the 10th Street store which would attract additional business for plaintiffs, but defendant never had the concessions in operation during the three months plaintiffs occupied the 10th Street store, hence no comparison between the two locations can be made. It is apparent that defendant's argument is such as would be more properly addressed to a trial court. There is abundant evidence that plaintiffs gave up their positions in Portland and moved to Richmond in reliance upon the oral agreement of February 18, 1946, and that defendant breached said agreement by causing plaintiffs to surrender possession on July 6, 1946. It cannot be said that as a matter of law the trial court erred in concluding that plaintiffs were damaged by defendant in the total sum of $1,655.10.

[12] The order denying defendant's motion for a new trial being non-appealable, the appeal therefrom is dismissed. Paul v. Layne & Bowler Corporation, supra, 9 Cal. 2d at page 566, 71 P.2d at page 820.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

87 Cal.App.2d 371

HOFFING v. COCA-COLA BOTTLING CO.

Civ. 16266.

District Court of Appeal, Second District,
Division 1, California.
Sept. 2, 1948.
Rehearing Denied Sept. 20, 1948.
Hearing Denied Oct. 28, 1948.

1. Negligence 🔑121(2)

Res ipsa loquitur does not apply unless defendant had exclusive control of thing causing injury and accident is of such nature that it ordinarily would not occur in absence of negligence by defendant.

2. Negligence 🔑121(2)

Res ipsa loquitur may be applied on theory that defendant had control at time of alleged negligent act although not at time of accident, provided plaintiff first sustains his burden of proving that condition of the instrumentality had not been changed after it left defendant's possession.

3. Negligence 🔑121(3)

In action against bottling company by confectionery store clerk for injuries sustained when bottle of carbonated beverage exploded, it was not necessary that clerk eliminate every remote possibility of injury to bottle after company lost control in order that res ipsa loquitur might be relied upon, but it was sufficient if there was evidence permitting a reasonable inference that bottle was not accessible to extraneous harmful forces and that it was carefully handled by clerk, or by any third person who might have moved or touched it.

4. Negligence 🔑136(18)

Where confectionery store clerk suing bottling company for injuries sustained when bottle of carbonated beverage exploded adduces evidence permitting reasonable inference that bottle was not accessible to extraneous harmful forces and that it was carefully handled by clerk or any third person who may have moved or touched it after company had lost control thereof, company's negligence becomes a question for jury under proper instructions.

5. Negligence 🔑121(3)

Confectionery store clerk relying on res ipsa loquitur doctrine in action against bottling company for injuries sustained when bottle of carbonated beverage exploded need not show affirmatively that there was some negligence on part of bottling company.

6. Appeal and error 🔑930(1)

On defendant's appeal from judgment in favor of plaintiff following trial before jury, evidence must be viewed most favorably to plaintiff.

7. Negligence 🔑134(4)

In action against bottling company by confectionery store clerk for injuries sustained when bottle of carbonated beverage exploded, evidence that condition of bottle did not change after leaving company's possession, that clerk handled bottle carefully without bumping anything, that company had exclusive control of charging and inspecting bottles and that company made only cursory, visible inspection of bottles warranted recovery by clerk relying on res ipsa loquitur doctrine.

8. Negligence 🔑136(6)

When a defendant produces evidence to rebut inference of negligence which arises upon application of doctrine of res ipsa loquitur, it is ordinarily a question of fact for jury to determine whether the inference has been dispelled.

9. Trial 🔑295(1)

Instructions must be considered as an entirety and not piecemeal.

◆

Appeal from Superior Court, Los Angeles County; Roy V. Rhodes, Judge.

Personal injury action by Harold Hoffing against Coca-Cola Bottling Company of Los Angeles. From a judgment for plaintiff, the defendant appeals.

Affirmed.

Schell & Delamer, of Los Angeles, for appellant.

Abe Richman and Samuel A. Rosenthal, both of Los Angeles (Leonard C. Ratner, of Beverly Hills, of counsel), for respondent.

DORAN, Justice.

The defendant herein has appealed from a judgment of $5,000.00 rendered in favor of the plaintiff following a trial before a jury. The judgment was for damages claimed to have resulted from the explosion of a bottle of Coca-Cola, injuring plaintiff's right hand. The beverage in question was manufactured, bottled and distributed by the appellant corporation. The bottles which contained the beverage, however, were manufactured and supplied by the Owens-Illinois Pacific Coast Glass Company. Both new and used bottles were made use of by the appellant company.

There is evidence in the record to the effect that plaintiff's father, F. L. Hoffing operated a confectionery store, first located at 7569 Sunset Boulevard, and moved just previous to the accident to 7615 Sunset Boulevard. For some months prior to March 30, 1944, plaintiff's father had been receiving a quota of three cases of Coca-Cola per week at the old store, but there is a conflict of evidence as to the time and place of delivery of the bottles here in question. It is plaintiff's contention that the bottles were delivered to the new store on March 30, 1944, whereas the defendant claims that they were delivered at the old store and moved to the new store by plaintiff's father. Plaintiff worked in the store part time.

The new store opened for business on April 1, 1944; about 10:00 a. m. plaintiff arrived there to take charge and the father left. About one-half hour later plaintiff's first customer arrived and requested three bottles of Coca-Cola. Plaintiff went into a small beverage room at the rear of the store where three cases of the beverage were stacked, and removed three bottles from the top case which stood about three and one-half feet off the floor. Plaintiff testified that each bottle was lifted out separately, grasping it by the neck; that the bottles were carefully carried, two in the right hand and one in the left, into the store, held close to plaintiff's stomach, with the tops of the bottles upward; that the bottles were not bumped against anything. The plaintiff further stated: "I was about to hand them to Mr. Todd (the customer). I heard a pop and I felt a jar, felt my hand jarred, and immediately dropped the bottles and grasped my right hand with my thumb to stop the squirt of blood." As stated in respondent's brief, "Plaintiff's right hand was badly cut, both an artery and a nerve being severed, and it was necessary for him to undergo extensive treatment. As a result plaintiff suffered a loss of motion and numbness in his right hand which interfered with his musical career", (saxaphone and clarinet playing).

Mr. Todd, the customer being served, and another customer, saw and heard the explosion, but disagreed as to whether one or two pops was heard. There was also testimony that during the short period of time between delivery of the beverage and the accident, the cases of Coca-Cola were not moved. Plaintiff's testimony that in carrying the three bottles into the store plaintiff did not bump the bottles against anything, is corroborated by the two customers who were in the store.

Expert witnesses testified concerning the manufacture of glass bottles and explained several standard methods for testing glass such as visual examination, hammer test, polariscope test, thermal test and pressure test. There was evidence that such tests are generally employed by bottle manufacturers, and while not infallible, reveal various defects present at that time. Plaintiff's expert, Dr. Benson, expressed an opinion that the explosion was probably caused by a defect in the bottle, perhaps accompanied by excessive pressure inside the bottle; that a mechanical or thermal strain or defect could arise either during the process of bottle manufacture or could be later acquired through handling, scratching, clipping, bumping, bruising, and general use. Two expert witnesses called by the defendant stated that no opinion could be expressed as to the cause of the explosion from the facts given. One of such experts, however, stated an opinion that the explosion was caused by outward force originating from inside the bottle; further, that fatigue from use would be a cause for explosion, and that the thermal shock test would probably reveal weakness in the bottle due to fatigue.

The record discloses that in the defendant's bottling plant there was some visual inspection of bottles at the rate of about 165 bottles per minute if there was but one inspector, or half that number if there were two inspectors. No other method of inspection was employed. Defendant's superintendent also testified that the pressure in the bottles after capping is about 47 pounds per square inch at 70 degrees Fahrenheit; that sometimes the filled bottles explode after delivery to the trade, or in the process of being filled. The defendant company also offered evidence to show that Coca-Cola bottles are the thickest and strongest commercial bottles used in the industry; that the bottles used averaged 30 to 40 trips; that the number of inspections made at defendant's plant equals those employed at other similar plants.

The chief contention expressed in appellant's briefs is that the doctrine of res ipsa loquitur is not applicable to the present case; that the trial court therefore erred in instructing the jury at all with reference to this doctrine; and that the instructions thereon were incorrect and prejudicial. It is also argued that there was no evidence of negligence on the part of the defendant and no proof that any negligence of the defendant proximately contributed to the plaintiff's injury. More specifically, appellant's claim is that "the evidence fails to show that the bottle was defective when it left the hands of the defendant"; that even if plaintiff "had shown a defect to have existed when the bottle left the possession of the defendant * * *, nevertheless he still has failed to show that such defect * * * was either caused by the defendant bottler or could have been discovered by that bottler by the use of reasonably practical tests."

The case of Escola v. Coca-Cola Bottling Co., 24 Cal.2d 453, 150 P.2d 436, 437, has been cited by both parties to this appeal, and the factual situation therein was not dissimilar from the present controversy. In the Escola case, "Plaintiff, a waitress in a restaurant, was injured when a bottle of Coca Cola broke in her hand. * * * Defendant's driver delivered several cases of Coca Cola to the restaurant, placing them on the floor, one on top of the other, under and behind the counter, where they remained at least thirty-six hours. Immediately before the accident, plaintiff picked up the top case and set it upon a near-by ice cream cabinet * * *. She then proceeded to take the bottles from the case with her right hand, one at a time, and put them into the refrigerator. Plaintiff testified that after she had * * * moved the fourth bottle about eighteen inches from the case 'it exploded in my hand. * * * It made a loud pop.' * * * The broken bottle was not produced at the trial, the pieces having been thrown away * * * shortly after the accident." The plaintiff was unable to show any specific acts of negligence and relied, as in the instant case, upon the doctrine of res ipsa loquitur. There, as here, the Coca-Cola Bottling Co. contended that this doctrine did not apply and that the evidence was insufficient to support the judgment. In the Escola case, judgment for plaintiff was affirmed.

[1-4] After reiterating the well established rule that "res ipsa loquitur does not apply unless (1) defendant had exclusive control of the thing causing the injury and (2) the accident is of such a nature that it ordinarily would not occur in the absence of negligence by the defendant", the Escola opinion contains the following statement particularly applicable to the present case: "Under the more logical view, however, the doctrine may be applied upon the theory that defendant had control at the time of the alleged negligent act, although not at the time of the accident, provided plaintiff first proves that the condition of the instrumentality had not been changed after it left the defendant's possession." As to this latter matter, the burden of proof is, of course, on the plaintiff. However, as said in the Escola case at page 458 of 24 Cal.2d, at page 439 of 150 P.2d, "It is not necessary, of course, that plaintiff eliminate every remote possibility of injury to the bottle after defendant lost control, and the requirement is satisfied if there is evidence permitting a reasonable inference that it was not accessible to extraneous harmful forces and that it was carefully handled by plaintiff or any third person who may have moved

or touched it. * * * If such evidence is presented * * * the issue should be submitted to the jury under proper instructions."

[5] Appellant's argument that the res ipsa loquitur doctrine does not apply in the instant case, and that it was incumbent on plaintiff to show affirmatively that there was some negligence on the part of the appellant bottling company is untenable. As respondent's brief avers: "If defendant were correct in its contention * * * there would be no purpose or meaning in the doctrine, because plaintiff would be required to establish the very facts to be inferred before he would gain the benefit of the inference." In other words, approval of appellant's proposition would amount to an abrogation of the doctrine of res ipsa loquitur in its entirety. The doctrine is too well established to admit of question at this time.

[6, 7] The evidence in the present case, as respondent has mentioned, "must be viewed most favorably to plaintiff (respondent) on appeal." The record herein discloses amply sufficient evidence to support the verdict. There is, for example, substantial evidence that the condition of the bottle did not change after it left the defendant's possession; there is likewise evidence that, at the time in question, plaintiff handled the bottles carefully and did not bump them against anything. That the appellant bottling company had exclusive control over both the charging and inspection of the bottles which were delivered to respondent's store, cannot be doubted. It will also be remembered that there was evidence concerning several standard methods which were available for testing glass bottles; that both new and used bottles were used, and that the only test made use of by appellant was a cursory, visible inspection which the jury may well have deemed insufficient.

[8] As was said in Escola v. Coca-Cola Bottling Co., 24 Cal.2d 453, 461, 150 P.2d 436, if "defects do occur in used bottles there is a duty upon the bottler to make appropriate tests before they are refilled, and if such tests are not commercially practicable the bottles should not be re-used. This would seem to be particularly true where a charged liquid is placed in the bottle." There, as here, the defendant presented evidence of the use of certain precautions during the bottling process, in regard to which the court said: "It is well settled, however, that when a defendant produces evidence to rebut the inference of negligence which arises upon application of the doctrine of res ipsa loquitur, it is ordinarily a question of fact for the jury to determine whether the inference has been dispelled." Such a question was presented in the instant case.

[9] Appellant's briefs make the further contention that even if the res ipsa loquitur doctrine does apply, the trial court's instructions thereon were erroneous, confusing and prejudicial. Certain isolated portions of the charge have been quoted in support of this argument. However, under the usual rule, the instructions must be considered, not piecemeal, but as an entirety, and when so reviewed, no prejudicial error is here apparent.

The judgment is affirmed.

YORK P. J., and WHITE J., concur.

Hearing denied; EDMONDS, J., dissenting.

---

87 Cal.App.2d 354

FULLERTON v. CONAN et ux.

Civ. 16482.

District Court of Appeal, Second District,
Division 1, California.
Sept. 1, 1948.
Rehearing Denied Sept. 20, 1948.
Hearing Denied Oct. 28, 1948.

1. Negligence 🔑33(2)

Gates and doors, constituting part of real property, must be assumed to represent purpose of indicating privacy of what is beyond them.

2. Negligence 🔑32(3)

A social invitation to enter on real property does not include right, as matter of law, to enter without observing customary formalities.

3. Animals 🔑**68**

The hosts of woman entering house for visit after leaving her infant child unattended in driveway separated by gate from hosts' back yard, wherein they kept dog, were not responsible for child's conduct in opening gate and entering yard, and hence were not liable for injuries to child as result of being bitten by dog thereafter. Gen.Laws, Act 384a.

4. Negligence 🔑**32(4)**

A mother's responsibility for her infant child does not shift to her hosts on mother's visit with child to hosts' residence.

5. Animals 🔑**74(5)**

Evidence supported trial court's finding that infant, bitten by dog after entering its owners' back yard through gate from driveway where infant was left by her mother while visiting one of owners in their house, was a trespasser, and hence not lawfully on owners' property at point where biting occurred within statute declaring owner of dog biting person lawfully on owners' property liable for damages. Gen.Laws, Act 384a.

6. Animals 🔑**68**

A dog owner is not insurer of safety of persons entering on owners' premises, where dog is kept, from being bitten thereby. Gen.Laws, Act 384a.

7. Animals 🔑**74(4)**

In action for injuries to infant, bitten by defendants' dog in their backyard while visiting one of them with her mother, evidence that dog was roaming at will in and about defendants' premises on prior visits was properly excluded as immaterial. Gen.Laws, Act 384a.

◆

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Action by Penelope Joan Fullerton, an infant, by her guardian ad litem, Dorothy Fullerton, against R. G. Conan and wife, for personal injuries sustained as the result of being bitten by defendants' dog. Judgment for defendants, and plaintiff appeals.

Affirmed.

French & Indovina and F. Walter French, all of Santa Monica, for appellant.

Crider, Runkle & Tilson and Donald E. Ruppe, all of Los Angeles, for respondent.

DORAN, Justice.

This is an appeal from the judgment in an action for damages.

The complaint alleges that while plaintiff, a child of the age of five years, "was lawfully upon the premises consisting of defendants' yard," defendants' dog bit plaintiff "on and about the mouth, inflicting severe pain, lacerations and wounds to said plaintiff's face and flesh." The trial court found for defendants.

It is contended by plaintiff on appeal that the "judgment for respondent based on the finding that appellant was a trespasser, is without support in the evidence and should be reversed." In that connection appellant argues, "It is our contention that appellant having shown that the minor came upon respondent's property under the invitation extended to her mother the burden was cast upon respondent to show that although lawfully arriving upon the premises she subsequently did something which changed her status."

The findings recite: "The Court finds that the plaintiff had been instructed not to go into that portion of the said premises where the dog was maintained, namely, in the back yard of said premises; that notwithstanding said warning and instruction not to go in said portion of said premises, plaintiff did go therein without the permission or consent of the defendant and was a trespasser therein, and that defendant was not guilty of any negligent, wilful or wanton act or conduct toward plaintiff."

Chap. 503, Statutes 1931, p. 1095, Gen. Laws, Act 384a, provides that: "The owner of any dog which shall bite any person while such person is * * * lawfully on or in a private place, including the property of the owner of such dog, shall be liable for such damages * * *. A person is lawfully upon the private property of such owner within the meaning of this act * * * when he is on such property upon the invitation, express or implied, of the owner thereof."

Appellant bases the within action on the foregoing provision and in that connection argues; "In plain language, the statute provides that, if appellant came upon respondent's premises lawfully and was bitten by his dog, respondent is liable. Because the statute is clear and unambiguous, there is no room for judicial construction.

"The court's duty is to apply the statute. The definition, that one is lawfully upon the owner's property if there pursuant to express or implied invitation, leaves no room to discuss the nice distinctions between invitee, business invitee, social guest, or trespasser. Every person, other than a trespasser, comes upon premises by invitation. Any invitation is sufficient to satisfy the requirement of the statute."

According to appellant, the question presented by the appeal is as follows:

"Was the infant plaintiff a trespasser on the premises when, while her mother called at the home, the child, in a manner not disclosed by the evidence, moved her position from a point near the back yard in the driveway where her mother had left her to a place near the back door of the house, or was she upon the respondent's 'property upon the invitation, express or implied, of the owner thereof'?"

And again, "The sole question is whether appellant was lawfully on respondent's property."

The only witnesses were the mother of the child and the doctor who treated the laceration. Mrs. Fullerton, the mother, testified as to the occasion for the visit, "I was picking up my mother who had spent the night with her"; that the two families had been friends for years; that they had visited back and forth for "quite a period of time." As to the children, Mrs. Fullerton testified, "I left them outdoors. I did not bring them in the house." That the children were left in the driveway where the car was parked; and in reply to the following questions, testified as follows:

"Q. On the driveway? And going into the back yard is a gate, is there not? A. Yes.

"Q. That gate when you arrived was closed? A. Yes.

"Q. And the children were on the side of the gate where the car was when you last saw them? A. Yes."

Mrs. Fullerton also testified that the children were told to stay in the front yard, which testimony appears in the transcript as follows:

"Q. Did Mrs. Conan see the children before the occasion of this incident that you have told us about? A. Truthfully, I don't know, but I would say when she came to the door she saw them.

"Q. As a matter of fact, didn't she state to you, or to the children, to play around, but not go in the back yard where the dog was? A. No, I was the only one who would ever say that to them.

"Q. Did you say that? A. I asked them to stay out in the yard.

"Q. You asked them to stay out of the yard? A. Out in the yard on the side there.

"Q. Out in the front? A. Yes.

"Q. What was the occasion of telling them that? A. I just naturally do that when I go any place."

The questions submitted by appellant, as noted above, confuse the issue because they are unqualified. To be properly presented they must include the qualification as the statute provides, namely, "within the meaning of this act." Although the words "property" and "invitation" are comprehensive terms, it does not follow that the legislative intent in connection with their use is without limitation. Therefore, whether the child was "lawfully upon the private property" of another as contemplated by the act in question depends upon its meaning and effect and what it is intended to include.

[1, 2] It should be noted at the outset that gates and doors have been the generally accepted means of indicating privacy for centuries; their use for such a purpose is traditional and is still sanctioned by universal custom. A gate is a barrier just as a door to a home; both in effect are notifications that what is beyond them is private. And it must be assumed that when gates and doors are a part of the property involved they represent such a

purpose. Nor is an invitation without limitation. It would be presumptuous indeed to assume that a social invitation includes authorization or permission to ignore the customary formalities and establish by judicial decision that such an invitation includes the right, as a matter of law, to enter without observing the customary formalities.

[3, 4] As the testimony of the mother recited above indicates, the child was left in the yard unattended. Although there is no direct evidence as to just what happened, the inference is warranted that the child opened the gate and entered the back yard. Manifestly, the host was not responsible for such conduct on the part of the child. And, in that connection, it should be emphasized that the responsibility of the mother for the welfare of her child does not shift to the host upon a visit by the mother and child to the latter's residence.

[5, 6] In the circumstances here presented, "The owner of any dog which shall bite any person" is liable only when such person is, "lawfully upon the private property of such owner." The conclusion reached by the trial court that the child was a "trespasser" simply means that the child was not lawfully upon the property of the dogowner at the point where the biting occurred. And the findings in this regard are supported by the evidence. Whether the child or the mother were lawfully upon the property at other points is beside the issue. The owner of a dog is not an insurer.

[7] It is also contended that the court erred in rejecting plaintiff's "offer to show that upon prior visits the dog had been roaming at will in and about the premises." As respondent points out, "There certainly cannot be any materiality to the fact that on previous times the dog was elsewhere. The only question involved is what happened on this particular day and when did it happen; not what happened at some other time or place."

For the foregoing reasons, the judgment is affirmed.

YORK, P. J., and WHITE, J., concur.

Hearing denied; EDMONDS and CARTER, JJ., dissenting.

---

87 Cal.App.2d 333

In re DALTON'S ESTATE.

Civ. 13829.

District Court of Appeal, First District, Division 1, California.

Sept. 1, 1948.

1. Courts 🔑200½

Probate court has no jurisdiction to adjudicate the validity of a claim of title which is adverse to that of decedent's estate.

2. Homestead 🔑150(1)

Probate court, upon petition after inventory is filed, may set apart property as a homestead for surviving spouse for a limited period within life of surviving spouse, if such property is inventoried as property of the estate, without reference to title thereto. Probate Code, § 661.

3. Courts 🔑200½

Probate court in proceeding to set apart probate homestead on realty for decedent's surviving spouse may in its discretion examine the title for the purpose of selecting an appropriate parcel, but it cannot adjudge in whom the title vests or adjudicate the title as between adverse claimants. Probate Code, § 661.

4. Homestead 🔑151

Adverse claim of title to realty by gift deed from deceased did not prevent probate court from setting apart a probate homestead on such realty for deceased grantor's surviving husband, though order setting apart homestead operated only upon whatever right deceased had at time of death and did not affect the true title to the realty. Probate Code, § 661.

5. Courts 🔑202(5)

Contention that decedent's husband upon remarriage lost his status as surviving spouse within meaning of Probate Code section providing for setting apart a probate homestead for decedent's surviving spouse could not be raised for the first time in closing brief on appeal. Probate Code, § 661.

◆

Appeal from Superior Court, **Santa** Clara County; John D. Foley, Judge.

Proceeding in the matter of the estate of Edith E. Dalton, also known as Edith E. Benson, deceased, upon petition filed by Frank A. Dalton, as administrator of the estate of Edith E. Dalton, also known as Edith E. Benson, deceased, for an order setting apart to petitioner as decedent's surviving spouse a probate homestead on realty. Joseph H. Syverson filed objections to the petition, and from an order setting apart a probate homestead, he appeals.

Order affirmed.

Owen D. Richardson and Donald B. Richardson, both of San Jose, for appellant.

L. F. Hobbs, of San Jose, for respondent.

WARD, Justice.

Joseph H. Syverson, herein called appellant, appeals from an order designating and setting apart a probate homestead on certain real property which had been returned in an inventory as property of the estate of Edith E. Dalton, deceased, Syverson's mother. The order was made in response to a petition filed by Frank A. Dalton, the surviving spouse and administrator of the decedent's estate. The homestead was limited to a term of ten years from January 19, 1948.

The first petition to set apart the probate homestead was presented prior to the filing of the inventory. Syverson filed objections. The petition was denied upon the ground that "petitioner's application for an order setting apart a homestead is premature." Subsequently, after the inventory was filed, there was a rehearing.

The probate court received evidence on the disputed petition. It developed that the deceased had been married to objector Syverson's father from whom she obtained a divorce. Later she married one Benson; and subsequently she married Dalton. During the period between the date when Dalton applied to set aside the property as a homestead and the date the order was made thereon, it developed, as appears from the record, that Dalton had remarried and was occupying the designated premises. This status of the administrator husband is mentioned in the closing brief. There was also conflicting evidence on the intent of the decedent—whether she desired Dalton to retain the premises after her death.

The objections filed by Syverson are based entirely upon the claims that he is the owner of the property in question, which is described in the inventory; that Dalton "never had any right or title in or to said real property"; that a separate action is pending to quiet title wherein Syverson is plaintiff and Dalton as administrator is defendant, and that a homestead appraisement was not made in accordance with Probate Code, sec. 664. The last point is not urged in the briefs.

The objections presented before the probate court, and advanced in appellant's opening brief in this court, are based upon the claim that the probate court erred in attempting to set aside a probate homestead to the surviving spouse since the homestead property had been conveyed to Syverson by the decedent before her death. In brief, Syverson did not contend that he was an heir or legatee but based his objection upon a claim that the title to the particular piece of property was not held by the estate.

[1-4] The probate court may not determine title to property in such a proceeding. It has no jurisdiction to adjudicate the validity of a claim of title which is adverse to that of the estate. The probate court, upon petition after the inventory is filed, may set aside property as a homestead for the surviving spouse for a limited period within the life of the surviving spouse if it is inventoried as property of the estate (Probate Code, sec. 661; 11A Cal.Jur., sec. 459, p. 641), without reference to its title. Estate of Burton, 64 Cal. 428, 1 P. 702. The probate court in its discretion may examine the title for the purpose of selecting an appropriate parcel. However, in "setting apart a probate homestead, the court cannot adjudge in whom the title vests, or adjudicate the title as between adverse claimants." (11A Cal.Jur., sec. 461, p. 644.)

In Sonnicksen v. Sonnicksen, 45 Cal. App.2d 46, 58, 59, 113 P.2d 495, 502, the court expressed the following views: "The order designating a homestead to Martha Sonnicksen was made under the provisions of section 661 of the Probate Code, which declares that the probate court, upon the petition of the surviving spouse, or minor children, 'must select * * * a homestead for the use of the surviving spouse and the minor children' out of the property of the decedent. In making the order the probate court acts under the limited jurisdiction conferred by the Probate Code and is without power or jurisdiction to try or determine any adverse claim of title to the property of the decedent. To the contrary, one of the purposes of the code section is to make provision for the maintenance of the surviving spouse and minor children during the pendency of any such litigation involving adverse claims to decedent's estate.

"The rule of decision in this state is in full harmony with these provisions of the Probate Code, and we find no departure from the statement of the rule in 11A Cal. Jur., page 649, reading: 'It is the duty of the court to set apart the homestead, and the performance of that duty does not change the property itself, nor affect the true title to it. The proceedings operate only upon whatever right the deceased had at the time of his death. In exercising its jurisdiction over the property and in making the order, the court deals with the property only as an asset of the estate. Being inventoried and appraised as such, it is subject to the jurisdiction of the court in the administration, but neither the inventory nor the withdrawal of a portion of it as a homestead affects or adjudicates the question of title as between parties claiming title thereto. Any question as to the validity of title must be tried and determined in another forum, in some appropriate action brought for the purpose. In view of the foregoing, it is clear that if one's opposition to granting the order is overruled by the probate court that does not preclude him from establishing his title in an action brought for that purpose.'" See, also, Dickey v. Gibson, 121 Cal. 276, 53 P. 704; Estate of Niccolls, 164 Cal. 368, 129 P. 278; Estate of Klumpke, 167 Cal. 415, 139 P. 1062.

Appellant cites authorities on the question of the validity of the gift deed from the mother to her son. This is not an appeal to determine the validity of such deed, hence the authorities need not be considered. In appellant's closing brief a new point is raised—that on the date the probate court set aside the homestead in favor of the administrator, Dalton, the former husband of the deceased "spouse" had previously remarried and therefore was no longer a "surviving spouse." This fact appears only incidentally in the evidence. It is contended that when respondent remarried he lost the status of "surviving spouse" as that term is used in section 661 of the Probate Code. If this point were before us there might be some merit in appellant's contention. Estate of Boland, 43 Cal. 640. However, whether the remarried status is to be determined at the date of the petition for the homestead or at the date it is granted, is a debatable question. Estate of Boland, supra; Estate of Wyss, 112 Cal.App. 487, 297 P. 100. But the point is not before us.

[5] In his objections Syverson claimed that he was the owner of the property and did not assert he was an heir or legatee. The point is not raised as an issue in the pleadings or at any time during the trial or in the opening brief on appeal. Not having been in issue in the court below the point cannot now be raised. (2 Cal.Jur., p. 234, sec. 67, et seq.) The court found, and the record substantiates the finding, that the "objections * * * go solely to a claim of title adverse to the above estate."

Appellant has mistaken his remedy. However, it should be understood that any statement as to the title herein is not to be accepted as the controlling view of this court upon the merits factually or legally of any pending action or of any other proceeding that may be instituted.

On the record presented on this appeal, the order appealed from is affirmed.

PETERS, P. J., and BRAY, J., concur.

87 Cal.App.2d 327

ANDERSON v. ANDERSON.

Civ. 16075.

District Court of Appeal, Second District,
Division 3, California.
Aug. 31, 1948.

1. **Appeal and error** ⚷428(2)

Filing of notice of appeal within time allowed by law is essential to confer jurisdiction on District Court of Appeal.

2. **Divorce** ⚷283

Where neither notice of appeal from portion of interlocutory divorce decree awarding wife real property and alimony, nor notice of intention to move for new trial, was filed within 60 days after entry of decree, as required by Rules, appeal must be dismissed. Code Civ.Proc. § 963, subd. 2; Rules on Appeal, rules 2(a), (3), 3(a).

3. **Appeal and error** ⚷110

An order denying motion for new trial is not appealable.

Appeal from Superior Court, Los Angeles County; Goodwin J. Knight, Judge.

Action by Della Anderson against Thomas F. Anderson for a divorce. From portions of an interlocutory divorce decree awarding plaintiff real property and alimony, defendant appeals.

Appeal dismissed. Motion to augment record denied.

See also 197 P.2d 66.

Elbert E. Hensley, of Los Angeles, for appellant.

Francis R. McKenna, of Montrose, for respondent.

WOOD, Justice.

Plaintiff was awarded an interlocutory decree of divorce and certain real property, furniture, and alimony. Defendant appeals from those portions of the decree wherein real property and alimony were awarded to plaintiff. He also attempts to appeal from the order denying his motion for a new trial.

[1, 2] The interlocutory decree was entered on December 24, 1945. A notice of intention to move for a new trial was filed on October 24, 1946. The court made an order denying said motion on December 24, 1946. Notice of appeal was filed on December 31, 1946. An appeal may be taken from an interlocutory decree of divorce. (Code Civ.Proc. sec. 963, subd. 2.) The notice of appeal, however, must be filed within 60 days from the date of entry of such decree (Rules on Appeal, rule 2(a)), unless the time is extended as provided in rule 3 of Rules on Appeal. Subdivision (a) of rule 3 provides that the time for notice of appeal is extended when a valid notice of intention to move for a new trial is served and filed within 60 days after entry of judgment. It therefore appears that the decree in the present case became final upon the expiration of 60 days after its entry, since neither the notice of appeal nor the notice of intention to move for a new trial was filed within that time. As above shown, the motion for a new trial was made ten months after the interlocutory decree had been entered, and the notice of appeal was filed more than a year after the decree had been entered.

The filing of notice of appeal within the time allowed by law is essential in order to confer jurisdiction upon this court. Lancel v. Postlethwaite, 172 Cal. 326, 331, 156 P. 486; Lane v. Pellissier, 208 Cal. 590, 593. 283 P. 810; O'Brien v. Hannon, 68 Cal. App.2d 399, 400, 156 P.2d 774; Sheets v. Cleveland, 51 Cal.App.2d 148, 150, 124 P.2d 200. The appeal from said portions of the interlocutory decree, not having been taken within the time prescribed by law, must be dismissed.

[3] The purported appeal from the order denying the motion for a new trial must also be dismissed, such an order not being appealable.

At the time set for argument herein, the appellant made a motion to augment the record on appeal by including therein a notice of motion to amend the judgment, which notice was filed by plaintiff in the trial court. Since the appeals herein must be dismissed for the reasons hereinabove stated, the motion to augment the record is denied.

The appeals are dismissed.

SHINN, P. J., and McCOMB, J. (Assigned), concur.

---

87 Cal.App.2d 329

ANDERSON v. ANDERSON.

Civ. 16074.

District Court of Appeal, Second District, Division 3, California.
Aug. 31, 1948.

1. Divorce 🔑286

Since all intendments are in favor of divorce judgment awarding house and lot to wife, Court must be assumed, in absence of written findings, to have found that parties agreed and intended that such property should be community property, though it stood of record in names of parties as joint tenants.

2. Divorce 🔑255

An interlocutory divorce decree, awarding house and lot to wife, was "res judicata" on issue of community character of such property in husband's action, tried after decree became final, for partition of property, regardless of whether court erred in awarding it to wife, so that order that neither party take anything in such action was correct and further part of order, dismissing cause without prejudice, was unnecessary.

Appeal from Superior Court, Los Angeles County; Warren Steel, Judge, assigned.

Action by Thomas F. Anderson against Della C. Anderson for partition of a house and lot. From an order that neither party take anything and that the cause be dismissed without prejudice, plaintiff appeals.

Modified and affirmed as modified.

Elbert E. Hensley, of Los Angeles, for appellant.

Francis R. McKenna, of Montrose, for respondent.

WOOD, Justice.

This is an action to partition certain real property (a house and lot) which had been conveyed to the plaintiff and defendant, husband and wife, as joint tenants, and which had been involved in a divorce action between them. Prior to the commencement of this action the defendant herein had commenced an action for divorce, wherein she had alleged that the property was community property, and wherein the plaintiff herein (as defendant therein) had denied that allegation. This action and the divorce action came on for trial at the same time. The divorce action was tried first, and then the present action was placed off calendar.

In the divorce case, the court awarded plaintiff therein (defendant herein) an interlocutory decree of divorce and the real property involved herein. That decree stated that it is ordered that the real property "be held in joint tenancy"; that the value of the equity of the parties in said property is $3,000; that said real property is awarded to plaintiff (therein) subject to the payment by her to the defendant (therein) of $1500 payable $150 per month; and that defendant (therein) pay to plaintiff (therein) $1500 alimony payable $150 per month. The defendant therein did not file a notice of intention to move for a new trial until 10 months after the entry of the judgment, and did not appeal until more than a year after the entry of the judgment. (That appeal, not having been taken within the time allowed by law, was dismissed as shown by an opinion of this court filed this day, 197 P.2d 65). Findings therein were waived. The evidence therein was sufficient to support a finding that the property was purchased with community funds, and with the separate funds of plaintiff therein. Also the evidence therein would have supported a finding that defendant therein was guilty of extreme cruelty to an extent which would have justified the court in awarding all the community property to plaintiff therein. The trial judge in that case stated at the time of his oral decision that the court had "a right to strip him [defendant therein] of everything under this kind of conduct, and he is lucky to get the Ford"; that as far as the court was concerned the real property "is never going to be divided up in such a way that he [defendant therein] will get it"; that "I am going to make an award of alimony herein which will take care of it in such a way that Mrs. Anderson is going to get all the property; she is entitled to it." The trial judge also said at that time that he would award the automobile to defendant (therein) "because, in the first place, he needs it, and, in the second place, it is not worth anything."

Thereafter, the court, on its own motion, set the present action for trial on September 27, 1946—nine months after the entry of the interlocutory decree in the divorce action. At the time of the trial herein on said September 27th, counsel for defendant objected to the introduction of any evidence on the ground that the issue as to the property herein had been decided in the divorce action, and that no appeal or motion had been filed therein. He argued, in effect, that by reason of the provisions of the interlocutory decree in the divorce action, and by reason of the fact that said decree had become final, the issue as to the property herein was res judicata. That objection was overruled without prejudice. Evidence was then introduced on behalf of plaintiff and defendant. When the case was submitted for decision, the trial court made a minute order that "Judgment is ordered that neither party is to take anything and that the cause be dismissed without prejudice." Plaintiff appeals from that order. No formal signed judgment was entered, and there were no written findings of fact. By reason of the words "Judgment is ordered," appearing in the minute order from which this appeal is taken, that order might be interpreted to be a memorandum for a final judgment, rather than a final judgment. That order, however, will be regarded as a final judgment.

At the time of his oral decision herein the trial judge said that he was not going to trespass on the business of the judge who decided the divorce action, and he would not make a ruling that might in any way be adverse to whatever the judgment in the divorce case purported to be; that his judgment would be that neither party take anything, and that the action be dismissed without prejudice, and that he would relegate the parties to the judge who tried the divorce case for such motions as they might see fit to make; that if the plaintiff herein wanted a ruling in this case, the court would hold that the evidence herein shows that the property is community property and that the divorce decree purported to award it to plaintiff therein as community property; that it would be presumptuous on the part of the trial judge herein to adjudicate something that had already been adjudicated; that the property had been awarded to the plaintiff in the divorce action, but whether the judge in that action had in mind community property or joint tenancy property was not specifically stated in the decree therein.

Appellant contends herein that the court should have decided this case on the merits, and should not have dismissed it. He argues that the divorce decree shows upon its face that it is erroneous, in that, it specifically holds (according to his argument) that the property is joint tenancy property, and that the court awarded it to the plaintiff therein. He asserts, in effect, that the trial court should have proceeded to partition the property, irrespective of the divorce decree, because the divorce decree shows on its face that there was no proper and legal disposition of the property, that the award of the property to plaintiff therein was a legal defect—the court having found that the property was joint tenancy property, and the court having power to award only community property.

[1, 2] The trial court herein did not err in ordering that neither party take anything, it appearing, as hereinafter shown,

that the issues as to the property had been adjudicated in the divorce action. It therefore appears that the further part of the order dismissing the case without prejudice was unnecessary and served no useful purpose. It is to be noted, however, in connection with the making of the order of dismissal, that appellant did not ask for a ruling on the merits after the trial judge stated what his ruling would be if plaintiff wanted a ruling on the merits. The judgment in the divorce case had been final for several months when this case was tried. The issue as to the rights of the parties in the property here involved had been submitted for determination in the divorce case. The provision in the decree therein that the equity of the parties in the property was of the value of $3,000, and that the property was awarded to plaintiff subject to the payment of $1500 by plaintiff to defendant, is clear. The other provision therein regarding the property, that is, that the property "be held in joint tenancy," is uncertain. The material question, regarding the property, is what the status of the property was at the commencement of the divorce action, rather than how it should be held after the decision therein. It cannot be ascertained from that last mentioned provision, that the property "be held in joint tenancy," whether the court found that, at the commencement of the divorce action, the parties held the property in joint tenancy, or whether the court found that the parties had agreed and intended that the property, which stood of record in their names as joint tenants, should be community property. It cannot be ascertained from said provision, that the property "be held in joint tenancy," whether the property should be held in joint tenancy for an unlimited period of time or only until the plaintiff therein had paid the $1500 to the defendant therein. The divorce decree does not state, as appellant asserts, that the property was joint tenancy property. As above stated, findings therein were waived, but the evidence was amply sufficient to support a finding that the property was purchased with community funds and with separate funds of the wife. It is true that the trial judge in the divorce case said at the time of his oral decision that he was going to hold that the property "is joint tenancy"; however, since all intendments are in favor of the judgment, it is to be assumed, in the absence of written findings, that the court thereafter and at the time of signing the decree found that the parties had agreed and intended that the property should be community property, even though the property stood of record in the names of the parties as joint tenants. It cannot properly be concluded that the divorce decree shows on its face that error was committed in awarding the property to plaintiff therein. As above shown, the decree in the divorce case had long since become final when this partition case was tried, and therefore, irrespective of whether the court erred or did not err in awarding the property to plaintiff in that case, the issues between the parties as to the property are, by reason of the divorce decree, res judicata.

As above stated, the order of the court in the present case that neither party take anything was correct, it appearing that the issues as to the property were res judicata. The further part of the order dismissing the cause without prejudice was, as above stated, unnecessary and served no useful purpose, and therefore the order should be modified by striking therefrom the words "and that the cause be dismissed without prejudice."

The order is modified by striking therefrom the words "and that the cause be dismissed without prejudice," and as so modified the order is affirmed.

SHINN, P. J., and McCOMB, J. (Assigned), concur.

87 Cal.App.2d 449

HOWARD et al. v. LAMPTON et al.

Civ. 7467.

District Court of Appeal, Third District, California.

Sept. 3, 1948.
Rehearing Denied Oct. 1, 1948.
Hearing Denied Oct. 28, 1948.

1. States 🔑55

Orders of chief of Highway Patrol that highway patrolmen required to work on their regular days off or on legal holidays would be allowed a day in lieu thereof to be taken at convenience of the service, that employees required to work overtime hours may be allowed compensating time off, and that overtime hours shall be adjusted by employee's immediate superior and shall not become part of headquarters' record, were effective to grant compensating time off and did not merely grant authority of an immediate superior to allow compensating time off. Government Code, § 18005, as amended, St.1943, § 2, p. 136.

2. Limitation of actions 🔑70(1)

Statutes of limitations are not intended to apply to any person when performance of an act by him is not within his right or power.

3. Limitation of actions 🔑46(7)

Where orders of chief of Highway Patrol provided that highway patrolmen required to work on their regular days off or on legal holidays would be allowed a day in lieu thereof to be at convenience of the service, and that employees required to work overtime hours may be allowed compensating time off, one year limitation statute did not begin running as to patrolmen until their separation from the service, since patrolmen, while still employed, could not have compelled the granting of compensating time off, but could take it only at the convenience of the service and at times deemed convenient by their superiors. Government Code, § 19630.

4. Limitation of actions 🔑46(7)

Bulletin issued by Department of Motor Vehicles and purporting to cancel all claims of highway patrolmen for overtime hours worked prior to certain date, did not start a statute of limitations running against patrolmen while still employed, where any right to payment in cash for overtime could only be enforced by patrolmen on separation from the service. Government Code, § 19630.

5. States 🔑61

Bulletin issued by Department of Motor Vehicles and purporting to cancel all claims of highway patrolmen for overtime hours worked prior to certain date, was not effective to cancel claims of highway patrolmen filed pursuant to an earlier bulletin recognizing that employees were entitled by orders of the chief of Highway Patrol to accumulated time off. Government Code, § 18005, as amended, St.1943, § 2, p. 136.

6. States 🔑64

Former highway patrolman did not waive a portion of his claim for 602½ hours for compensation for overtime hours worked by letter written to chief of Highway Patrol in which patrolman presented a claim for 212 hours overtime and stated that he was willing to waive other hours, where all claims of patrolman, including the claim for 212 hours overtime, were rejected. Government Code, § 18005, as amended, St.1943, § 2, p. 136.

7. States 🔑64

Where overtime hours worked by highway patrolman were all performed by him prior to issuance of bulletin of the Department of Motor Vehicles requiring patrolmen to furnish proof in a specified form and within a specified time concerning overtime hours worked, department could not forfeit patrolman's claims for overtime hours because of his failure to comply with the bulletin. Government Code, § 18005, as amended, St.1943, § 2, p. 136.

8. States 🔑61

Former highway patrolman was not precluded from recovering compensation for overtime hours worked prior to order of chief of Highway Patrol providing for the granting of compensating time off in lieu of overtime worked, where at the time a bulletin had been issued by the chief providing for the granting of compensating time off for overtime hours. Government Code, § 18005, as amended, St.1943, § 2, p. 136.

Appeal from Superior Court, Sacramento County; B. F. Van Dyke, Judge.

Mandamus proceeding by M. P. Howard and E. F. Herzinger against Edgar E. Lampton, director of the Department of Motor Vehicles for the State of California and others, to compel respondents to allow petitioners' claims for payment for overtime worked by them while employed as members of the highway patrol of the Department of Motor Vehicles. From a judgment in favor of the petitioners, the respondents appeal.

Affirmed.

Fred N. Howser, Atty. Gen., and Wilmer W. Morse, Deputy Atty. Gen., for petitioners.

James H. Phillips, of Sacramento, for respondents.

ADAMS, Presiding Justice.

This is an appeal by respondents from a judgment of the Superior Court of Sacramento County ordering the issuance of a peremptory writ of mandate commanding respondents to allow the claims of petitioners for payment for overtime worked by them while employed as members of the highway patrol of the Department of Motor Vehicles of this state.

Petitioner Howard retired from service on April 30, 1946, and claimed compensation for overtime hours worked between January 1, 1939, and September 28, 1943, for which no compensating time off had been granted. Petitioner Herzinger resigned January 1, 1946, and claimed compensation for extra hours worked from August 7, 1940, to December 11, 1942, for which he had not been allowed compensating time off.

That petitioners worked the overtime hours for which they claim compensation is not denied by respondents, nor is it claimed that compensating time off was ever allowed them. But appellants on this appeal claim that petitioners made no showing that compensating time off for overtime worked had been accumulated by them under any rule or practice establishd by the appointing power or statute in effect when the overtime was worked; that their causes of action are barred by statutes of limitation; that petitioner Herzinger waived a portion of his claim by failing to take compensating time off during his employment; that Herzinger also waived all claim to cash payment by his failure to prove his overtime in the manner provided by Headquarters Information Bulletin No. 323, issued June 5, 1945; and that the conclusion of the trial court that petitioner Howard is entitled to be paid for overtime hours worked between January 1, 1939 and October 1st of that year is not supported by the findings.

In Pohle v. Christian, 21 Cal.2d 83, 130 P.2d 417, decided in October, 1942, the right of a civil service employee on separation from the service without fault on his part, to compensation in cash for unused vacation time was established; and in Clark v. State Personnel Board, 56 Cal.App.2d 499, 133 P.2d 11, decided in January, 1943, a like right to a cash payment for overtime worked for which compensating time off had not been granted was decided. Also in an opinion of the Attorney General, rendered on July 26, 1944 (N.S. 5597) it was stated that "The right of a State employee, separated from service without fault, to a lump sum payment upon separation for accrued vacation rights was established in Pohle v. Christian, Oct. 1942, 21 Cal.2d 83 [130 P.2d 417]. The right to payment under similar circumstances for overtime worked, when departmental rules provided for compensating time off was established in Clark v. State Personnel Board, Jan. 1943, 56 Cal.App.2d 499 [133 P.2d 11]."

Statutory recognition of the principles enunciated in those decisions appears in section 18005 of the Government Code (based on Stats.1937, ch. 753, sec. 150.5, as added by Stats.1943, ch. 20, sec. 2, p. 136, approved Feb. 6, 1943), which provides:

"Upon separation from service under Part 2, without fault on his part, a person is entitled to a lump sum payment as of the time of separation for any unused or accumulated vacation or for any time off to which he is entitled by reason of previous overtime work where compensating time off for overtime work is provided for by the appointing power or by rules of the State Personnel Board."

On September 28, 1939, effective October 1, 1939, the Chief of the Highway Patrol issued headquarters General Order No. 295, with reference to "Regular Days off, Accumulative Days, and Overtime," stating therein that it superseded and cancelled Information Bulletin No. 52 issued May 17, 1933, and other previous orders in reference thereto. This order provided that in the future employees ordered by their superiors to work on their regular days off or legal holidays, would be allowed a day in lieu thereof which would be termed an accumulative day, and that such accumulative days must be taken as soon thereafter as practicable and at the convenience of the service. It also provided that "Employees ordered to work beyond the hours ordinarily required or hours overtime in addition to what is considered their regular full day's work, may be allowed time off on the day following or at some other convenient time in lieu of the overtime hours worked. Overtime hours shall be adjusted by the immediate superior of the employee affected and shall not become part of the Headquarters' record."

On August 5, 1942, Headquarters General Order No. 394 was issued, effective that day, providing that: "Employees ordered to work beyond the hours ordinarily required and considered as a full days work may be allowed compensating time off in lieu of such overtime worked. Such overtime hours may be granted and adjusted by the immediate superior of the employee affected and shall not become a part of the Headquarters record."

On June 5, 1945, the Chief of the Highway Patrol, with the approval of the Acting Director of the Department of Motor Vehicles, issued "Information Bulletin No. 323," addressed to all members of the highway patrol. It provided that any claims for overtime hours accumulated prior to September 29, 1943, should be reported to the department in writing, accompanied by evidence in affidavit form in support thereof, on or before June 30, 1945, such affidavits to set forth the number of hours, by date, claimed to have been accumulated during such period, and to be certified by the immediate superior of the claimant. It also provided that if a claim in the form outlined were not presented by June 30, 1945, no overtime hours accumulated prior to September 29, 1943, would be credited, and that failure to so present a claim would be considered a waiver of all claims for overtime worked before September 29, 1943.

[1] As to the effect of Orders No. 295 and No. 394, appellants contend that they did not grant compensating time off, but merely granted authority of an immediate superior to allow it, that petitioners did not show that their immediate superiors had allowed them such time off; and that it was demonstrated, by the provision that overtime hours were not to become part of headquarters records, that it was not intended to make the allowance of compensating time off a *right* under the terms of employment. In short, that whether or not compensating time off should be granted an employee was a matter of discretion on the part of his superior, and that it was not shown by petitioners that such discretion had been exercised in their behalf by their superiors. We find no merit in this contention. The two orders aforesaid were a recognition of the right of an employee to be allowed time off for hours worked in excess of his regular hours of duty. And while such orders left it to the immediate superiors to determine *when* such time off should be taken, they did provide that "overtime *shall* be adjusted" by such superiors, thus making it the duty of such superiors to so adjust them. If such orders were not intended as recognizing a right to compensating time off for all overtime worked, then superiors might grant it to one and not to another, a discrimination which would have been devastating to the morale of the employees and which could not reasonably have been intended.

Nor do we attach any significance to the provisions that overtime hours should not become a part of the headquarters' record, in so far as the right of employees to such time off is concerned. It is not contended that petitioners did not work the overtime hours for which they claim compensation, or that such overtime was not made a matter of record with their immediate superiors. It is quite as reasonable to assume that this provision had for its purpose a desire not to increase the burden of keeping such headquarters' records as it is to assume that it was meant thereby to limit the right of employees to such compensating time off or leave it to the whim of immediate superiors.

Furthermore, Bulletin No. 323, issued on June 5, 1945, the subject matter of which was declared to be "overtime hours accumulated prior to September 29, 1943," was a recognition by the Department itself that employees were entitled by previous orders to such accumulated time off; and the provision therein for the making of such proof indicates that the fact that same had not theretofore been made a part of headquarters' records was not considered as having affected the rights of employees thereto.

[2] As for the application of any statute of limitations, the general orders above mentioned contained no provision that time off in lieu of overtime worked must be taken within any specified time. When it should be taken was left to the discretion of the immediate superior; and an employee obviously could not have demanded or taken it except at such time as his superior might allow, depending upon what was deemed by him to be convenient under conditions of the service then existing. Statutes of limitations are not intended to apply to any person when the performance of an act by him is not within his right or power.

[3] Appellants rely upon section 52 of the State Civil Service Act as amended (now section 19630, Govt. Code), which provided that "No action or proceedings shall be brought by any person having or claiming to have a cause of action or complaint or grounds for issuance of any complaint or legal remedy for wrongs or grievances based on or related to any civil service law in this State or the administration thereof unless such action or proceeding is commenced and served within one year after such cause of action or complaint or ground for issuance of any writ or legal remedy first arose. * * *"

Plainly, under the circumstances shown by this record, and the decisions in the Pohle and Clark cases, no right in petitioners for the issuance of any writ or legal remedy arose until their separation from the service; they could not have compelled the granting of compensating time off; it was only to be taken at the convenience of the service and at times deemed convenient by their superiors. Therefore, such compensating time off might have been given to petitioners by their superiors at any time before their services terminated. Surely it cannot be said that if such superior officer had not deemed it convenient to give compensating time off within a year or even three years of the time when overtime was worked, petitioners could have compelled it, since it might still be given them by such superior.

Appellants also argue that in any event a cause of action on behalf of respondents as to overtime worked prior to October 1, 1939, must he held to have arisen on *August 21, 1945*, when Information Bulletin No. 329 was issued by the department. That bulletin purported to deny and cancel all claims for overtime hours worked prior to September 29, 1943, which had been presented by 46% of the members of the patrol pursuant to instructions contained in Bulletin No. 323. It was recited in said bulletin that considerations upon which the denial and cancellation were based were that it was the general understanding that an officer's salary was in full for all services performed by him, including overtime worked; that it was never intended that overtime hours worked should accumulate indefinitely; that headquarters had no record against which to verify the claims submitted; that it was believed that by failure of an officer to arrange with his superior for compensating time off at the earliest possible date constituted a waiver of overtime; that it was believed that some of the claims or some portion thereof were barred by statutes of limitation; that 60%

of the claims filed did not comply with Bulletin No. 323, and that it was believed that in legal effect this may have constituted a waiver; that the fact that officers who had left the service had not been allowed compensating time off or paid a cash equivalent indicated an understanding by the officers themselves that they had no claim for overtime worked prior to September 29, 1943; and that there was no legislative provision for compensating employees for overtime.

[4, 5] This bulletin did not base its refusal to recognize the claims filed on the ground that the appellants were without power to grant cumulative time off, nor deny the tacit recognition in Bulletin 323 that they had such power; and it is a little difficult to arrive at the motive behind its pronouncements in view of the decisions in the Pohle and Clark cases, the opinion of the Attorney General herein previously mentioned, and the enactment in 1943 of the legislation now embodied in section 18005 of the Government Code, all of which preceded the issuance of Bulletin 329. But whatever motivated it, it did not start a statute of limitations running against petitioners, since any right to payment in cash for overtime could only be enforced on separation from the service, and, as hereinbefore stated, claimants could not have compelled the granting of time off the allowance of which was discretionary with their superiors as to time and convenience. Nor do we believe that such bulletin was effective to cancel claims which had been filed pursuant to Bulletin No. 323 which preceded it, the filing of which was, in effect, an acceptance by employees of the offer made by the department in that bulletin.

Petitioners had the right, then conferred by statute, to payment for overtime upon separation from the service, which statute did not limit the time within which such overtime should have been worked; and Order No. 295, which allowed time off in lieu of overtime worked, was still in effect. These petitioners had the right to continue their employment notwithstanding this pronouncement, and to rely upon their statutory right to compensation in cash if and when they might terminate their employment.

[6] The next claim of appellants is that petitioner Herzinger waived a portion of his claim by failing to take compensating time off during his employment. The claim is premised upon a statement contained in a letter written to the Chief of the Highway Patrol by Herzinger on June 15, 1945, with which he transmitted a claim for 212 hours overtime, and stated: "The overtime hours put in on my own detail in my home district I am willing to waive as some of them were worked on my own when there was work to do and it is as much my fault as anyone that I did not take time off for the time put in." However, at the trial he furnished proof of 602½ hours overtime worked for which he had not been compensated. This claim was substantiated by daily activities reports which he had made, and is not disputed. The trial court concluded that the language in the letter did not constitute the intentional relinquishment of a known right, and, furthermore, that since appellants claim that by Bulletin 329 all claims filed were rejected, petitioner's offer of waiver was not accepted, and cannot now be relied upon. It may also be noted that Herzinger did not state, nor is it contended, that he had failed to take compensating time when same was offered, or that it had been offered. Rather the contrary is to be inferred. And, in addition, the record shows that Herzinger had tried repeatedly to get such time off, even going to the Chief of the Highway Patrol who told him that he should take the matter up with the district inspector. Finally, we do not find that in the account rendered by Herzinger he included the overtime worked in his home district. If it is so included, appellants have failed to point out the portion of the record containing it.

[7] The next contention of appellants is that Herzinger waived all claims to cash in lieu of overtime by failing to prove such overtime in the manner provided by Bulletin No. 323. Herzinger's claim was not certified by his immediate superiors, but he explained at the trial that he was furnished with a copy of the bulletin less than a week before the date fixed therein for

filing such claims, and did not have time to circulate it for certification; that he had worked overtime under five different captains throughout the state, and that one of his immediate superiors had died and another was in the military service. It was not shown that Herzinger's report of overtime work is not correct; also the evidence shows that the department had a record of same through official daily reports which were filed in the field offices, and copies filed in the headquarters office of the department, weekly. The trial court held that since the overtime worked by petitioner was all performed by him prior to the issuance of Bulletin 323, the department could not forfeit his rights by requiring him, after the event, to furnish proof in a specified form and within a specified time, nor could it decree that he must be considered as having waived his claims if they were not presented in conformity with its ultimatum. We are in accord with that conclusion.

[8] Finally appellants urge that the conclusion that petitioner Howard is entitled to be paid for extra hours worked between January 1 and October 1, 1939, is not supported by the findings. We find no merit in this claim. The petition of this claimant alleged that he worked the overtime hours set forth, including hours worked prior to October 1, 1939, and the court found such allegation to be true. But, say appellants, Order No. 295 was not issued until September 28, 1939, therefore there was no authority for granting compensating time off at the time those hours were worked. But Bulletin 323 specifically provided for the granting of compensating time off for overtime hours worked prior to September 29, 1943, on the making of proof thereof in the manner provided, and stated, regarding what it designated as Account No. 1, "There will be added to this account all overtime hours, if any, proven to have been accumulated by members of the Patrol prior to September 29, 1943, as hereinafter provided, * * *" This was a tacit admission that such authority existed. Also, in an opinion rendered by the Attorney General April 9, 1940 (1–NS2496) it was said: "Situations will arise from time to time where certain employees in an office may be required in certain emergencies to work a number of hours of overtime for one or more days in a week. The emergency may be such that the officer or board cannot procure the services of some other person to do this overtime work. It seems entirely reasonable and in accord with efficient and humane office management that the head of the office should grant to such an employee compensating time off for the extra hours worked under such circumstances. Such compensating time off does not constitute additional payment for overtime. The monthly salary of the employee is not increased."

In Howard's case proof of his overtime was made in conformity with those requirements. No limitation was made in Orders No. 295 or No. 394, or in Bulletin No. 329, regarding hours worked prior to October 1, 1939, and at the trial no objection to Howard's account was interposed on this ground. Appellants are therefore hardly in a position to say here for the first time that the offer and promise made in said bulletin must be held invalid, or that they had no right to grant compensating time off for the overtime hours worked by Howard prior to its issuance, or prior to October 1, 1939. It is also to be noted that section 18005 of the Government Code, enacted in 1943, did not limit the time from which overtime should be reckoned, and that it provided for payment on separation from the service for previous overtime work "where compensating time off for overtime work *is* [not was] provided for by the appointing power or by rules of the State Personnel Board." (Italics added.)

The judgment and order appealed from are affirmed.

PEEK and THOMPSON, JJ., concur.

Hearing denied; EDMONDS and SCHAUER, JJ., dissenting.

87 Cal.App.2d 465

INDUSTRIAL INDEMNITY EXCHANGE v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 7507.

District Court of Appeal, Third District, California.

Sept. 7, 1948.

Rehearing Denied Oct. 2, 1948.

1. Workmen's compensation ⚿1339

Section of the Labor Code dealing with burden of proof and affirmative defenses in a compensation proceeding must be construed in light of mandatory provisions of section of the Labor Code requiring that divisions IV and V of the Labor Code shall be liberally construed by the courts, to extend their benefits for protection of persons injured in course of their employment. Labor Code §§ 3202, 5705.

2. Workmen's compensation ⚿1365

Where an employee is suffering from silicosis, all that needs to be proved in a compensation proceeding is that he was exposed to dust while employed by the defendant employer.

3. Workmen's compensation ⚿1509

In proceeding for compensation for death of miner from silicosis, evidence sustained finding of Industrial Accident Commission that silicosis was contracted at employer's mine rather than at other mines where miner had previously worked, or that employment in employer's mine substantially and proximately contributed to the silicosis, so as to render employer liable.

4. Administrative law and procedure ⚿789
Workmen's compensation ⚿1939

Where findings of Industrial Accident Commission are supported by inferences which may fairly be drawn from evidence, even though evidence is susceptible of opposing inferences, a reviewing court will not substitute its views for those of the commission, or disturb the resulting award.

5. Workmen's compensation ⚿622

Even if Industrial Accident Commission found that miner's employment at mine was not the sole cause of miner's death from silicosis, employer could be held for miner's death, so long as the employment substantially and proximately contributed to the death.

ADAMS, P. J., dissenting.

◆

Petition for writ of review by the Industrial Indemnity Exchange to annul death benefit award by the Industrial Accident Commission, in favor of Mary G. Alatorre and others.

Award affirmed.

Leonard, Hanna & Brophy and Gladstein, Andersen, Resner & Sawyer, all of San Francisco, for petitioner.

T. Groezinger and John A. Rowe, Jr., both of San Francisco, for respondents.

PEEK, Justice.

On the ground that the findings of fact have no foundation in the record, but are based purely on speculation and surmise, the petitioner herein seeks a review of the award of death benefits by the respondent commission to the surviving wife and children of Ralph Alatorre, deceased. It is our conclusion that under the facts and circumstances as shown the award was proper.

The record before the Industrial Accident Commission discloses that for more than twenty years deceased had worked intermittently as a miner. During this period, when not so engaged, he worked as a farm laborer and during the war years worked in ship yards in the San Francisco Bay area. On March 31, 1947, because of illness, he quit his employment with the Winston Copper Company where he had been for approximately ten and one-half months, and on May 11, 1947, died as the result of "Pulmonary tuberculosis; silicosis." The widow testified they were married in Arizona in October 1929, and a few months thereafter moved to California because the mines where decedent was then working were "Too bad—too hot" and "Too dirty." Although he had worked in many mines in California she testified concerning only the Pine Tree Mine in Mariposa county, where he worked for approximately six of the intervening years; her testimony regarding this mine being that at the end of the day when he returned home he would be "dusty and dirty". While he was employed at the Winston mine she lived in Oakland and apparently had no knowledge of the conditions at that mine. The only evidence relative to the conditions there was given by a daughter of decedent who testified she had visited him there on several occasions and in response to the question, "* * * on those occasions what was his general appearance with reference to dirt and dust?" and replied "Very dirty." Petitioner's safety engineer who was called by it as a witness testified that he had worked in some of the same mines in Arizona as had decedent, that they were dusty, that dust counts taken by the United States Bureau of Mines were high and that the dust contained a certain amount of silica. A letter addressed to petitioner's claims adjuster from a physician who had examined decedent at its request, referred to his general history and concluded with the statement that at the time of the examination on April 24, 1947, he was then suffering from "silicosis with superimposed tuberculosis," the exact source of which was not disclosed by his occupational history but in the doctor's opinion was "definitely not of recent origin."

On such evidence the commission found that the deceased while employed at the Winston mine "was exposed to dust in deleterious amount and contracted the disease of silico-tuberculosis," which having arisen out of and in the course of his employment "constitutes an injury within the meaning of the Workmen's Compensation Law," and accordingly made an award to the widow and children of the deceased. A petition by the insurance carrier for a re-hearing was denied by the commission and the present petition for a review was thereafter filed in this court.

[1] It is true as petitioner contends that under Labor Code section 3600 liability does not attach merely by virtue of employment but only if the requirements set forth in said section have been met, and that under section 5705 of the same code the burden rests upon the claimant to establish a prima facie case. However, that section must be construed in the light of the mandatory provisions of section 3202 thereof requiring that Division IV and V of the code relating to Workmen's Compensation and Workmen's Safety, respectively, shall "be liberally construed by the courts with the purpose of extending their benefits for the protection of persons injured in the course of their employment."

[2] The Supreme Court of this state in a recent case, likewise involving silicosis, has enunciated the rule to be that where an employee is suffering from such disease all that needs to be proved is that he was exposed to dust while employed by the defendant employer. Colonial Ins. Co. v. Industrial Accident Commission and Pedroza, 29 Cal.2d 79, 172 P.2d 884. The court, after observing that the essence of the rule is that it is sufficient if the employment contributes to the ultimate disability, stated, 29 Cal.2d at page 83, 172 P.2d at page 887:

"True the disease must arise out of the employment—must be employment connected, but a particular employment is not required to be the sole proximate cause of the disease. As long as it substantially and proximately contributed to it, the employer may be held liable for the full disability."

Pursuant to the provisions of the code and the rule so stated and in support of the award, respondent commission argues that although the record discloses decedent was exposed to dust at mines other than the Winston nevertheless the record also shows that decedent was exposed to dust while employed by petitioner's assured, and therefore the award was proper against petitioner, and full responsibility for compensation must be met by it.

This gives rise to the argument of petitioner that merely because the symptoms of the disease manifested themselves during the decedent's last employment it is not sufficient to warrant an award against such employer in the absence of a prima facie case which it contended the claimants failed to establish.

Thus the problem is reduced to the one remaining question: the sufficiency of the evidence to sustain the finding of the commission as to the element of exposure to dust.

As previously stated, the only direct evidence concerning dust conditions at the Winston mine was that given by the daughter. No evidence was offered by petitioner to rebut her testimony. Likewise no evidence was offered to rebut testimony of the widow or the further testimony of the daughter that decedent was a normal, healthy person until stricken while working at that mine.

[3] Therefore from the evidence before it, respondent commission first, could reasonably conclude that as the decedent had at some time inhaled a sufficient amount of silica dust as to ultimately cause his death, such inhalation could only have occurred during the three periods previously mentioned: His early employment in Arizona, his employment at the Pine Tree Mine or his last employment at the Winston Mine. Secondly, however, as there is nothing in the record to rebut the evidence that decedent was a normal healthy person prior to his last employment; that the disease did not manifest itself in any way prior to November or December 1946, and that when he emerged from the mine he was, as his daughter testified, dirty, it could under such circumstances reasonably infer and find that the disease was either contracted at his last employment or that such employment "substantially and proximately contributed to it." Colonial Ins. Co. v. Ind. Acc. Comm., supra. Such an inference is not only supported by the evidence but by the nature of the disease, for, as this court stated in Argonaut Mining Co. v. Ind. Acc. Comm., 21 Cal.App.2d 492, 70 P.2d 216, the rapidity of its fatal development appears to depend both upon the physical condition of the employee and the conditions of his employment which obviously may vary widely, some persons appearing to be immune but a greater majority appearing to be more readily susceptible. See also Marsh v. Ind. Acc. Comm., 217 Cal. 338, 18 P.2d 933, 86 A.L.R. 563.

Petitioner, however, challenges the sufficiency of the evidence given by the daughter to sustain such a finding; its contention being that the commission interpolated the word "dirty" as used by the daughter to mean "dusty," and it is argued that as one may be "dirty" but not "dusty" therefore such testimony in no way supports the finding that decedent was exposed to dust while working at the Winston Mine.

In this regard it is of interest to note that the inference drawn by the commission from the use of such words in the testimony of the daughter, which inference petitioner challenges, is the identical inference drawn by petitioner from the use of like words in the testimony of the widow, i. e., in its petition it is stated that the reason given by the widow for decedent leaving Arizona "was that the underground working conditions were bad and the mines were hot and *dusty.*" (Italics ours.) The actual testimony of the widow in this regard is as follows:

"Q. Did he ever say anything about the mines? A. About the mines over there?

"Q. Yes. A. Too bad—too hot.

"Q. Too dirty? A. Too dirty. He never liked Arizona is why. He live over here all his life almost."

The question which immediately presents itself is: If the inference drawn by petitioner is reasonable, can it be said that a like inference drawn by the commission is unreasonable.

As stated in Webster's Dictionary, the adjective "dirty" is properly used to describe that which is base or sordid, or that which is obscene or indecent, or weather that is foggy, gusty or stormy. It is also stated in that work, the noun "dirt" is proper when used to name any filthy substance such as mud or dust adhering to a thing, thereby rendering it unclean, or in reference to earth or in reference to a state of mind or in relation to mining. Hence it would seem that by reason of the broad and varied meanings, the *particular subject* to which such adjective or such noun may refer, necessary must be considered with, as a part of, the answer to a question relating thereto. Particularly apropos, therefore, is the admonition of the court in Re Estate of Bristol, 23 Cal.2d 221, 224, 143 P.2d 689.

690, to be "realistic and practical" in exploring the reasonable inferences which may arise from the evidence.

[4] It necessarily follows that where, as here, it appears that "the findings of the Industrial Accident Commission are supported by inferences which may fairly be drawn from evidence, even though the evidence is susceptible of opposing inferences" (Riskin v. Ind. Acc. Comm., 23 Cal. 2d 248, 254, 144 P.2d 16, 19), and which obviously is the case herein, a reviewing court will not substitute its views for those of the commission, or disturb the resulting award.

[5] For the purposes of compensation, the disability of decedent culminated in his incapacity for work during his employment at the Winston Mine, and even if the commission had found that such employment was not the sole cause of death, as long as it substantially and proximately contributed to it, the petitioner could properly "be held for the full disability." Colonial Ins. Co. v. Ind. Acc. Comm., 29 Cal.2d 83, 172 P.2d 887.

The award is affirmed.

THOMPSON, J., concurs.

ADAMS, Presiding Justice (dissenting).

I dissent. The commission found that deceased, while employed at the Winston mine, was "exposed to dust in deleterious amount and contracted the disease of silico-tuberculosis." The evidence relied upon to support the conclusion that deceased while so employed was exposed to dust is the testimony of decedent's daughter that on two or three occasions when she visited her father at the mine, he was "dirty" when he emerged. She did not say that he was dusty, and she may as well have meant that he was muddy; and her testimony is farther still from showing that decedent was exposed to dust in "deleterious amounts" in said mine. In addition, the uncontradicted medical testimony is that decedent's diseased condition was "definitely not of recent origin." In my opinion the findings of the Commission are without support in the evidence and the award should be set aside.

Rehearing denied; ADAMS, P. J., dissenting.

CITY OF FAIRFIELD v. HUTCHEON.

Civ. No. 7547.

District Court of Appeal, Third District, California.

Sept. 3, 1948.

Hearing Granted Oct. 28, 1948.*

1. Municipal corporations ⚷911

Propositions submitted to electors for bonded indebtedness of city of the sixth class which included repairing of existing water and sewer systems as one of the purposes were invalid, since statute does not authorize bonded indebtedness for that purpose. Gen.Laws, Act 5178, §§ 2, 5; Act 5233, § 850.

2. Municipal corporations ⚷57

The powers of a municipal corporation are confined to the authority conferred upon it by the Constitution, the provisions of its charter or enactments of general law.

3. Municipal corporations ⚷906

The purpose, manner of creating and extent of municipal indebtedness are limited by express authority granted by statute. Gen.Laws, Act 5178, §§ 2, 5.

4. Municipal corporations ⚷935

Where municipal bonds, if they had been issued, would have been void because issued for the unauthorized purpose of repairing water and sewer systems, validating Act of 1948, which became effective 16 days after bond election, did not validate bonds, since legislature, had it so intended, could have easily amended Municipal Improvements Act so as to have specifically authorized the incurring of bonded indebtedness to pay for repairing public works. Gen.Laws, Act 5178, §§ 2, 5; Act 5233, § 850; St.1948, c. 35, § 8.

5. Municipal corporations ⚷935

The deliberate inclusion of a stated purpose to create bonded indebtedness to pay for repairing municipal structures or works in a proposal for an election to authorize issuance of bonds, which purpose was intentionally omitted by legislature from Municipal Improvements Act, did not constitute a mere "defect," "irregularity,"

---

* Subsequent opinion 202 P.2d 745.

"omission" or "ministerial error" within scope of 1948 Validating Act. Gen.Laws, Act 5178, §§ 2, 5; St.1948, c. 35, § 8.

See Words and Phrases, Permanent Edition, for all other definitions of "Defect", "Irregularity", "Ministerial Error" and "Omission".

6. Municipal corporations ⚷918(1)

The validation of bonded indebtedness of a sixth class city for a purpose in conflict with existing statutes would be invalid as violative of constitutional provision as to the manner by which a municipality may incur bonded indebtedness exceeding the revenue of a particular year. Gen. Laws, Act 5178, §§ 2, 5; Act 5233, § 850; St.1948, c. 35, § 8; Const. art. 11, § 18.

7. Constitutional law ⚷196
Statutes ⚷268

A validating statute is ordinarily retrospective in character and may be enacted to cure or validate errors or irregularities in legal or administrative proceedings except such as are jurisdictional in effect or violative of existing vested, substantive rights.

8. Constitutional law ⚷92
Municipal corporations ⚷935

The unauthorized incurring of bonded indebtedness contrary to statute by city of the sixth class is both jurisdictional and violative of vested rights of citizens thereof, and hence, is not curable by a validating act. Gen.Laws, Act 5178, §§ 2, 5; Act 5233, § 850; St.1948, c. 35, § 8.

◆

Original proceeding in mandamus by the city of Fairfield against Colin C. Hutcheon, as city clerk of the city of Fairfield, to compel respondent to countersign and issue municipal improvement bonds. On respondent's demurrer.

Demurrer sustained and writ denied.

Goodman & Goodman, of Fairfield, for petitioner.

Kenneth I. Jones, of Fairfield, Orrick, Dahlquist, Neff & Herrington, of San Francisco, amici curiæ.

THOMPSON, Justice.

The City of Fairfield, a municipal corporation of the sixth class, seeks by mandate to require its clerk to countersign and issue municipal improvement bonds in the aggregate sum of $125,000, which were voted by over two-thirds majority at an election held May 13, 1948, for "acquisition, construction or completion" and *repairing* of the city water and sewer systems. The clerk refused to countersign or issue the bonds on the theory that they are invalid because the ordinance, published notices and printed ballots misled the voters by including in the purposes for which the first and second propositions for bonds were submitted to the electors the unauthorized specified purpose of resorting to the bonds to pay for *repairing* the water and sewer systems. An alternative writ was issued. A general demurrer was filed by the respondent.

The petitioner contends that the statutory authorization to incur municipal indebtedness and issue bonds therefor by "the acquisition, construction or completion of any municipal improvement" (Stats.1901, sec. 2, p. 27, and amendments, 2 Deering's Gen. Laws, p. 1723, Act 5178) necessarily includes the right to incur indebtedness and issue bonds for *repairing* the water and sewer systems, and that the Validating Act of 1948, Section 8, which became effective April 29, 1948, after the election was held, has the effect of curing the defect and rendering the bonds valid. (Stats.1948, Chap. 35.)

The respondent asserts that Section 2 of the Municipal Improvements Act limits the purposes for which such bonds may be voted and forbids the right of a municipality to incur indebtedness and vote bonds for *repairing* water and sewer systems, but that such repairs "must be paid from the ordinary revenue of the city." City of Long Beach v. Boynton, 17 Cal.App. 290, 296, 119 P. 677, 680. The respondent claims that the unlawful inclusion of the right to pay for such repairs renders the election and bonds invalid as to the first and second propositions submitted to the voters and that the validating act may not retroactively authorize the inclusion of an unlawful purpose not contemplated by the statute and that it is in conflict with Article XI, Section 18, of the California Constitution.

The cause was ably argued by respective counsel. By leave of court the law firm of Orrick, Dahlquist, Neff and Herrington, filed an enlightening amici curiæ brief in support of the respondent. The only issues are whether the first and second propositions included in the city ordinance, published notices of election and printed ballots rendered the election and bonds invalid, and whether the bonds were nevertheless validated by the subsequent legislative enactment. No other alleged irregularities were urged.

The petition alleges that Fairfield is a municipal corporation organized and existing under the laws of California; that the respondent is the duly elected and acting City Clerk of Fairfield; that, on March 23, 1948, that city passed ordinance number 167, pursuant to a previously adopted resolution, authorizing the creating of municipal indebtedness in the aggregate sum of $125,000, and calling an election in said city for that purpose to be held April 13, 1948, to acquire, replace, extend and *repair* its water and sewer systems, together with other specified improvements not involved in this proceeding. For those purposes four separate propositions were included in the ordinance, notices of election and printed ballots. The first proposition was to incur a bonded indebtedness of $52,000 for "the improvement of its water works and water system by the acquisition of certain land therefor, *the repair,* replacement and extension of its water mains," etc. The second proposition was to incur bonded indebtedness of $23,000 "for the object and purpose as follows: The improvement of its sewer system *by the repair,* reconstruction and extension of its sewer mains," etc. The third and fourth propositions to incur indebtedness of $25,000 each were for street improvements and the construction of a bridge and for building a fire house and purchasing fire equipment. The last two propositions are not involved in this mandamus proceeding. At the election which was held April 13, 1948, each proposition was carried by the approval of more than two-thirds of the voting electors. The bonds were thereafter prepared in accordance with said proceedings, but the City Clerk refused to countersign the bonds as required by Section 5 of the Municipal Improvements Act, for the reasons previously stated. This mandamus action was thereupon commenced in this court.

[1-3] We are of the opinion the first and second propositions for bonded indebtedness are unauthorized and invalid for the reason that each proposition included in the ordinance, published notices and printed forms of ballots the specifically stated purpose of incurring bonded indebtedness to *repair* the water and sewer systems, in addition to the other stated purposes. City of Long Beach v. Boynton, supra; Board of Supervisors v. Cothran, 84 Cal.App.2d 679, 191 P.2d 506; Municipal Improvements Act, Stats.1901, p. 27, and amendments, 2 Deering's Gen. Laws, p. 1723, Act 5178, secs. 2 and 5. We assume the electors of Fairfield were misled to their detriment by the unauthorized statements in said propositions that the bonded indebtedness was to be applied in part to the payment of the cost of *repairing* the existing water and sewer systems. The statute does not authorize bonded indebtedness for that purpose. Section 2 of that act confines the purposes to the "acquisition, construction or completion of any municipal improvement." It specifies those improvements to which it may apply. The authority to create bonded indebtedness for the purpose of repairing public structures or utility systems is not included therein. Section 5 of that act authorizes the issuance of such municipal bonds only "in conformity with the provisions of this act." The powers of a municipal corporation are confined to the authority conferred upon it by the constitution, the provisions of its charter or enactments of general law. Legault v. Board of Trustees of the City of Roseville, 161 Cal. 197, 118 P. 706, 39 L.R.A.,N.S., 519; Ellis Landing & Dock Co. v. Richmond, 70 Cal.App. 720, 234 P. 336; 1 McQuillin's Mun. Corp., 2d ed., sec. 386, p. 1061; 18 Cal.Jur. 797, sec. 105; 44 C.J.

1107, sec. 4030; 56 C.J. 577, sec. 696; 43 Am.Jur. 300, sec. 38. The purpose, manner of creating and extent of municipal indebtedness are limited by the express authority granted. Zottman v. San Francisco, 20 Cal. 96, 81 Am.Dec. 96; Reams v. Cooley, 171 Cal. 150, 152 P. 293, Ann. Cas.1917A, 1260; Keller v. City of Oakland, 54 Cal.App. 169, 172, 201 P. 618. Fairfield is not a chartered city. It is a city of the sixth class governed by the provisions of the Municipal Corporation Act of 1883, page 93, and amendments, 2 Deering's Gen.Laws, p. 1810, Act 5233, sec. 850 et seq Neither that act nor the Constitution contains any provision authorizing a municipal corporation to incur bonded indebtedness for the purpose of repairing existing public works.

The Long Beach case, supra, is determinative of the issue as to whether a city may lawfully create bonded indebtedness to pay for repairing existing municipal works. It squarely decides that issue adversely to the petitioner in this case. The only distinction between that case and the present proceeding is that Long Beach was a chartered city, and Fairfield is not, but operates under the general laws. However, the principle involved is applicable to both classes of cities. The City of Long Beach sought to incur bonded indebtedness for the aggregate sum of $125,000. Two propositions were submitted to the electors: First, for "the acquisition, construction and completion *of certain repairs*" on a pier owned by the city, at a cost of $75,000, and, second, for "the acquisition, construction and completion of a new pier", at a cost of $50,000. At an election held for that purpose, the voters approved the first proposition by a majority in excess of two-thirds, but defeated the proposition to construct the new pier by a lack of such two-thirds majority vote. The City Clerk refused to attest the bonds prepared pursuant to the first proposition. On petition for a writ of mandamus to require him to do so, the Appellate Court denied the writ and held that the charter of Long Beach did not authorize that city to incur bonded indebtedness to repair the pier, and that such bonds were therefore void. The court said:

"* * * Where it is provided that a bonded indebtedness may be created for specified purposes, the permission and authority so given is exclusive of every purpose not expressly so named. The municipality of Long Beach may lawfully issue bonds to obtain funds with which to construct a wharf or pier, but, when such wharf or pier is once constructed, the cost of maintenance thereof and *repairs thereon must be paid from the ordinary revenue of the city.* * * *"

In the case of Board of Supervisors v. Cothran, supra [84 Cal.App.2d 681, 191 P. 2d 508], this court held that bonds in the sum of $800,000 which were voted at an election held in a high school district, for several stated purposes, some of which were valid, but which also included "The purchase of a school laboratory farm", rendered the bonds invalid and void because the last mentioned purpose was not authorized by statute. In that case the writ of mandamus was denied. The court quoted with approval from the text in 56 Corpus Juris at page 577, section 696, as follows:

> "The purposes for which bonds may be issued are generally fixed by statute, and where so fixed bonds may not be issued for any other purpose, nor may bonds be issued to raise funds for matters otherwise provided for by statute, and bonds issued for an unauthorized or improper purpose are void."

In that case this court also held that the Validating Act of 1947 did not have the effect of legalizing the bonds, and, on the contrary, that since the stated purposes of the bonded indebtedness contained the unauthorized one previously mentioned, the bonds were void.

In the case of School District No. 6, Chase County, v. Robb, 150 Kan. 402, 93 P.2d 905, 906, 124 A.L.R. 879, the Supreme Court of that State held that, under the statutory power of incurring indebtedness for "erecting and equipping" school houses, the district did not have authority to incur a bonded indebtedness for the purpose of *repairing* school buildings. The court there said:

"* * * We think that had it been intended by the legislature that a school district be authorized to issue bonds for such purpose, it would have used language clearly indicating that purpose."

Some statutes specifically provide for authority to acquire school sites, construct, equip and *repair* school buildings. But the term "repairing" as used in such statutes, has been construed to exclude indebtedness incurred for making "ordinary repairs, which merely constitute maintenance" of the buildings. (See, 124 A.L.R. 883, Note.) That is exactly what the California court held in the Long Beach case, supra. It said such cost of repairs for maintenance "must be paid from the ordinary revenue of the city."

We conclude that the first and second propositions for incurring bonded indebtedness in the present case are invalid and void for the reason that they included among the stated purposes therefor the unauthorized object of using the funds for repairing the existing water and sewer systems.

[4] We are also constrained to hold that the Validating Act of 1948, which became effective as an emergency statute on April 29, 1948, sixteen days after the election in this case, does not have the effect of rendering said bonds valid, even if they had been previously issued. If the legislature had so intended it could have easily amended the Municipal Improvements Act so as to have specifically authorized the incurring of bonded indebtedness to pay for repairing public works. That was not done. The Validating Act of 1948 (Stats. 1948, Ch. 35), so far as it is applicable to this case, merely added to Section 8 of the previous Validating Act of 1947 (Stats. 1947, Ch. 492, p. 1473, Gen.Laws, Act 8924) certain general language upon which the petitioner relies in support of its assertion that the challenged statement that the bonded indebtedness was to be incurred, in part, to pay for "repairs" does not render the bonds invalid or void because that unauthorized purpose could have been *supplied* by the legislature, and that the bonds are therefore valid and binding. Section 5 of the Validating Act of 1948 provides, as the previous act also did, that:

"All acts and proceedings heretofore taken by or on behalf of any public body under any law, or under color of any law, for the authorization, issuance, sale, or exchange of bonds of any such public body for any public purpose are hereby confirmed, validated, and declared legally effective. This shall include all acts and proceedings of the governing board of such public body and of any person, public officer, board or agency heretofore done or taken upon the question of the authorization, issuance, sale, or exchange of such bonds."

Section 8(a) of the 1948 Act reads:

"This act shall be limited to the correction of defects, irregularities, omissions, and ministerial errors in carrying out statutory provisions which the Legislature originally could have omitted from the law under which such acts or proceedings were taken, *provided that this act shall also operate to supply such legislative authorization as may be necessary to validate any such proceedings heretofore taken which the Legislature could have supplied or provided for in the law under which such acts or proceedings were taken.*" (Italics added.)

The foregoing italicised language was added to the 1948 Validating Act. It was not contained in the Act of 1947.

[5] It may not be held that the deliberate inclusion of a stated purpose to create bonded indebtedness to pay for *repairing* municipal structures or works, which we must assume was intentionally omitted by the Legislature from the Municipal Improvements Act, constituted a mere defect, irregularity, omission or ministerial error. (1 McQuillin's Mun.Corp., 2d ed., p. 1028, sec. 370.) It was an unlawful and material enlargement of the statutory authorization which would tend to mislead the voters to their prejudice. Such a deliberate and unauthorized act, therefore, does not come within the provisions of the first portion of Section 8(a) of the 1948 Validating Act which we have

previously quoted without italics. That portion of Section 8, therefore, affords no relief to petitioner in this case. Regarding the principle that we must presume the Legislature intentionally omitted from the Improvements Act the authorization to incur bonded indebtedness to pay for repairs, the text in 1 McQuillin's Municipal Corporations, above cited, states that:

> "Late decisions adhere to the general rule that where the law enumerates specific powers with reference to a named subject, a power not enumerated is presumed to be withheld. This is to say the enumeration of powers operates to exclude such as are not enumerated."

[6] We do not think the Legislature intended, by the previously italicised portion of Section 8(a) of the Validating Act of 1948, to validate such deliberate and unauthorized purpose to incur bonded indebtedness to pay for repairs which were already provided for by the general tax fund of the city. That language merely states generally that the Validating Act "shall also operate to supply such legislative authorization as may be necessary to validate *any such proceedings* heretofore taken which the Legislature could have supplied or provided for in the law under which *such acts or proceedings* were taken." (Italics added.) Of course the Legislature could have amended the Improvements Act to so provide, but it did not do so. To validate bonded indebtedness *for a purpose* in conflict with the existing statute would appear to be unconstitutional, an invasion of vested rights and absurd. It would dispense with compliance of essential provisions of statutory law. Article XI, Section 18, of the California Constitution provides the only manner by which a municipality may incur such bonded indebtedness exceeding the revenue of a particular year. That may be done only by approval of two-thirds of the voters at an election. Suppose the bonds were issued without an election, could they, nevertheless, be validated? We think not. On the same principle they may not be validated when issued in conflict with material requirements of existing statutes. This leads us to conclude the legislature did not intend, by the Act of 1948, to attempt to validate municipal bonds issued for a stated purpose in conflict with the provisions of the Improvements Act.

[7] The rule is well established that a validating statute is ordinarily retrospective in character and may be enacted to cure or validate errors or irregularities in legal or administrative proceedings except such as are jurisdictional in effect or violative of existing vested substantive rights. Board of Supervisors v. Cothran, supra; 11 Am.Jur. 1208, sec. 379; 59 C.J. 791, sec. 370; 25 R.C.L. 790, sec. 37. In the Cothran case, supra, in which this court held that a school district had no authority to incur bonded indebtedness for "the purchase of a school laboratory farm", and therefore determined that the bonds for that purpose were invalid, it was said with respect to the Validating Act of 1947:

> "* * * But the purpose being unauthorized, the validating act cannot be said to have been intended to confer authority denied by the existing statute. In People v. Van Nuys Lighting District, 173 Cal. 792, 797, 162 P. 97, 99, Ann.Cas.1918D, 255, where a curative act was relied upon the court said: 'A curative act or a conclusive evidence clause in a statute is effective to cure all defects resulting from a failure to comply with provisions which are merely directory of the mode of the exercise of the power. But defects and omissions which go to the jurisdiction of the board to act at all, and which make their action absolutely void, cannot be cured in this manner. [Citing authorities.]'"

[8] We assume that the previously stated rule limiting the right to enact validating acts to cure defects which are not jurisdictional or in contravention of vested rights, is applicable to the present case. The unauthorized incurring of bonded indebtedness contrary to law was both jurisdictional and violative of the vested rights of the citizens of Fairfield. They had a vested right to assume that the cost of repairs would be paid from the ordinary revenue of the city, as the court determined in the Long Beach case. The legislative branch of the city had no jurisdic-

tion to incur indebtedness for an unauthorized purpose.

For the foregoing reasons the demurrer is sustained and the writ is denied.

ADAMS, P. J., and PEEK, J., concur.

87 Cal.App.2d 480

STAFFORD v. CLINARD.

Civ. 16376.

District Court of Appeal, Second District, Division 1, California.

Sept. 10, 1948.

Rehearing Denied Sept. 28, 1948.

Hearing Denied Nov. 8, 1948.

Mortgages ⚷357

An unexecuted oral agreement to postpone valid sale of realty beyond date when it may be sold under terms of trust deed is unenforceable as agreement to alter terms of written instrument. Civ.Code, § 1698.

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by Guy N. Stafford against R. D. Clinard for breach of an oral agreement to enter into a written agreement to postpone a sale of lots under trust deeds securing plaintiff's notes and an injunction against such sale. From a judgment for defendant and orders denying a temporary injunction and dissolving temporary restraining orders, plaintiff appeals.

Affirmed.

Guy N. Stafford, in pro per.

Hix & Binns and Walter S. Binns, all of San Pedro, for respondent.

DORAN, Justice.

This is an appeal from the judgment, also from orders refusing to grant a temporary injunction and dissolving temporary restraining orders.

A demurrer was sustained to the first amended complaint without leave to amend. The complaint alleges that in November, 1945, plaintiff "executed and delivered" to one Hansberger a certain note and trust deed; that thereafter a second note and trust deed covering the same property was "executed and delivered" to Hansberger by plaintiff; "That plaintiff has defaulted in the payment of said notes, and said lots are about to be sold under the power of said deeds of trust." "That plaintiff gave said notes and deeds of trust to secure that payment of the purchase price of certain used oil well drilling equipment." "That on or about the month of March, 1947, said Hansberger, was compelled by circumstances to assign said notes and deeds of trust to R. D. Clinard." It is also alleged that at the time the trust deeds were delivered to Hansberger plaintiff was litigating the validity of certain oil leases "recorded against said lots" and, "that it was agreed at said time that plaintiff should have until the conclusion of said litigation to make payment of said notes." It is also alleged that "Hansberger told said Clinard of his acts and intentions concerning said deferment of payment of said notes, and said Clinard agreed to be bound thereby." It is then alleged that plaintiff received notice in August, 1947, "of the impending sale of said lots on August 26th, 1947." The complaint sets forth alleged conversations between plaintiff and Clinard concluding with the allegation in substance that Clinard orally agreed to enter into a written agreement to postpone the sale and on the following day refused so to do.

A summary of the complaint reveals that plaintiff's cause of action is based on respondent's alleged violation of an oral agreement to enter into a written agreement concerning another written agreement, to-wit, the trust deed. It is argued, however, by appellant that, "this oral agreement by Mr. Clinard in no wise altered the deeds of trust, but that he orally agreed to forbear and postpone the sale of the property for a time, and that he, thereby, waived his rights to continue with the sale."

Appellant's contentions cannot be upheld. An agreement to postpone a valid sale of property beyond the date when said property may be sold under and according to the terms of a trust deed obviously is an agreement to alter the terms of the instrument. And as pointed out by respondent, "a contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise." Civil Code, sec. 1698. Therefore the oral agreement relied on by appellant is unenforceable. To hold otherwise would reduce a trust deed in any case to an unsubstantial if not a worthless security.

The judgment and orders are affirmed.

YORK, P. J., and WHITE, J., concur.

87 Cal.App.2d 427

ROSA v. ROSA.
Civ. 7487.

District Court of Appeal, Third District, California.
Sept. 2, 1948.

1. Appeal and error 🔑931(1)

In reviewing evidence on appeal, District Court of Appeal will resolve all conflicts and all reasonable inferences in favor of findings of trial court.

2. Appeal and error 🔑1008(1)
Deeds 🔑196(2)

Generally, lack of independent advice or consideration, advanced age, and both physical and mental condition of grantor, coupled with confidential relationship between him and his grantee, is sufficient to raise a presumption of fraud, thereby casting burden of refutation upon grantee; but presence of one or more of the same or similar elements does not conclusively establish the presumption, and each case must be determined on its own facts and circumstances, weight of which is exclusively for trial court.

3. Appeal and error 🔑1012(1)

Weight and sufficiency of evidence, if substantial, is exclusively within province of trial court.

4. Appeal and error 🔑1008(1)

In action by father to set aside deed executed and delivered to son, whether son falsely, fraudulently, and without consideration procured signature of father to document which son represented to be an application for refinancing of father's property, or whether there was a consideration for transfer in nature of love and affection and moneys advanced to and services performed for father by son over a period of years, was for trial court.

◆

Appeal from Superior Court, Sacramento County; B. F. Van Dyke, Judge.

Action by Manuel G. Rosa against Manuel G. Rosa, Jr., to set aside a deed. From the judgment, plaintiff appeals.

Affirmed.

McAllister & Johnson and Walter C. Frame, all of Sacramento, for appellant.

Murle C. Shreck, of Sacramento, for respondent.

PEEK, Justice.

This is an action by plaintiff, the father of defendant, to set aside a deed previously executed by the father and delivered to the son. We find no merit in the appeal of plaintiff from the judgment of the trial court decreeing defendant to be the owner of the ranch property involved subject to a life estate in the plaintiff.

By his complaint plaintiff alleged that he was an elderly man of seventy-four years and could neither read nor write the English language; that between himself and the defendant, his only son, there existed the highest relationship of trust and confidence; that the defendant falsely, fraudulently and without consideration procured the signature of plaintiff to a document which defendant purported to be an application for the refinancing of plaintiff's property, and that it was not until more than one year thereafter that he discovered the document was in fact a deed to the farm. The answer of defendant denied the alleged fraud and misrepresentation, specifically admitted the confidential relationship and affirmatively alleged that the consideration for the transfer was the love and affection which plaintiff bore to defendant and the monies advanced to and the services performed for plaintiff by defendant over a period of years. On the issue so joined the cause proceeded to trial, resulting in the judgment as mentioned.

[1] In view of appellant's one contention which is directed solely at what is alleged to be the sufficiency of the evidence to "rebut the presumption that the transfer of a father's entire property to his son was fraudulently consummated" we have carefully examined the entire record. In so doing we have resolved all conflicts and all reasonable inferences, as we must, in favor of the findings of the trial court. Crawford v. Southern Pac. Co., 3 Cal.2d 427, 45 P.2d 183; Estate of Bristol, 23 Cal.2d 221, 143 P.2d 689.

So reviewed the evidence may be summarized as follows:

Respondent was born on the farm which was acquired by plaintiff as his separate property in the year 1903. In 1930 plaintiff and respondent's mother separated, the plaintiff moving to a garage and later to a small cabin situated on the premises. The mother, who was then an invalid, and defendant, continued to reside in the main ranch house. At approximately the same time defendant married and at the request of plaintiff the defendant continued to make his home on the ranch. From 1928 to 1939 defendant, in addition to paying all of the operating expenses of the dairy ranch operated by plaintiff, including the purchase of dairy stock and general ranch equipment, paid compensation and automobile insurance for plaintiff, remodeled the ranch home, installed a water pressure system, paid interest on a Federal Loan Bank loan on the ranch, and the personal obligations of plaintiff including doctor bills. Defendant also supported his mother and assisted plaintiff in paying to her the monthly sum agreed upon at the time of their separation for her support. He also paid the expenses of her last illness and burial. During all of this time plaintiff and defendant were on intimate terms and on several occasions plaintiff told defendant that the property would be his some day. Similar statements were made by plaintiff to mutual acquaintances and neighbors as well as additional statements to them in which he said he was getting old, that he had only one son and was turning all of his property over to him. The public accountant and notary public in whose office the deed was executed testified that plaintiff stated to him that he knew what the document was and that he wanted the defendant to have it. The witness further testified that pursuant to the transfer of the property he prepared a Federal Gift Tax Return which was signed by both parties. At the time of the transfer the property was valued at $14,500, subject to a $5000 encumbrance, which the defendant was to pay.

[2] As stated in the memorandum opinion of the trial court it is a familiar rule that generally lack of independent advice or consideration, the advanced age and both the physical and mental condition of the grantor, coupled wtih a confidential relationship between him and his grantee, is sufficient to raise a presumption of fraud thereby casting the burden of refutation upon the grantee. But that is not to say that the presence of one or more of the same or similar elements conclusively establishes the presumption. Each case must be determined on its own facts and circumstances, the weight of which is exclusively for the trial court.

[3, 4] It is appellant's contention that the defendant has not sustained such burden, and in support thereof he relies upon portions of the record arguing that such evidence was not sufficient. It was no more incumbent upon the trial court to believe the testimony of plaintiff and his witnesses than it was to believe the testimony of defendant and his witnesses. In either case the weight and sufficiency of the evidence if substantial, and we conclude it was, was exclusively within the province of the trial court. Azevedo v. Leavitt, 76 Cal.App.2d 321, 172 P.2d 704.

The judgment is affirmed.

ADAMS, P. J., and THOMPSON, J., concur.

87 Cal.App.2d 460

DE PIER et ux. v. MADDOX et al.

Civ. 3925.

District Court of Appeal, Fourth District, California.

Sept. 7, 1948.

1. Automobiles 🔑235

The statute authorizing service of process on director of motor vehicles when a "non-resident" is sued for damages arising out of an automobile accident within the state uses quoted word as meaning a person who was not a resident of state at time accident occurred. Vehicle Code, § 404.

See Words and Phrases, Permanent Edition, for all other definitions of "Nonresident".

2. Automobiles 🔑235

Evidence sustained finding that member of Marine Corps who almost three years before accident had come to California where he was married and thereafter maintained a residence, remaining in California for almost five years, was a resident of state at time of automobile accident and was not subject to service of summons after leaving the state in the manner provided by statute for service on a nonresident motorist. Vehicle Code, § 404.

3. Appeal and error 🔑931(1)

On appeal from order made on affidavits involving decision of a question of fact, appellate court is bound by same rule that controls where oral testimony is presented for review and where affidavits are in conflict, those in favor of prevailing party must be taken as true and the facts stated therein must be considered established.

4. Appeal and error 🔑95

Order quashing service of summons made and filed more than three years after commencement of action for injuries sustained in automobile collision was appealable, since under statute, providing for dismissal of action unless summons shall be served and return thereon made within three years after commencement of action, such order effectively terminated the proceedings. Code Civ.Proc. § 581a.

Appeal from Superior Court, San Diego County; Arthur L. Mundo, Judge.

Action by Edward De Pier and wife against Howard W. Maddox and others for injuries sustained in automobile collision. From an order quashing service of summons on named defendant, plaintiffs appeal and they also petition for a writ of ceriorari to review such order.

Writ of certiorari denied and order affirmed.

A. T. Procopio, of San Diego, for appellants.

Monroe & McInnis, of San Diego, for respondents.

MUSSELL, Justice.

This is an appeal by plaintiffs from an order quashing service of summons on defendant Howard W. Maddox.

Plaintiffs filed this action for damages for personal injuries alleged to have been sustained in an automobile accident which occurred on February 5th, 1944. Service of summons upon the defendant and respondent, Howard W. Maddox, owner and operator of one of the automobiles involved was made in the manner provided by section 404 of the Vehicle Code for service of process on non-residents. At the time of the service of summons respondent was living in the State of Alabama and was a resident of that State. After such service of process, respondent made a special appearance in the action for the sole purpose of filing his motion to quash the purported service of summons. The motion was based upon the ground that respondent was a resident of the State of California at the time of the happening of the accident and that the court had not obtained jurisdiction over him by the attempted nonresident service of process. The motion was heard upon affidavits and other documents referred to therein.

From these affidavits it appears that respondent was a member of the United

States Marine Corps and came to San Diego, California, from the State of Alabama on July 3, 1941, being stationed at the Marine Corps Base in San Diego, where he remained, with the exception of overseas duty from which he returned to San Diego in November, 1943; that he was married in San Diego on January 9, 1944 and that it was stated in the marriage license, procured in San Diego, that he was a resident of this State at that time; that respondent and his wife made their home and residence at 435 Bancroft Street, San Diego; that respondent received his mail at the Bancroft Street address and continued to make it his home and residence until his return from overseas duty in 1946; that on January 10, 1944, respondent purchased the automobile which was later involved in this action, from dealers in San Diego, and forwarded to the Motor Vehicle Department at Sacramento the certificate of ownership in which his residence was stated as 435 Bancroft Street, San Diego, California; that the accident giving rise to this action occurred on the 5th day of February, 1944, while respondent was going from his work to his residence on Bancroft Street; that on March 30th, 1944, respondent sold this automobile, giving his address as 435 Bancroft Street, San Diego; that from the time respondent commenced to reside at the Bancroft Street address he had directed his mail to that street number, had forwarded all allotment checks to his wife at that place, and maintained this residence as his only home; that after the accident in 1944, he was again sent overseas and returned to San Diego in 1946; that on April 10th, 1946, he left San Diego for Alabama where he was residing when served with summons. It further appears from respondent's affidavit that at the time of the accident he had no other residence than the South Bancroft Street address where he was then residing with his wife.

The affidavits of John L. King, filed by appellants, stated that he contacted the mother of respondent in the State of Alabama and was informed by her that respondent, prior to his being inducted into the Marine Corps, lived with her and her husband in Alabama and that it was respondent's intention, on being released from service, to return to Alabama and resume his residence with his mother and father.

Appellants contend that the trail court erred in determining that respondent Maddox was at the time of the accident a resident of the State of California, and the case of Briggs v. Superior Court, 81 Cal.App.2d 240, 183 P.2d 758, is cited to support this contention.

In the Briggs case a writ of prohibition was sought to stay proceedings after a motion to quash service of process under section 404 of the Vehicle Code had been denied. The writ was denied on the ground that the defendant was a non-resident at the time of the accident. The sole evidence consisted of affidavits of petitioners, the substance of which were contradictory, the acts of the parties as shown in the affidavits contradicted their statements as to their intentions. The petitioners came to California because of petitioner-husband's Navy orders. They were in California only seven days when the accident occurred and altogether they were here only one month and twelve days. The car involved in the action was never registered in this State. The court found that petitioners intended to remain in California only so long as the Navy required them to do so and that intention to remain in California was most indefinite.

In the instant case the statement of respondent of his intention to be a resident of California and that he had no other residence than California at the time of the accident, is amply supported by his acts and conduct. From 1941 to 1946 his residence was in San Diego, he was married there and was within the State until November of 1944. The application for license, the automobile registration, and other documents all contain statements indicating that respondent was in fact a resident of California at the time of the accident. There is no testimony in the record, other than the affidavit of John L. King, which the court properly designated as a conclusion under the authority of Johnson v. Benton, 73 Cal.App. 565, 569, 239 P. 60, indicating that respondent was a resident of the State of Alabama on the date of the accident.

[1] As used in section 404 of the Vehicle Code, a non-resident means a person who is not a resident of this State at the time the accident or collision occurs.

In Briggs v. Superior Court, supra, it was stated that the purpose of the act is to provide a method whereby persons from other States, who while temporarily within the State of California, become involved in litigation as a result of their use of a motor vehicle on the highways of the State, may be sued in this State and, although they have left the State, may be served with process by substituted service.

[2] The evidence here presented supports the contention that respondent was a resident of the State of California at the time of the accident and for some time thereafter and that his stay in this State cannot be classified as merely temporary.

Appellants argue there is no binding force in the trial court's decision. They state that no oral testimony was introduced; that the matter was heard on affidavits and documents attached thereto and that there are no findings of fact which are binding on appeal.

[3] With this contention we cannot agree. This is an appeal from an order granting a motion and motions are usually made and determined on affidavits alone. In the consideration of an appeal from an order made upon affidavits involving the decision of a question of fact, an appellate court is bound by the same rule that controls where oral testimony is presented for review. Where there is a conflict in the affidavits, those in favor of the prevailing party must be taken as true, and the facts stated therein must be considered established. Fuller v. Lindenbaum, 29 Cal.App.2d 227, 230, 84 P.2d 155.

Appellants have filed herein a petition for a writ of certiorari, and a copy of the opening brief on appeal is attached to the petition. The petitioners express some doubt as to whether the order quashing the service of summons is appealable and they therefore have filed the petition for the writ.

The order quashing service of summons was made and filed on the 22nd day of December, 1947, more than three years after the commencement of the present action. Under the provisions of section 581a of the Code of Civil Procedure, unless summons shall be served and return thereon made within three years after the commencement of the action no further proceedings may be had in the action and on motion of any party interested, or on the court's own motion the action must be dismissed. Appellants concede that the order of the trial court effectively terminated the proceedings herein.

Our attention has been directed to the case of Fuller v. Lindenbaum, supra, where an appeal was taken from an order quashing service of summons which was made pursuant to section 404 of the California Vehicle Code. However, the question of the right of appeal from the order was not directly raised in that case.

In Howe v. Key System Transit Co., 198 Cal. 525, 531, 246 P. 39, 41, we find the following language:

> "The theory upon which the decisions sustain the right of appeal from orders, where that right does not rest upon the express provisions of section 963 (Code of Civil Procedure), is that the order is in effect a final judgment against a party in a collateral proceeding growing out of the action—is so far independent of the suit itself as to be substantially a final decree for the purpose of an appeal, although there has been no final decree in the suit."

[4] We conclude the appeal was properly taken from the order, for the reasons stated.

Order affirmed. Writ denied.

BARNARD, P. J., and GRIFFIN, J., concur.

87 Cal.App.2d 337

PEOPLE v. SILVER.

Cr. 2500.

District Court of Appeal, First District, Division 2, California.

Sept. 1, 1948.

Hearing Denied Sept. 30, 1948.

1. Criminal law 🔑553

In criminal case, the testimony of one witness, if believed by jury, is sufficient to prove a custom or usage. Pen.Code, § 1102.

2. Bribery 🔑11

Evidence warranted conviction of investigator of State Board of Architectural Examiners for soliciting and receiving bribe for giving out questions to be asked in examination for architects' licenses on ground that secrecy of examination questions was required by practice of board, that investigator knew of such practice, and that investigator's duties required him to keep questions secret. Business and Professions Code, §§ 5510, 5514–5516, 5519, 5522, 5525, 5550–5556.

3. Criminal law 🔑558

The uncontradicted testimony of a witness to a particular fact may not be disregarded but should be accepted as proof of the fact.

4. Criminal law 🔑1172(1)

In prosecution against investigator of State Board of Architectural Examiners for soliciting and receiving bribe for giving out questions to be asked in examination for architects' licenses, instruction that law implied that examination questions were to be kept secret was not reversible error in view of uncontradicted evidence establishing practice of board to maintain secrecy and integrity of examination questions. Business and Professions Code, §§ 5550–5556.

5. Criminal law 🔑1172(4)

In action against investigator of State Board of Architectural Examiners for soliciting and receiving bribe for giving out questions to be asked in examination for architects' licenses, conflicting instructions that law impliedly imposed duty to keep examination questions secret and that it was sufficient to establish investigator had legal duty not to disclose questions if prosecution proved board's practice known to defendant not to disclose questions in advance of examination were not prejudicial, where jury could have found only one way as to existence of practice. Business and Professions Code, §§ 5550–5556.

6. Criminal law 🔑304(2)

It is common knowledge that practice exists not to disclose examination questions in advance of examination.

7. Criminal law 🔑1169(1)

In prosecution against investigator of State Board of Architectural Examiners for soliciting and receiving bribe for giving out questions to be asked in examination for architects' licenses, admission of the Personnel Board's designation of duties of investigator, if error, was not prejudicial, where designation went no farther than statute defining investigator's duties. Business and Professions Code, § 5525.

8. Criminal law 🔑784(7)

In a criminal case wherein circumstantial evidence is received, the court should unequivocally declare to jury that to justify conviction, facts or circumstances must not only be consistent with theory of guilt, but must be inconsistent with any other rational conclusion.

9. Criminal law 🔑829(15)

The refusal to give requested circumstantial evidence instruction was not error where the instruction given fully and fairly informed the jury on the subject of circumstantial evidence and the jury was elsewhere given the usual instructions on presumption of innocence and reasonable doubt.

◆

Appeal from Superior Court, San Francisco County; Stanley Murray, Judge.

Benjamin G. Silver was convicted for soliciting and receiving a bribe. From the judgment of conviction and from the order denying a new trial, he appeals.

Judgment and order affirmed.

Leo Friedman, of San Francisco, for appellant.

Fred N. Howser, Atty. Gen., David K. Lener, Dep. Atty. Gen., and Edmund G. Brown, Dist. Atty., and Charles Peery, Asst. Dist. Atty., both of San Francisco, for respondent.

GOODELL, Justice.

On July 14, 1944 an indictment was presented accusing the appellant of soliciting and receiving a $200. bribe for giving out the questions to be asked in an examination for architects' licenses. A motion to set aside the indictment was made and denied, whereupon a plea of not guilty was entered. At the ensuing trial the jury disagreed. Before the second trial opened appellant again moved, before a different Judge, to dismiss and set aside the indictment, which motion was granted. The People appealed and this Court reversed the order. People v. Silver, 75 Cal.App.2d 1, 170 P.2d 80. A petition for hearing by the Supreme Court after the decision of this Court, was denied. At the second trial which then ensued, the jury found the appellant guilty. The present appeal is from the judgment and from the order denying a new trial.

The indictment alleges that the bribe was received in San Francisco on June 16, 1944. The examination was set for June 26, 1944.

Appellant had been with the State Board of Architectural Examiners from 1934 to 1939; he had been in the army for a period between 1939 and 1943, and in the latter part of 1943 had been re-employed by the Board. His position was that of investigator. One Robert Anshen had studied architecture and held two degrees in that subject, but had never been licensed in California. He held a responsible position in a large wartime housing project in Vallejo, and in February 1944 he and appellant first met. Anshen and one Allen had been associated in business and had designed and built a home in Woodside, about which they had written an article published in a national architectural magazine over the names "Anshen & Allen, Architects". Appellant's first interview with Anshen had to do with this article, as it gave the impression that Anshen was a practicing architect whereas he had not been licensed in California. According to Anshen, after a discussion of that matter, (during which Anshen disclaimed having signed the article as "architect" and promised to request a correction), appellant dismissed the matter by saying he was only "kidding". According to appellant, however, there was no such amicable disposition of the matter, but it remained an open and active subject committed to his investigation, and he expected Anshen to clear it up. The bearing of this subject—remote as it may seem from the important question of a sale of examination questions—is of importance since appellant claims that when he received the envelope containing $200 in currency he understood it to contain the correspondence which Anshen had promised to send him touching the magazine article, and nothing else.

After the February meeting there was no communication between them until June 14. At the February meeting they had incidentally discussed the June 26 examination, in which Anshen had indicated his interest. In May Anshen filed his application to take it. In the late afternoon of Wednesday, June 14, appellant, en route from Sacramento to San Francisco, called at the project office, and as Anshen was not there, he called at Anshen's home in Vallejo. His visit was unexpected and unannounced. Anshen, who was at home, invited him in, and they had a few drinks. He was asked to stay to dinner and finally accepted. There is a sharp conflict as to some of the incidents of that visit. Anshen testified that appellant indicated he knew the application had been filed, and questioned why Anshen had communicated with the Board instead of with himself. Anshen testified, also, that appellant told him "They have asked me to proctor the examination in Los Angeles, and I don't know whether I will or not, and it would be so much easier for you if you were to take it there" to which Anshen replied that he had arranged to take it in Berkeley. Anshen also testified that appellant told him that he sat with the Board during oral examinations and that he volunteered the information that the principal problem of the examination would be the design of a veterans' memorial clubhouse. Also, that appellant suggested that Anshen might look over former examination questions, which was permissible, and that he had those given in 1936, 1939, 1940, 1942 and 1943, which he got from his car and brought in and turned over to Anshen, who inquired whether he could make notes from them and was told, "I am not looking anyway; I am reading the newspaper," or words to that effect. Anshen spent about three quarters of an hour looking over these old questions. These questions, given at prior examinations, were permitted by the Board to be seen by candidates. They are *not* the questions upon which this prosecution was based, and which are about to be discussed.

According to Anshen, he saw appellant out to his car where, in the course of the parting conversation, appellant said "Some people say I can be bought and sold, but of course I can't" and added "If you want the examination papers, let me know," to which Anshen replied, "Where will you be?" and appellant responded, "How much are they worth to you?" After further conversation appellant said "Name any figure at all" and Anshen said "$150.00" to which appellant replied, "Oh, come, come. They are worth more than that to you." Anshen then said "Well, you name any figure" and appellant said, "What about $500.00?" to which Anshen assented. All this is flatly denied by appellant, who testified that the visit of June 14 was for the purpose of following up his investigation of the magazine article, as Anshen had not sent, as promised, the correspondence looking to the correction. Appellant admitted that during the evening they discussed the coming examination and that he told Anshen he had been asked to proctor the Los Angeles examination, but said he had declined, and he denied saying it would be easier for Anshen to take the examination in Los Angeles rather than Berkeley. Appellant admitted, also, that he had brought in the old examination questions and had permitted Anshen to look over them and make notes from them, but said he told him that the Board did not permit anyone to copy them. Appellant denied flatly and definitely everything testified to by Anshen as to the parting conversation dealing with claimed negotiations as to price and the solicitation of a bribe.

The next day Anshen telephoned to his attorney, later consulted an architect friend of his, and thereafter got in touch with the Attorney General's office where he gave his version of what had occurred. State agents were assigned to the case and Anshen lent his cooperation. At a dinner on June 16 in the grill room of a San Francisco hotel, at which Anshen was the host and appellant the guest, appellant inquired, according to Anshen, where the papers or the examination papers (he did not remember which) should be sent by him and when told that Anshen's mail was opened at his office, appellant said "How about sending it to the General Delivery?" This being discarded, appellant asked if Anshen's wife opened his mail and when he said "no", appellant said "Well, I might as well send it to your house then" and that was agreed to. "At that point", said Anshen, "I took the blank envelope with the money in it and put it over on his side of the table". The money referred to meant the ten $20. bills which had been supplied by the agents for that purpose, the serial numbers of which had been recorded. Appellant then wrote something on a slip of paper. When they parted after dinner appellant was arrested by the agents and the envelope containing the ten $20. bills was taken from his person. A later search disclosed in his pocket the slip of paper with Anshen's Vallejo home address written thereon by appellant. The understanding, according to Anshen, was that the remaining $300. was to be paid within three months.

The indictment charged that while acting as an investigator for the Board appellant received the bribe with the understanding that his action "upon a matter then pending and which might be brought before" him, should be influenced thereby, in that appellant "was required to assist in the handling and assembling of the examination questions and problems chosen" by the Board to be asked of applicants for licenses.

In the first appeal (75 Cal.App.2d 1 page 5, 170 P.2d 80, page 82) we held that the indictment stated a public offense and said: "We are satisfied that it will be sufficient to establish defendant's duty not to disclose the questions if the people prove a practice of the state board of architectural examiners not to disclose the examination questions in advance of the examination and that such practice was known by defendant. Such practice being proved the absence of statute or formal rule on the subject would be immaterial. It would be the legal duty of defendant not to violate the established practice known to him. * * *"

Appellant claims that there was no evidence establishing any one of the following essential elements of the offense:

"(1) That the examination questions were to be kept secret and that such secrecy was required by either a rule, regulation or custom of the Board,

"(2) that Silver knew of such rule, regulation or custom, and

"(3) that it was part of Silver's duties to keep such questions secret."

This calls for an inquiry into appellant's duties and responsibilities.

The Board consists of five members appointed by the Governor (Bus. & Prof.Code sec. 5510) for four year terms (Id. 5515) who serve without compensation (Id. 5516). The Board elects its secretary, who holds office for two years (Id. 5519). The Board is required to meet quarterly (Id. 5522). Section 5525 provides that "* * * The board may employ inspectors, special agents, investigators, and such clerical assistants as it may deem necessary to carry into effect the provisions of this chapter" which provisions include article 4 (Id. 5550–5556) *dealing with examinations and the issuance of certificates.*

Jeanette Dolsberry at the time of the trial was secretary of the Board and had held that position for almost 22 years. She testified that she managed the office, expedited the routine work under the Board's supervision and direction and *had complete charge of the examinations* and the registering of the questions and typing them; picking the dates for the examinations; *getting proctors to assist in them,* and that *she managed the examinations,* and usually proctored one of them.

She told how examination questions were prepared, being first assembled by an assistant examiner selected by the Board, then submitted through the secretary to the five members, then sent back to the assistant examiner with suggested changes, and finally mimeographed.

The assistant examiner selected for the June examination was a professor of architecture of the University of California and the questions for that examination were considered by the Board at its April meeting. The secretary testified that she had had appellant proof-read these questions with her *and nobody else did any proof-reading.* There were 60 applicants, and about 70 copies were mimeographed by two girl employees.

The examinations were to be held in Berkeley and in Los Angeles. In addition to appellant's statement to Anshen that he had been asked by Mrs. Dolsberry to proctor the Los Angeles examination, she testified: "Q. Who was to proctor the examination to be given in Los Angeles? A. I had asked Mr. Silver if he could. Q. What reply did he make? A. He said, yes, he would." When asked as to a proctor's functions she said: "There has to be someone in charge, something of a teacher. I call the classes and dismiss them, and generally supervise them; no copying or talking. Everything is run according to regulation."

Mrs. Dolsberry's testimony was sufficient to prove the allegation that appellant "was required to assist in the handling and assembling of the examination questions and problems", for he was the only person who assisted her in proof-reading the questions, and her testimony that he had been requested to proctor the Los Angeles examination was proof to the same point, for as such he would have sole responsibility for the handling of the questions at the examination itself. In both tasks *he would be carrying into effect the provisions of the chapter dealing with examinations and the issuance of certificates,*— a duty prescribed by the statute itself (secs. 5525; 5550–

5556, supra) and not laid down by any mere rule or regulation.

With respect to whether it was the practice of the Board to require secrecy respecting the questions to be given, Mrs. Dolsberry was interrogated at some length. It is not necessary to quote all this testimony, but the following is typical:

"Q. Is it your understanding that any person can disclose these examination questions in advance? A. No, it is not my understanding." She admitted that she never had any instructions on the subject; she assumed that secrecy was called for. In the following colloquy, in which the court took part, she made it clear that *her* practice was *the Board's practice,* for she was in charge of the questions and of the examinations themselves.

"Q. Upon what do you base your testimony here they should be kept secret? A. The examination that should be given should be secret * * * My practice was not to disclose any questions.

"The Court: Q. But you don't know what the general practice was in the office? A. Your Honor, I was the only one in—

"Q. Answer the question: Do you or do you not know what the practice in the office was? A. My practice was not to disclose them.

"Q. You don't know anything about the general practice in the office? A. I was working for the Board. I had charge of them.

"Q. Answer my question. Is your answer 'Yes' or 'No'? A. I don't know how to answer it. You get me so confused, your Honor, I don't know what to say * * * My rule was not to disclose the questions * * * I would say my practice, because I represent the Board.

"Q. The Board's practice was not to disclose the examinations? A. Yes * * *"

On cross-examination appellant's counsel asked her "You just answered in reply to the Judge's query that it is the practice of the Board that these questions should not be made public. Was any mention made of that?" to which she responded: "As I say, there never was any conversation one way or the other about it. I had charge of it and kept the questions secret."

Her testimony that she "had charge of it and kept the questions secret" was given before appellant took the stand. He had the opportunity then to dispute that she had charge, and that there existed the practice of non-disclosure, but made no attempt to do so. In our earlier opinion (75 Cal.App.2d 1, 5, 170 P.2d 80) we said, "We agree that proof of a practice permitting the disclosure of the questions in advance of the examination would be a defense to the charge." Mrs. Dolsberry's uncontradicted testimony as to her authority and her practice was sufficient basis for a finding by the jury that secrecy was accepted and prevailing rule. Her testimony is all the more convincing since she was a reluctant witness and had written the District Attorney that she felt appellant was being persecuted.

It is argued that the foregoing testimony is but a summary of the secretary's own opinions and conclusions and shows no official *Board action.* There is other testimony, however, which goes far beyond her own conception of the duty of secrecy and the practice relative thereto and which reaches all the way into the Board's own functioning. Appellant was arrested on June 16, just ten days before the examination. There is nothing in the record to show that anybody other than the secretary then had possession of any copies of the questions, or that any had been released or were at large, but it does appear that appellant had proof-read them. The Board's action in changing the entire examination after appellant's arrest indicated that secrecy was the prevailing rule, and it was utterly inconsistent with the idea that the questions could be had or read in advance of the examination. This testimony is as follows:

"Q. Mrs. Dolsberry, had you received word of the accusation made against Benjamin Silver prior to the time you received that letter? A. Yes, we had.

"Q. Had any steps been taken by the State Board of Architectural Examiners with reference to the examination that was to be given on June 26th? A. Yes, we had to prepare another set of questions.

"Q. Were all of the questions given in the examination that year changed from those which had been proof read by you and the defendant Silver? A. Yes, we made a complete new set * * *

"Q. After word of this case was received they changed the entire examination, is that correct? A. Yes."

The point need hardly be labored that with a five-man Board, at least two of them in the southern part of the state, and at least two in the northern part (sec. 5514) and the assistant examiner in Berkeley, it was no small task to completely rewrite the questions for a three or four-day examination in the few days between the 16th and 26th of June. Still this was done and it must have been because of fear of a leak. This could mean but one thing—that the Board's established practice was secrecy. To say the very least, it was in itself sufficient basis for a finding that such was the established rule.

This brings us to the question of appellant's knowledge of the practice. He had been around that office for five years, from 1934 to 1939 before the war, and for some months after his return, during all of which time Mrs. Dolsberry had been the active, full-time secretary, as its executive head. That in itself was sufficient basis for a finding of his knowledge of the practice. But, beyond that, his own words and conduct indicate that he knew it. If, as now contended, there was no such rule, *or appellant knew of no such rule,* it is difficult to see why he was so careful to inquire (as Anshen testified) whether mail addressed to Anshen was opened by others. In other words, if the questions were open to preview by any candidate as a matter of *right* why this fear that a third person might see them? The jurors could have asked themselves these questions and could have drawn their own inferences.

Appellant makes a serious attack on the secretary's testimony, and claims that his repeated objections to it should have been sustained. His complaint that "No regulation, resolution or order of the Board, relating to the manner of conducting the examinations, was offered in evidence" is answered by what was said on the first appeal (75 Cal.App.2d 1, 5, 170 P.2d 80): "* * * the absence of statute or formal rule on the subject would be immaterial. It would be the legal duty of defendant not to violate the established practice known to him." Secondly, a resolution or order elucidating the obvious by prohibiting a preview of examination questions would be almost as ridiculous as one prohibiting a disclosure of model answers. Appellant's complaint that the only evidence as to the manner of conducting the examinations was given by the secretary, "a civil service employee", and that "No member of the Board * * * was called as a witness", is answered by the fact that this civil service employee, in almost 22 years of continuous, every-day, service, conceivably could have handled a score of examinations, while Board members come and go every four years and meet as a rule but every three months. Obviously no Board member was as well qualified as she to testify as to the continuous practice.

[1] Next, it is claimed that there was no direct competent evidence establishing either a rule or a custom to keep the questions secret but "The matter was left entirely to conjecture." The answer to this is that Mrs. Dolsberry spoke, not from hearsay or common repute, but out of a wealth of actual experience of almost 22 years without a break or interruption either in her service or in the practice about which she testified. Moreover, documentary evidence is not required in such cases, nor is corroboration, for "the testimony of one witness, if believed by the jury is sufficient to prove a custom or usage" McComb v. Atchison T. & S. F. R. Co., 110 Cal.App. 303, 306, 294 P. 81, 83. That this happens to be a criminal case makes no difference in the rule of evidence (Pen.Code, sec. 1102). As we have already pointed out, the secretary's testimony stands uncontradicted. In discussing the rule that one witness is sufficient to prove the existence of a custom or usage Wigmore (Evidence, Vol. VII, 3rd ed. sec. 2053) says "Another [answer] is that, if such a possibility of contradiction is to be feared, it is amply provided for in

the liberty of the opponent to produce dissentient witnesses and the fair certainty that he will be prepared to do so." In deciding the first appeal we said: "We agree that proof of a practice permitting the disclosure of the questions in advance of the examination would be a defense to the charge" and in the same opinion we discussed the necessity for proof of defendant's knowledge of the practice. Despite the suggestive character of these utterances the appellant, who testified at length on other subjects, made no attempt to deny either the practice of non-disclosure or his own knowledge of such practice—the two cardinal points urged on this appeal. He had been with the Board for well over five years in what was unquestionably a position of trust and confidence—so much so that he had been asked to proctor the Los Angeles examination—and he surely knew what was the practice with respect to the very questions which he would have to give as proctor. If a preview was permitted, as now contended, he could have so testified, which would have put up to the jury a disputed issue of fact. As it stands, the case went to the jury with no contradiction whatever as to the Board's practice.

[2] What has been said answers appellant's contention that the evidence was insufficient to support the verdict on this branch of the case.

The appellant contends that "the court erred in instructing the jury that the law implied that the examination questions were to be kept secret"; that such instruction invaded the province of the jury; that it deprived appellant of a jury trial by withdrawing from the jury's consideration a *controverted* question of fact.

The instruction reads: "You are instructed that one of the principal functions of the * * * Board * * * is the fair and impartial examination of persons seeking to become licensed as architects * * * The law impliedly imposes a duty on all officers and employees of the * * * Board * * * to maintain the secrecy and integrity of all examination questions to be used in the future in examinations to be held by the Board."

[3] In the first place as we have seen it did not withdraw a *controverted* question of fact. The secretary's testimony was uncontradicted, unimpeached, and certainly not inherently improbable. A practice contrary to that to which she testified would have been so "inherently improbable" as to reflect on the intelligence of the Board. If, then, our conclusion is correct that her testimony was competent to prove the practice, the case comes within the familiar rule "that the uncontradicted testimony of a witness to a particular fact may not be disregarded, but should be accepted as proof of the fact" (10 Cal.Jur. 1143) recently restated in Gomez v. Cecena, 15 Cal.2d 363, 366, 101 P.2d 477, 478, as follows: "* * * it has frequently been said that testimony which is not inherently improbable and is not impeached or contradicted by other evidence should be accepted as true by the trier of fact."

Appellant's argument that "Instances many times arise in the conduct of examinations where the very questions are divulged in advance in order that research may be made by one taking the examination" is disposed of by the absence from this record of anything of that kind. The Board had given out in advance the "titles of the examinations that would take place the various days" or "the particular branches of architecture that would be examined on during the various days of the examination". Anshen had obtained that information *from the Board itself by inquiry*. The Board had gone that far, but no further.

[4] On this record the court might well have instructed the jury (following the pattern of People v. Fowler, 178 Cal. 657, 174 P. 892, a murder case) as follows: "It is not denied that there was an established practice of the Board 'to maintain the secrecy and integrity of all examination questions to be used in the future'". In upholding such an instruction the court in the Fowler case said (178 Cal. pages 667, 668, 174 P. page 896): "There was no controversy or dispute at the trial over these facts [the facts of that case]. The court was authorized to state the testimony, if it was uncontradicted, and declare

the law, on any subject involved in the case. Const. art. 6, § 19". That being so, it could not have been error to simply tell the jury that "The law impliedly imposes a duty" etc.

[5, 6] There may have been a conflict between this instruction and the one which immediately followed it, which was couched in the language of our former opinion, reading as follows: "* * * it is sufficient for the prosecution to establish that it was the Defendant's duty not to disclose the questions to be given in the architectural examination if the People prove a practice of the * * * Board * * * not to disclose the examination questions in advance of the examination, and that such practice was known by the Defendant. Such practice being proved, the absence of a statute or formal rule on the subject would be immaterial. It would be the legal duty of the Defendant not to violate the established practice known to him." Respondent concedes that such conflict exists. However, the error, if any, in giving these conflicting instructions could not have been prejudicial in this case in view of the fact that the jury could have found only one way as to the existence of the practice. Moreover, the instruction which told the jury that "The law impliedly imposes a duty" of secrecy with respect to examination questions told them no more than they must have known from their earliest school experiences. It was a matter of common knowledge.

[7] Appellant contends that it was error to admit in evidence the Personnel Board's designation of duties of architectural investigators because appellant held an "exempt" position not within that Board's jurisdiction. This document contains the following: "Definition: Under direction, to do investigating and related work in connection with the prosecution of violators of State laws regulating the practice of architecture; *and to do other work as required.*" (Emphasis added.) It then enumerates "Typical Tasks", within which examinations are not included. The court was in doubt as to its admissibility, saying "I can't see * * * why that has anything to do in connection with this particular charge * * *" Had the appellant's objection been sustained, the prosecution's case would not have suffered in the least. At the same time its admission could not have harmed the defense, for the reason that it went no further than the statute itself which defines an investigator's duties. Section 5525, Bus. & Prof. Code provides for the appointment of investigators, "to carry into effect the provisions of this chapter." The subject of the chapter is "Architecture", and *article 4 thereof deals with "Issuance of Certificates" to practice, after the passing of an examination.* The statutory language "to carry into effect the provisions of this chapter" makes an investigator's duties coextensive with everything embraced within the chapter. The Personnel Board's direction that an investigator shall "do other work as required" is substantially the same as the statutory requirement, but not quite as definite. The admission of this document, even if erroneous, could not have been prejudicial because of the overriding statutory requirement.

What has been just said answers the contention that the instruction embracing the same subject was erroneous.

[8] Appellant claims that the court erred in its instruction on circumstantial evidence. That instruction concluded as follows: "In cases of circumstantial evidence, in order to justify a conviction, facts should be proved which must not only be entirely consistent with the guilt of the Defendant, but must be inconsistent with any other rational conclusion." Appellant's criticism is addressed only to that language. He complains that "it does not contain the necessary element that 'where circumstantial evidence is relied upon it must be irreconcilable with the theory or hypothesis of innocence in order to furnish a basis for conviction'". The language as given is approved substantially in People v. Bender, 27 Cal.2d 164 where, at page 175, 163 P.2d 8, at page 15, after quoting from 8 Cal.Jur. p. 371, the court says: "It cannot be too strongly emphasized that such quoted statement enunciates a most important rule governing the use of circumstantial evidence. *In unequivocal language*

it should be declared to the jury in every criminal case wherein circumstantial evidence is received." (Emphasis added.) That part of the instruction given in the case at bar (quoted above) is *substantially the same as the model* quoted in the Bender case from 8 Cal.Jur., p. 371.

[9] There was no error in refusing defendant's requested instruction No. 19, since the instruction given fully and fairly informed the jury on the subject of circumstantial evidence and, in addition to that, the jury was elsewhere given the usual instructions on presumption of innocence and reasonable doubt.

The judgment and order appealed from are affirmed.

NOURSE, P. J. and GRIFFIN, J., pro tem., concur.

---

87 Cal.App.2d 417

BEDELL v. MASHBURN et al.

MASHBURN et al. v. BEDELL et al.

Civ. 7483.

District Court of Appeal, Third District, California.

Sept. 2, 1948.

1. Bailment ⊂⇒31(3)

In action for reasonable value of personalty delivered by plaintiffs to defendants pursuant to agreement to purchase at reasonable prices to be fixed by plaintiffs, evidence supported trial court's findings of defendants' conversion of properties and reasonable values thereof.

2. Fixtures ⊂⇒27(1)

While fixtures attached to realty pass with conveyance thereof, in absence of contrary agreement between parties, agreement by them that article attached to realty shall retain its character as personalty and become removable by owner of realty is binding on them.

3. Fixtures ⊂⇒35(6)

Where parties to contract for sale of ranch and personalty thereon agreed that water heater, left on premises when purchasers took possession thereof, should retain its character as personal property and become removable by vendors, reasonable value thereof was recoverable by vendors as damages for conversion of heater by purchasers.

4. Bailment ⊂⇒32

Persons to whom household furniture, a truck, and other personal property were delivered by owners thereof pursuant to such persons' agreement to purchase property at reasonable price to be fixed by owners, who subsequently fixed price, which buyers refused to pay, owed duty to restore property to owners' possession in condition wherein buyers received it and became liable to owners for reasonable value of use of property and such value of property converted by buyers, even if they were mere bailees thereof.

5. Bailment ⊂⇒32

One disposing of, destroying, or converting to his own use, personal property in his possession as bailee, without owner's consent, is liable to owner for reasonable value, detriment, or loss thereof, not exceeding its actual value.

6. Bailment ⊂⇒30

Where complaint demanded reasonable value of personal property, sold and delivered by plaintiffs to defendants pursuant to agreement to purchase it at reasonable price to be fixed by plaintiffs, who subsequently fixed price which defendants refused to pay without returning property, plaintiffs' bill of particulars specifically demanded rent for use of furniture and truck included in such property, defendants filed cross-complaint setting up counterclaim or offset against such items, and amended complaint specifically alleging identical claims was filed by court's leave, reasonable rental value of furniture and truck were proper issues in case. Code Civ.Proc. § 454.

7. Pleading ⊂⇒313

A "bill of particulars," filed by plaintiff, is amplification of complaint and in nature of more specific allegation of facts recited therein. Code Civ.Proc. § 454.

See Words and Phrases, Permanent Edition, for all other definitions of "Bill of Particulars".

8. Pleading 🔑243

Where rental values of household furniture and truck were definite issues under complaint and plaintiffs' bill of particulars in action for reasonable value of personal property sold and delivered by them to defendants pursuant to agreement, breached by defendants, to purchase property at reasonable prices to be fixed by plaintiffs, court did not err in allowing amendment of complaint so as to allege specifically such values. Code Civ.Proc. § 454.

9. Sales 🔑355(1)

An action based on common count for goods sold and delivered is sufficient to raise issues ordinarily incident thereto.

10. Sales 🔑1(4)

A contract for sale of goods is not necessarily void for uncertainty merely because exact selling price is not specifically mentioned.

11. Sales 🔑78

When goods are sold and delivered to and accepted by purchaser without specifying exact purchase price, there may be implied understanding between parties that reasonable price is to be paid on theory that contract has been executed. Civ.Code, § 1729(4).

12. Sales 🔑199

Title to personal property sold and delivered must be determined by parties' intention.

13. Sales 🔑168½(5)

When goods are delivered to purchaser thereof conditionally for sale or return to owner, condition fails, and no time for return of goods is specified, they may be returned within reasonable time. Civ.Code, § 1739, rule 3(2) (b).

14. Limitation of actions 🔑55(5)

An action commenced by sellers on February 26, 1946, for buyers' conversion of goods delivered to them in October, 1944, alleged by complaint and found by court to have been converted within two years before commencement of action, and shown by evidence to have been converted after failure of negotiations as to purchase price several months after delivery, was not barred by two-year statute of limitations, especially in view of statute authorizing commencement of action for taking, detaining, or injuring goods within three years. Code Civ.Proc. §§ 338, 339.

15. Limitation of actions 🔑55(5)

The statute of limitations governing action for conversion of personal property does not begin to run until time of wrongful taking of property or occurrence of illegal exercise of dominion over it. Code Civ.Proc. §§ 338, 339; Civ.Code, § 3336.

16. Frauds, statute of 🔑89(3)

The statute declaring oral contract to sell goods worth $500 or more unenforceable by action, unless buyer accepts and actually receives part of goods, is inapplicable to sellers' action for reasonable value of goods actually received and accepted by buyers as evidenced by their subsequent conversion thereof. Civ.Code, § 1624a.

◆

Appeal from Superior Court, Napa County; Joseph M. Raines, Judge.

Action by Dora M. Bedell and husband against Alice M. Mashburn and another to recover damages, the reasonable value of certain personal property delivered by plaintiffs to defendants pursuant to defendants' agreement to purchase it, and the reasonable rental value of household furniture and a truck so delivered, in which defendants filed a cross-complaint for the value of services performed and money expended for plaintiffs' benefit. From a judgment for plaintiffs and cross-defendants, defendants and cross-complainants appeal.

Modified and affirmed as modified.

Palmer & York, of Calistoga, for appellants.

Francis H. Frisch, of Napa, for respondents.

THOMPSON, Justice.

This is a suit to recover damages and the reasonable value of personal property consisting of pigs, poultry, grain, household furniture and a truck which were delivered to the defendants pursuant to an agreement to purchase the same at reasonable prices to be fixed by the owners. One month after delivery of the property the plaintiffs fixed the purchase price at $2500, which defendants refused to pay. The defendants retained possession of the property, and used the household furniture and truck for their own benefit for a period of about one year. Without the consent of plaintiffs they killed and consumed two of the pigs and sold the remaining pigs, the poultry and the grain and appropriated the proceeds of said sales to their own use. Defendants wilfully or negligently damaged some of the articles of furniture.

The original complaint contained a mere common count demanding payment of the reasonable value of personal property sold and delivered to the defendants, in the sum of $2421.50, which defendants refused to pay. No demurrer was filed. Defendants' answer denied the material allegations of the complaint. They filed a cross-complaint against Mr. and Mrs. Bedell for alleged services performed and for money expended for the benefit of plaintiffs at their special instance and request, in the aggregate amount of $1075.-25. Plaintiffs denied the allegations of the cross-complaint. Plaintiffs served upon the defendants an itemized bill of particulars pursuant to section 454 of the Code of Civil Procedure claiming the specified rental value of the furniture and truck. At the close of the trial, on motion of plaintiffs, they were permitted to and did file an amended complaint to conform to the evidence, praying for reasonable rental value of the household furniture and of the farm truck. The court adopted findings favorable to the plaintiffs on the theory that the defendants converted and used the personal property for their own benefit to the damage of plaintiffs in the aggregate amount of $1917.95, but allowed defendants an offset or reduction therefrom of the sum of $855, for money expended in purchasing feed for the pigs and poultry, for money expended in repairing the truck, and for labor performed in caring for the hogs and poultry. Judgment was thereupon rendered in favor of plaintiffs and cross-defendants for the sum of $1062.95. From that judgment the defendants and cross-complainants have appealed.

The plaintiff and the cross-defendant, her husband, owned an 1100 acre ranch in Napa County, together with the personal property which is involved in this suit. September 20, 1944, they sold the ranch to the defendants for $32,500. Independently of the sale of real estate, at the request of the defendants, plaintiffs agreed to sell to them the pigs, poultry, grain, household goods and truck which are involved in this action, for a reasonable price to be thereafter determined *by plaintiffs.* Mr. Bedell testified in that regard that Mr. Mashburn said they wanted to buy the personal property and have it left on the premises. The price was not then stated. Bedell testified that "they said that anything we wanted to leave there and sell to them at a fair price, *what we thought was a fair price,* was all right with them." (Italics added.) When the defendants took possession of the ranch, plaintiffs left with them on the premises, and delivered to them, under the agreement to sell the personal property, 400 sacks of grain, 100 chickens and ducks, 5 pigs, 1000 feet of "sheet-rock" plaster-board, a water heater, household furniture and a farm truck. About one month thereafter the plaintiffs presented a claim of $2500 for all of said personal property, which the defendants refused to pay, claiming that the price was too great. Negotiations followed, but the parties failed to agree upon a price which was satisfactory to both. Without the consent of plaintiffs the defendants thereafter killed and consumed two pigs, and sold the remaining pigs and their offspring, together with the grain and poultry, and appropriated the proceeds of said sales to their own use. They used the furniture which supplied several rooms in their home, together with a water heating tank, during the period of eleven months. They also used the truck for farm work during that period of time. They appropriated and used 1000 feet of sheetrock plaster-board for their own benefit. Some of the articles of furniture were damaged or destroyed.

After demand, this suit was commenced in February, 1946.

The court adopted findings determining that the defendants sold and converted to their own use the proceeds of sales of five pigs and their offspring of the reasonable value of $239, poultry of the value of $214, grain of the value of $493, and sheet-rock plaster-boards of the value of $26.95; that they used for their own benefit household furniture of the rental value of $55, which they damaged in the further sum of $90; that they used the farm truck for their own benefit, which was of the reasonable rental value of $500, and converted to their own use the water heater of the value of $300, aggregating the sum of $1917.95, no part of which was paid. As an offset to said award, the court allowed the defendants $265 expended by them for repairing the truck, $340 expended for purchasing grain and feed for the hogs and poultry, and the sum of $250 for labor performed in caring for the pigs and poultry, aggregating the sum of $855. Judgment was thereupon rendered for plaintiffs in the sum of $1062.95, being the difference between said aggregate allowances to the respective parties. The plaintiffs recovered possession of their truck and household furniture. Defendants retained the water heater.

The appellants contend that the findings and judgment are not supported by the evidence; that the transaction constituted a mere bailment of the personal property and not a sale for the reasonable value thereof; that the rental values of the truck and household furniture were not proper issues at the trial; that the damages allowed plaintiffs for conversion of the pigs, poultry, grain, water heater and sheet-rock boards were excessive, and that the court abused its discretion in permitting plaintiffs to amend their complaint to set up their claim for rental value of the truck and furniture.

[1] We are of the opinion the findings and judgment are adequately supported by the evidence, with the exception that an excessive allowance was made for the conversion of the water heater. There is ample proof, to support the findings, of the conversion of the pigs, poultry, grain, and other properties, and of the damages to and reasonable values of the same. The defendants wrongfully appropriated and disposed of the grain, pigs, poultry and sheet-rock boards, without the consent of plaintiffs and contrary to their agreement. Their possession of the property was conditional upon their purchasing the same. Mr. Bedell testified they delivered to the defendants 400 sacks of grain weighing 100 pounds per sack, and that he had been offered $2.45 per sack for the grain. The court allowed them $493 for the grain, which was only $1.23 per sack. Mrs. Bedell testified that they delivered to defendants 100 ducks and 34 chickens, which weighed from six to eight pounds apiece, and that she had previously sold similar chickens and ducks for 35 cents per pound, which, at the minimum weight of six pounds apiece, would furnish evidence of a valuation of more than $2.10 each. The court allowed plaintiffs $214 for the poultry, which would be an average valuation of only $1.58 apiece. Regarding the pigs, the defendant Edward Mashburn testified that twelve pigs were born to two of the sows and that he sold the twelve small pigs for $48. He admitted that, without the consent of plaintiffs, he killed and they consumed two of the matured pigs, one of which weighed 375 pounds and the other weighed 475 pounds. He said the butcher told him the pigs were worth 12½ cents per pound, and he testified that he received for the other pigs which he sold the sum of $368, no part of which was paid to plaintiffs. The court allowed plaintiffs, as the reasonable value of the pigs converted by defendants, only the sum of $239. Regarding the sheet-rock plaster-boards converted by the defendants, Mr. Bedell testified that there were 1000 square feet of that material for which he paid $50. The court allowed for that sheeting only the sum of $26.95.

There is ample evidence that the rental value of the furniture exceeded $55, which was allowed plaintiffs for the period of time it was used by the defendants, and that the rental value of the truck exceeded $500, which was allowed for that period of time. A sales manager of an automobile business testified that the rental value of the truck was $60 per month, or approximately $2 per day, which is not unreasonable.

Moreover, the court allowed the defendants, as an offset to said figures, the sums of $340 for grain and feed purchased by defendants for the pigs and poultry, $250 in payment for services performed in care of the pigs and poultry, and $265 expended by defendants for repairing the truck.

[2, 3] The respondents concede that the court erred in finding that the reasonable value of the water heater was $300. The evidence shows that it cost plaintiffs, with the attached fixtures, only the sum of $130.-82. The judgment should be modified by reducing it to the extent of the difference between said figures, which is $169.18. It is true, as the appellants contend, that, in the absence of an agreement between the parties, fixtures which are attached to the real property pass with a conveyance of the latter. But the rule is established that, as between the parties to a conveyance of real property, an agreement that an attached article shall retain its character as personal property and become removable by the owner of the realty, will be binding upon them. Dauch v. Ginsburg, 214 Cal. 540, 544, 6 P.2d 952. In this case the court specifically found that the parties agreed that the water heater should retain its character as personal property and become removable by plaintiffs.

[4] We are of the opinion the reasonable value of the personal property in possession of the defendants, which was wrongfully converted to their use and benefit, and the reasonable rental value of the household furniture and truck, were proper issues in this suit. This was not an action in replevin or for specific performance. The property in question was delivered to defendants on an agreement that they would purchase it at a reasonable price *to be fixed by plaintiffs*. The price of $2500 was subsequently fixed by plaintiffs. The defendants refused to purchase it at that price. Since the parties were unable to agree upon a selling price, it was defendants' duty to restore the property to the possession of plaintiffs in the condition in which they received it, subject to depreciation or loss sustained without the fault of the defendants. Certainly defendants did not have a right to damage or destroy the furniture, or to convert any portion of the property to their own use. Assuming, as defendants contend, without so deciding, that they became mere bailees thereof, they would still be liable for the reasonable value of the use of the property, and for the reasonable value of any such property converted by them. The property was delivered to the defendants with the understanding that they would purchase it and pay at least a reasonable price therefor. There was an implied agreement to pay a reasonable sum for its use, and for the value of any such property which defendants converted.

[5] One who is in possession of personal property as a bailee, who disposes of the property, destroys or converts it to his own use without the consent of the owner, is liable to the owner for the reasonable value, detriment or loss thereof, not exceeding the actual value of the article. 1 Restatement of the Law of Torts, sec. 226, p. 578; Chatterton v. Boone, 81 Cal.App.2d 943, 185 P.2d 610; Rider v. Union India Rubber Co., 28 N.Y. 379; 8 C.J.S., Bailments, § 31, page 283.

[6-9] The reasonable rental value of the household furniture and truck were proper issues in this case. The complaint demanded "the reasonable value" of personal property sold and delivered to defendants. It did not allege a specified agreed purchase price. The bill of particulars which was served on the defendants specifically demanded rent for the furniture for eleven months in the sum of $82.50, and rent for the truck for the same period of time in the sum of $495. It has been held the bill of particulars "is an amplification of the complaint." Edelman v. McDonell, 126 Cal. 210, 213, 58 P. 528, 529; Silva v. Linneman, 73 Cal.App.2d 971, 975, 167 P.2d 794, 797; 21 Cal.Jur. 69, sec. 43 at page 71. In the Silva case it is said the bill of particulars "is in the nature of a more specific allegation of the facts recited in the complaint." Moreover, the cross-complaint recognized that issue by setting

up a counter claim or offset to those items. And an amended complaint was filed by leave of court specifically alleging those identical claims. The defendants were not prejudiced thereby. The rental values of the properties were definite issues, and the court did not err in allowing the amendment to the complaint. It has been held an action based on a "common count", for goods sold and delivered, is sufficient to raise the issues ordinarily incident thereto. American-La France Fire Engine Co. of California v. Bagge, 98 Cal.App. 291, 296, 276 P. 1066; Magee v. Kast, 49 Cal. 141.

[10, 11] The contract for sale of the goods was not necessarily void for uncertainty merely because the exact selling price was not specifically mentioned. When the goods are sold, delivered and accepted by the purchaser, even though the exact price is not specified, on the theory that the contract has been executed, there may be "an [implied] understanding between the parties that a reasonable price is to be paid." Jules Levy & Bro. v. A. Mautz & Co., 16 Cal.App. 666, 669, 117 P. 936, 937; Hass v. Alpert, 111 Cal.App. 26, 29, 295 P. 66; Charles Brown & Sons v. White Lunch Co., 92 Cal.App. 457, 462, 268 P. 490; 6 Am.Jur., sec. 292, p. 377.

[12, 13] The title to property sold and delivered is to be determined by the intention of the parties. When goods are delivered to a purchaser conditionally for "sale or return" to the owner, and the condition fails, and no time for the return is specified, they may be returned within a reasonable time. It is said in that regard in Rule 3(2) (b) of section 1739 of the Civil Code, that "If he [the purchaser] does not signify his approval or acceptance to the seller, but retains the goods *without giving notice of rejection,* then, * * * *if no time has been fixed,*" they may be returned within a reasonable time. (Italics added.) In the present case no notice of refusal to accept the goods was given. On the contrary most of them were converted to the use and benefit of the defendants.

In support of the theory that since the price of the personal property was not specifically fixed before delivery, the purchasers were liable for the reasonable value thereof, section 1729 of the Civil Code provides that:

> "The price may be fixed by the contract, or may be left to be fixed in such manner as may be agreed, or it may be determined by the course of dealing between the parties.
>
> * * * * * *
>
> "(4) *Where the price is not determined in accordance with the foregoing provisions the buyer must pay a reasonable price.* What is a reasonable price is a question of fact dependent on the circumstances of each particular case." (Italics added.)

In the present case the personal properties were delivered on an agreement to sell, and they were accepted, appropriated and used for the benefit of the defendants. But the trial court accepted the theory that title had not passed to the defendants, and, upon the contrary, that the defendants had converted plaintiffs' property to their own use. That was an issue in this case, and the findings in that regard are amply supported by the evidence.

[14, 15] The defendants contend that the action for conversion of the property was barred by the provisions of section 339 of the Code of Civil Procedure, because more than two years elapsed from the time of delivery thereof before the action was commenced. We think not. The goods were delivered in October, 1944. The complaint alleges that "within two (2) years * * * prior to the commencement of this action," the indebtedness (for conversion) occurred. The court found that the property was converted within said period of time. The evidence shows that they were converted after negotiations for the purchase price had failed, which was several months after delivery of the property. The suit was commenced February 26, 1946. It is apparent that if more specific findings had been adopted in that regard they would have been adverse to the defendants. The judgment may therefore not be reversed on that account. Moreover, an action for "taking, detaining, or injuring any goods, or chattels," may be brought within *three* years. Code Civ.Proc., sec. 338. For the conversion of personal property, the statute of limitations does not begin to run until the time of the wrongful taking of the property or the occurrence of illegal exercise of dominion over it. Reed v. Molony, 38 Cal.App.2d 405, 411, 101 P.2d 175; Chatterton v. Boone, supra, 81 Cal.App.2d at page 947, 185 P.2d 610; Civ.Code, sec. 3336.) The last cited section provides that "The detriment caused by the wrongful conversion of personal property is presumed to be: First—The value of the property *at the time of the conversion,* * * * ." (Italics added.) For the foregoing reasons we are of the opinion the statute of limitations did not bar this action.

[16] Finally the appellants contend that the action failed, under section 1624a of the Civil Code, because the contract to sell was not in writing and it involved goods of a value in excess of $500. But that section has no application to this case, since, as we have previously held, the defendants "actually received" the goods and accepted them, as evidenced by their conversion of the property, and their conduct. That section provides in part:

> "A contract to sell or a sale of any goods * * * of the value of five hundred dollars or upward shall not be enforceable by action unless the buyer *shall accept part of the goods* * * *, *and actually receive the same,* * * *." (Italics added.)

The judgment is modified by reducing it in the amount of $169.18, being the stipulated excess sum allowed for the conversion of the water heater. With that reduction, the valid balance of the judgment awarded to the plaintiffs is the sum of $893.77. As so modified the judgment is affirmed.

ADAMS, P. J., and PEEK, J., concur.

32 Cal.2d 892

LIPPOLD et al. v. JOHNSON.

BACK et al. v. YOUNG et al.

THOMPSON et al. v. CLARKE et al.

MERRIWEATHER et al. v. FLEMING et al.

MERRIWEATHER et al. v. LOOPER et al.

MAYER et al. v. ROBINSON et al.

PEARCE et al. v. CROCKER et al.

CAVETT et al. v. BUTLER et al.

S. F. 17592, 17510, 19578, 19916, 20165, 20491, 20255.

Supreme Court of California, in Bank.
Sept. 15, 1948.

Injunction 🔑62(1)

Privately imposed restrictions against occupation of lands by non-Caucasians cannot be enforced through court action such as injunction.

◆

S.F. 17592

Appeal from Superior Court, Alameda County; A. J. Woolsey, Judge.

S.F. 17510

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

L.A. 19578

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

L.A. 19916. L.A. 20165

Appeals from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

L.A. 20491

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

L.A. 20255

Appeal from Superior Court, Los Angeles County; Pat R. Parker, Judge.

Actions by Frank C. Lippold and another against Minnie Johnson, by Carl O. Back and others against Johnnie Young and another, by Allan H. Thompson and others against Roland J. Clarke and others, by Stella Merriweather and others against W. T. Fleming and another and against Roscoe Looper and another, by Frederick Herman Mayer and another against James Robinson and another, by Harold M. Pearce and others against Harry Crocker and others, and by William R. Cavett and others against Riley Butler and others for injunctions against defendants' occupancy of certain lots in violation of restrictions against occupation thereof by non-Caucasians. From judgments enjoining defendants' occupancy of the lots, they appeal.

Reversed.

L.A. 19916:

Loren Miller and Harold J. Sinclair, both of Los Angeles, for appellant.

John F. Poole, of Los Angeles, for respondents.

L.A. 20165:

Willis O. Tyler, of Los Angeles, for appellants.

Eberhard & Zeigler, Ray C. Eberhard and Elisabeth Eberhard Zeigler, all of Los Angeles, for respondents.

L.A. 20491:

Wm. G. Condron, of Los Angeles, for appellants.

William H. Wilson, of Los Angeles, for respondents.

L.A. 20255:

Cummins, Goodstein & Paltun, of Los Angeles, for appellants.

Charles E. McGinnis, of Los Angeles, for respondents.

S.F. 17592, S.F. 17510:

Edises, Treuhaft & Condon and Bertram Edises, all of Oakland, for appellants.

Granville T. Burke and Albert M. Hardie, both of Oakland, for respondents.

L.A. 19578:

Loren Miller, of Los Angeles, for appellants.

Lindstrom & Bartlett, of Los Angeles, for respondents.

PER CURIAM.

The above entitled cases, like Cumings v. Hokr, 1948, 31 Cal.2d 844, 193 P.2d 742; Cassell v. Hickerson, 1948, 31 Cal.2d 869, 193 P.2d 743; Davis v. Carter, 1948, 31 Cal.2d 870, 193 P.2d 744; In re Laws, 1948, 31 Cal.2d 846, 193 P.2d 744; Clayton v. Wilkins, Cal.Sup., 197 P.2d 162, and Morin v. Crane, Cal.Sup., 197 P.2d 162, involve the legality and enforceability of privately imposed restrictions against occupation of certain lots of land by persons other than those of the Caucasian race. In each of the instant cases the trial court enjoined occupancy of the respectively concerned lots by non-Caucasians.

Upon the authority of Shelley v. Kraemer (McGhee v. Sipes), 1948, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (see also Hurd v. Hodge, 1948, 334 U.S. 24, 68 S.Ct. 847, 92 L.Ed. 1187), holding that such restrictions cannot be enforced through court action, the judgment of the trial court enforcing the restrictions is in each case reversed.

32 Cal.2d 895

CLAYTON et al. v. WILKINS et al.

L. A. 20399.

Supreme Court of California, in Bank.

Sept. 15, 1948.

Injunction ⚷62(1)

Privately imposed restrictions against occupation of lands by non-Caucasians cannot be enforced through court action such as injunction.

◆

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by Frank F. Clayton and others against Mrs. A. M. Wilkins, Sr. and others to enjoin defendant's occupancy of certain lots in violation of restrictions against such occupancy by non-Caucasions. From an order granting a preliminary injunction, defendants appeal.

Reversed.

Gallagher, Margolis, McTernan & Tyre, of Los Angeles, for appellants.

Ray C. Eberhard and Elisabeth Eberhard Zeigler, both of Los Angeles, for respondents.

PER CURIAM.

Defendants appeal from an order granting a preliminary injunction enjoining occupancy of certain lots of land by non-Caucasians.

Upon the authority of Shelley v. Kraemer (McGhee v. Sipes), 1948, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (see also Hurd v. Hodge, 1948, 334 U.S. 24, 68 S.Ct. 847, 92 L.Ed. 1187) holding that such restrictions cannot be enforced through court action, the order of the trial court granting the preliminary injunction must be reversed. See also Cumings v. Hokr, 1948, 31 Cal.2d 844, 193 P.2d 742; Cassell v. Hickerson, 1948, 31 Cal.2d 869, 193 P.2d 743; Davis v. Carter, 1948, 31 Cal.2d 870, 193 P.2d 744; In re Laws, 1948, 31 Cal.2d 846, 193 P.2d 744; Lippold v. Johnson, Cal.Sup., 197 P.2d 161; Morin v. Crane, Cal.Sup., 197 P.2d 162.

For the reasons above stated the order appealed from is reversed.

32 Cal.2d 896

MORIN et al. v. CRANE et al.

L. A. 20376.

Supreme Court of California, in Bank.

Sept. 15, 1948.

Specific performance ⚷64

Privately imposed restrictions against occupation of lands by non-Caucasians cannot be specifically enforced through court action.

◆

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by Corinne Morin and another against Charles Crane and others for specific enforcement of restrictions against occupation of certain lots by non-Caucasians. From a judgment of dismissal, plaintiffs appeal.

Affirmed.

Kilpatrick & Robbins, of Los Angeles, for appellants.

Loren Miller and Harold J. Sinclair, both of Los Angeles, for respondents.

PER CURIAM.

This case, like Cumings v. Hokr, 1948, 31 Cal.2d 844, 193 P.2d 742; Cassell v. Hickerson, 1948, 31 Cal.2d 869, 193 P.2d 743; Davis v. Carter, 1948, 31 Cal.2d 870, 193 P.2d 744; In re Laws, 1948, 31 Cal.2d 846, 193 P.2d 744; Lippold v. Johnson, Cal. Sup., 197 P.2d 161, and Clayton v. Wilkins, Cal.Sup., 197 P.2d 162, involves the legality and enforceability of privately imposed restrictions against occupation of certain lots of land by persons other that those of the Caucasian race. A demurrer to the complaint was sustained without leave to amend and judgment of dismissal was entered. Plaintiffs appealed.

Counsel for the respective parties have agreed that the decision of the United States Supreme Court in Shelley v. Kraemer, 1948, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161, (see also Hurd v. Hodge, 1948, 334 U.S. 24, 68 S.Ct. 847, 92 L.Ed. 1187), holding that such restrictions cannot be enforced through court action, is controlling here. Accordingly, we do not reach the question as to whether any tenable cause of action for relief or recovery other than specific enforcement of the racial restrictions is, or could be, stated.

It follows that the judgment of the trial court refusing to enforce the restrictions should be, and it is hereby, affirmed.

---

87 Cal.App.2d 494

In re ETTLINGER'S ESTATE.

Civ. 13842.

District Court of Appeal, First District, Division 1, California.

Sept. 13, 1948.

Hearing Denied Nov. 8, 1948.

1. Courts 🔑202(5)

Order, in estate proceeding approving an assignment by testator's widow of her residuary interest in testator's estate for a consideration, was appealable.

2. Wills 🔑742

Evidence was insufficient to require that order, in estate proceedings approving an assignment by testator's widow of her residuary interest in testator's estate to the executor's mother and aunt for certain consideration, be set aside on ground that widow had been defrauded through false representations. Probate Code, § 1020.1.

3. Wills 🔑742

Code section providing that all transactions between a trustee and his beneficiary during existence of trust, or while influence acquired by trustee remains, by which he obtains any advantage from beneficiary, are presumed to be under undue influence, did not give rise to presumption that purchase of interest of beneficiary of an estate by executor's mother and aunt was a fraudulent transaction perpetrated by executor, requiring that order approving assignment by beneficiary of her interest be set aside. Civ.Code, § 2235.

4. Wills 🔑742

Code section prohibiting the purchase by executor of property of estate did not give rise to presumption that purchase of interest of beneficiary of an estate by executor's mother and aunt was fraudulent transaction perpetrated by the executor, requiring that order approving assignment by beneficiary or her interest be set aside. Probate Code, § 583.

5. Wills 🔑742

Code section prohibiting a purchase by executor of property of estate does not apply to sale by a beneficiary of beneficiary's interest in an estate. Probate Code, § 583.

6. Wills 🔑742

Testator's widow, who assigned her residuary interest in testator's estate to executor's mother and aunt for a consideration, was not entitled to an order setting aside order in estate proceedings approving the assignment, on ground of alleged intrinsic fraud inducing the assignment. Probate Code, § 1020.1.

◆

Appeal from Superior Court, San Mateo County; Andrew R. Schottky, Judge.

Proceeding in the matter of the estate of Isaac L. Ettlinger, also known as I. L. Ettlinger, Isaac Leon Ettlinger, and Isaac Lionel Ettlinger, deceased, wherein Clare Ettlinger moved to set aside her assignment of her interest in the estate to Hattie Straus and Gertrude Marx, on ground that assignment was unjust and was induced under duress, undue influence, misrepresentation, and without full knowledge of the facts. From an order refusing to set aside the order approving the assignment, Clare Ettlinger, opposed by Melville Marx, as executor of the estate of Isaac L. Ettlinger, deceased, and others, appeals.

Decree of distribution affirmed.

See also 73 Cal.App.2d 967, 167 P.2d 738.

Single and Watt, of San Francisco, for appellant.

Claude N. Rosenberg, Bacigalupi, Elkus, & Salinger, John Elliott Cook, and Sloss & Eliot, all of San Francisco, for respondents.

WARD, Justice.

This appeal involves an order refusing to set aside an order approving an assignment by Clare Ettlinger of a residuary interest in the estate of Isaac L. Ettlinger, deceased, pursuant to Probate Code, sec. 1020.1. Clare Ettlinger, the appellant, is the decedent's widow. Under his will she received a "home on Austin Avenue, Atherton, California," and a one-fourth share in the residue of the estate. The testator's nephew, Melville Marx, was appointed executor and received letters testamentary. A prior wife, Millicent Sears Ettlinger, held a property settlement entitling her to $250 per month until she should remarry or die.

Following the filing of a notice of motion for an order approving an assignment, a hearing was held at which Clare Ettlinger testified that by a recent order of distribution she had received certain property in accordance with the terms of the will; that Millicent Sears Ettlinger had been in receipt of $250 a month and that in the probable course of events she would continue to receive that amount for "some 18 or 20 years"; that this probably would reduce Clare Ettlinger's income to "rather a nominal" sum; that she had been advised by her counsel that it would be to the best interest of the witness to sell all of her interest in the estate; that she had "also employed an auditor and a certified public accountant, who has done considerable work in connection with the books of the estate of Ettlinger, and the books of the Rio Farms Corporation, and he has submitted to you a complete analysis of holdings both of the estate and of the Rio Farms Corporation, and you have had the benefit of analyzing those and consulting personal friends of yours, besides the advice of counsel"; that $25,000 net had been offered by Hattie Straus and Gertrude Marx for her interest, from which certain attorney fees would be deducted. The following evidence also appears in the record: "Q. And you appreciate that when you have effected the assignment and have accepted the money payment that it calls for, that you will have then surrendered and finally parted with all of your right, title and interest of every kind and character to this estate? A. Yes, sir." Whereupon the court on October 22, 1946, approved the assignment and allowed a distribution of $1,000 to the residuary legatees and the widow's assignees.

The executor subsequently filed the second and final account and petition for final distribution, which named the assignees of Clare Ettlinger as the persons entitled to receive her interest. On October 11, 1947, opposition to the Final Account and Distribution was filed by Clare Ettlinger, who claimed that the assignment of her interest "is unfair, unjust and inequitable" and that she was induced to execute and consent to the assignment under duress, undue influence, misrepresentation and without full knowledge of the facts. At the same time she filed her "Affidavit in Support of Motion to Set Aside Assignment." Referring to entering into the agreement to assign her interest, "affiant alleges that she was induced to do so upon the representation, that the mortgage upon the real property of said estate, given to her by will, and which said property is her home, was about to be foreclosed; that payments upon said mortgage could not be made, and that she would lose her home and interest thereby; and that affiant had no funds other than her interest in said estate, wherein and whereby said mortgage could be paid; further, that affiant alleges she was not adequately informed of the condition, assets, and liability of said estate, but that it was represented to her that said estate was in a precarious condition and that it was impossible to reach any settlement with one Millicent Sears Ettlinger, a creditor of said estate, by reason of which said estate could not be closed and its assets distributed; that due to said situation, affiant would be unable to realize her distributable share of said estate, and in the future to adequately protect her home from foreclosure and that she would lose her interest thereby; that affiant relied upon such representation and was induced thereby to execute said documents and sell her interest and to petition this Court for confirmation thereof; that affiant executed said agreements and petitioned said Court solely by reason of said representations, and for no other reason; that affiant is informed and believes and therefore alleges; that all of said representations were false; and affiant is informed and believes and therefore alleges, that her residuary interest in said estate actually far exceeded the sum of $25,000.00."

Attorneys for the assignees filed a motion to strike from the record the opposition of Clare Ettlinger to the final account and the affidavit in support of the motion to set aside the assignment. The probate court denied the motion to set aside the assignment and heard Clare Ettlinger's objections to the distribution of the estate. In answer to the question "Now, tell me, Mrs. Ettlinger, what is your objection to the account and to the Court's making an order for final distribution of your husband's estate?" she answered: "Because I have been defrauded of my rightful legacy in my husband's estate." The testimony reveals that her claim that she had been defrauded was based upon her assertion that her previous attorneys had misrepresented to her the financial condition of the estate and upon the fact that as the widow she had not had "an accounting in six years." The following testimony appears:

"The Court: You do not contend that the estate has not been appraised and an inventory made, and that there is something which has been left out of the estate that is in it?

"Mr. Dewar [attorney for appellant]: No, nothing of that kind.

"The Court: If you had contended that the estate had been undervalued, or something of that kind, or there is some incorrect statement, then you should specify your objections on that ground. * * *

"The Court: Well, of course, the Court will make a minute order. The grounds of opposition were overruled, and the order of the account is approved, and decree and distribution therewith."

From the decree of distribution and from all the orders and decrees therein Clare Ettlinger filed a notice of appeal "in propria persona."

Certain points raised by respondents may be eliminated. The basic contentions made upon appeal are "that [1] at the time of the assignment of her interest in the estate to the mother and the aunt of the executor, the executor then secretly intended to purchase an annuity for Millicent Sears Ettlinger and thus free the estate for distribution to the beneficiaries, and [2] that the value of the estate had been grossly undervalued by the executor who was both the president of the corporation, whose stock was the major part of the estate, and also was the trustee of a "20-year voting trust controlling the stock in the estate."

[1] The original order approving the assignment was appealable, but no appeal was taken therefrom, and the present proceeding was not instituted until nearly a year after that order was made and nearly ten months after the annuity was purchased.

[2] The record before this court does not show evidence of fraud that requires the order approving the assignment to be set aside. Jorgensen v. Jorgenson, 32 Cal. 2d 13, 193 P.2d 728. On the contrary, there is evidence that the life expectancy of Millicent Sears Ettlinger, the financial condition of the Rio Farms Stock, and the facts surrounding the voting trust, were questions upon which appellant was ad-

vised by her own attorneys. In this connection it should be noted that the appellant's briefs do not mention any evidence showing that at the time of the court's approval of the assignment the executor secretly intended to purchase an annuity for Millicent Sears Ettlinger, or that he grossly undervalued the estate. The final account merely shows that on a date two months after the approval of the assignment the estate paid an insurance company for "M. Sears Settlement." As to the second contention, the estate was valued by appraisers and not by the executor.

Appellant's opening brief states that she was relying upon the statements of the executor and the attorney for the executor, that an annuity would not be purchased for Millicent Sears Ettlinger, and that therefore the estate would not be distributed until the death of Millicent Sears Ettlinger, who had a life expectancy of 20 years. However, the only evidence which appellant quotes to support this contention is the testimony of the attorney for the executor given after the approval of the assignment and on petition for a ratable distribution that "If I were a beneficiary here, I would not consider buying an annuity for a split second." The testimony given by the attorney was an attempt to satisfy Millicent Sears Ettlinger and her attorney that her interest as a creditor of the estate would not be jeopardized by a ratable distribution of $10,000. The assignment had been previously approved.

[3-5] Neither Civil Code, sec. 2235, nor Probate Code, sec. 583, supports the contention that the purchase of an interest of a beneficiary of an estate by the mother and the aunt of the executor is presumed to be a fraudulent transaction and thus may be classified as a fraud perpetrated by the executor, requiring the order approving the assignment to be set aside. An executor may not purchase property of an estate, or any claim against an estate, directly or indirectly, nor be interested in any such purchase. It should be noted that Probate Code, sec. 583, does not apply to the sale by a beneficiary of his interest in an estate. There is no evidence that the executor directly or indirectly purchased any interest in the estate. The transaction was authorized by order of the probate court after a hearing on the petition to assign. 54 Am.Jur., p. 248, sec. 313, p. 370, sec. 466. Clare Ettlinger testified: "I have been defrauded in my husband's estate through false representations of my previous attorneys."

[6] "It is necessary to examine the facts in the light of the policy that a party who failed to assemble all his evidence at the trial should not be privileged to relitigate a case, as well as the policy permitting a party to seek relief from a judgment entered in a proceeding in which he was deprived of a fair opportunity fully to present his case." Jorgensen v. Jorgensen, supra, 32 Cal.2d at page 19, 193 P.2d at page 732. In the present case Clare Ettlinger was not precluded from having her day in court or from fully presenting her application to assign her interest in the estate. Under such circumstances there was no evidence of fraud. However, even if the evidence raised an inference of fraud such fraud would be intrinsic and not extrinsic and therefore not a ground for relief in this type of action. Jorgensen v. Jorgensen, supra.

The decree of distribution entered on November 10, 1947, is affirmed.

PETERS, P. J., and BRAY, J., concur.

87 Cal.App.2d 482

CARLESIMO v. SCHWEBEL.
Civ. No. 13777.

District Court of Appeal, First District,
Division 1, California.
Sept. 13, 1948.

Rehearing Denied Oct. 13, 1948.
Hearing Denied Nov. 8, 1948.

1. Corporations 🔑306

Where directors or officers of a corporation contract with a third person who is ignorant of the existence of the corporation, and to whom no disclosure of the existence of the corporation is made, such director or officer is personally liable on the contract.

2. Corporations 🔑306

The mere self-serving statement of a third person who contracts with directors or officers of a corporation, that he did not know of the existence of the corporation, is not binding on the trier of the facts in an action by the third person against the directors or officers personally on the contract.

3. Corporations 🔑306

Where name of company which included abbreviation "Inc.", appeared on door of office and on company's stationery used for all correspondence between the parties and for contracts, and signature on contract was the name of the company followed by name of secretary-treasurer of company, trial court could infer in action for breach of contract that plaintiff had knowledge of existence of corporation, and could not hold secretary-treasurer personally liable on ground that existence of corporation was concealed from plaintiff.

4. Contracts 🔑179

Where agent of corporation signs contract with the name of the corporation "by" the agent, the corporation is liable and the agent is not.

5. Evidence 🔑418

Where there is no indication that an officer of a corporation signed a contract other than as an individual, the parol evidence rule prohibits the introduction of oral evidence to vary terms of contract in order to show that officer signed merely as an agent of corporation.

6. Evidence 🔑459(2)

Where stationery on which contract was drafted, had name of corporation printed in large black letters, and signature contained corporation's name followed by the written signature of the secretary-treasurer of the corporation without the word "by" before his name, parol evidence was admissible in action for breach of contract, to explain the signature, if the signature was ambiguous.

7. Contracts 🔑179

Where stationery on which contract was drafted had name of corporation printed in large black letters, and signature contained corporation's name followed by written signature of secretary-treasurer of corporation, court, as trier of facts, properly found in action by breach of contract that secretary-treasurer signed as corporation's agent rather than as an individual, though the word "by" did not appear before name of secretary-treasurer.

8. Corporations 🔑306

In action for breach of contract against secretary-treasurer of corporation individually, on ground that corporation was but the alter ego of the secretary-treasurer, and was being used by him for an improper purpose, evidence sustained finding that plaintiff was not deceived into believing that he was dealing with the secretary-treasurer as an individual, rather than with corporation.

9. Corporations 🔑1

In action for breach of contract against secretary-treasurer of corporation individually, on ground that corporation was underfinanced to such an extent that it constituted a fraud on persons dealing with it, and that therefore the corporate entity should be disregarded, burden was on plaintiff to establish what would constitute a reasonable capital for such a corporation.

10. Corporations 🔑1

In action for breach of contract against secretary-treasurer of corporation individually, on ground that corporation was underfinanced to such an extent that it constituted a fraud on persons dealing with it, and that therefore the corporate entity should be disregarded evidence concerning alleged underfinancing was insufficient to require that corporate entity be disregarded.

11. Corporations ⚷1

The doctrine that under certain circumstances corporate entity may be disregarded, or corporation may be regarded as the alter ego of the stockholders, is an equitable doctrine and for that reason is particularly within the province of the trial court.

12. Corporations ⚷1

Corporate entity will be disregarded and corporation will be regarded as the alter ego of the stockholders only where there is such unity of interest and ownership that separate personalities of the corporation and the individual no longer exist, and adherence to the fiction of separate existence would, under the circumstances, promote fraud, or injustice.

13. Corporations ⚷1

The fact that a corporation is organized with an obviously inadequate capital setup may be considered in determining whether corporate entity should be disregarded.

14. Corporations ⚷1

One seeking to pierce a corporate veil on ground that there has been inadequate financing of corporation must show by the evidence that the corporation's financial setup is merely a sham and accomplishes injustice.

◆

Appeal from Superior Court, City and County of San Francisco; Preston Devine, Judge.

Action by Louis Carlesimo against Dave Schwebel and others for damages for breach of contract to sell plaintiff two carloads of tomato paste. From a judgment in favor of the named defendant, the plaintiff appeals.

Judgment affirmed.

Rogers & Clark and Bruce F. Allen, all of San Francisco, for appellant.

Leo H. Shapiro and Virgil G. Skinner, both of San Francisco, for respondent.

PETERS, Presiding Justice.

Plaintiff, Louis Carlesimo, brought this action against The Feldheym Co., Inc., a corporation, Dave Schwebel, an individual, Jesse Feldheym, an individual, and The Schwebel Co., a copartnership, for damages for the breach of a contract to sell to plaintiff two carloads of tomato paste. The damages were alleged to consist of a $3,125 deposit made by plaintiff, and $14,125 loss of profits. The corporation, the partnership and Feldheym were properly served, failed to appear, and default judgments were taken against them. Executions issued on these judgments and were returned satisfied to the extent of $16.40. Defendant Schwebel answered, and the cause proceeded to trial before the court without a jury against Schwebel alone. The trial court determined that Schwebel, as an individual, was not liable, and plaintiff appeals.

The facts are not substantially in dispute. Appellant and respondent were the only witnesses. Appellant operates a wholesale wine and grocery business in New Jersey. He first met Schwebel in 1945 when the latter was a sales representative for the Pastori Winery. In July of 1946 Schwebel and Feldheym organized The Feldheym Co., Inc., for the purpose of buying and selling groceries. An office was opened at 149 California Street, San Francisco. On October 4, 1946, a letter was sent to appellant, who was then in Stockton, California. This letter was written on the stationery of The Feldheym Co., Inc. The corporate name is printed on the letterhead in large black letters at least a quarter of an inch high, and in heavy black type. The letter was signed:

"The Feldheym Co., Inc.
Dave Schwebel
Dave Schwebel."

The italicized name was in the handwriting of Schwebel, while the last line of the signature was typed. In this letter Schwebel informed appellant that he was no longer connected with Pastori, and stated: "*I* can get you the canned vegetables you are looking for particularly tomato products." The letter requested appellant to visit the writer "and *we* will go over your requirements. Please take notice of *our* new address." (Italics added.)

On October 26, 1946, appellant visited the office on California Street. On the office door were the names of Pastori Winery, Feldheym Co., Inc., and River Glow, Inc. Schwebel's name was not on the door.

Appellant testified that Schwebel introduced him to Jesse Feldheym, and stated that he and Feldheym were in business together, but did not disclose the nature of the relationship. After some discussion with Schwebel the contract forming the basis of this action was drafted by Schwebel. It is typed on the letterhead of The Feldheym Co., Inc., and is addressed to the Roma Distributing Co., operated by appellant. It confirms the purchase by appellant of 2,500 cases of tomato paste (two carloads) at $7.85 per case, F. O. B. cannery. Acknowledgement of $3,125 as a deposit is made, and the method of delivery stated. The contract was signed in the same fashion as the letter of October 4, 1946, mentioned above. It is admitted that Schwebel received the $3,125 deposit, that the tomato paste was not delivered, and that the deposit was never returned. The only evidence of damage, other than the amount of the deposit, was given by appellant to the effect that on the date the tomato paste should have been delivered the broker's price per case was $13.50. Appellant testified that he did not learn that The Feldheym Co., Inc., was a corporation until he instituted the present action on April 11, 1947.

The evidence shows that during the fall of 1946 appellant placed some eight or nine other orders through Schwebel, and made deposits totaling $16,000 thereon. There were no deliveries under these orders, but all of these deposits were returned by Schwebel to appellant. All of these orders were on the stationery of The Feldheym Co., Inc., and appellant noticed that fact.

Defendant testified that The Feldheym Co., Inc., was organized in July of 1946, and went out of business in December, 1946. What caused the company to go out of business does not appear. Schwebel and Feldheym organized the company, and, pursuant to the approval of the state corporation department, five shares of stock were issued to each of them, for which each paid into the company $500. Schwebel was the secretary-treasurer, and Feldheym the president. A nephew of Schwebel's, who owned no stock, was vice-president. No other stock was issued, offered or subscribed. The sole capital of the corporation was this $1,000, plus $221.82 in cash paid in by Schwebel. From this total capital of $1,221.82, $373 was spent for costs of incorporation. Schwebel loaned the corporation some office furniture, and it rented a typewriter. The office was rented in the name of the corporation. The funds of the corporation were deposited in a bank in the corporate name, but Schwebel admitted that at times he kept some of the corporate funds in his personal safe deposit box.

On these facts the trial court found that The Feldheym Co., Inc., was a corporation; that it was untrue that Schwebel and Feldheym were partners; that it was untrue that the two incorporators used The Feldheym Co., Inc., as a fictitious name under which they did business, or created or used the corporation as a device to avoid their individual or partnership obligations; that the contract of October 26, 1946, was entered into with the corporation; that Schwebel was not a party to the contract, but signed only as agent for the corporation; that it was untrue that Schwebel used the corporation as an instrument through which he conducted his business so as to avoid his individual or partnership obligations to plaintiff.

The first contention made by appellant is that, as a matter of law, from the manner in which Schwebel signed the contract, he undertook a personal liability thereunder. Appellant attempts to bolster this argument by a reference to his testimony, apparently not believed by the trial court, that he did not know that The Feldheym Co., Inc., was a corporation until suit was filed.

[1-3] There can be no doubt at all that, where directors or officers of a corporation contract with a third person who is ignorant of the existence of the corporation and to whom no disclosure of the existence of the corporation is made, such director or officer is personally liable on such contract. (See many cases collected 19 C.J.S., Corpora-

tions, § 840, page 264.) However, the mere self-serving statement of the third party that he did not know of the existence of the corporation is not binding on the trier of the facts. The true rule is that, in such cases, the directors or officers are personally liable unless the third person knew, or in the exercise of reasonable care should have known, that he was dealing with a corporation. Here the name of the company, including the abbreviation "Inc.," appeared on the door of the office. Any reasonable man, and certainly any reasonable business man, should know that the abbreviation "Inc.," means "incorporated," which directly informs every one dealing with the company that it is a corporation. The very sheet of paper upon which the contract is typed, and all correspondence between the parties, was on letterheads of the corporation with the words "The Feldheym Co., Inc.," printed thereon in heavy black type. Then, the signature of the contracting party reads:

"The Feldheym Co., Inc.
Dave Schwebel
Dave Schwebel."

Thus the contract discloses, on its face, that the corporation was a contracting party. Certainly the trial court from such evidence could infer, reasonably, that appellant had knowledge of the existence of the corporation prior to and at the time the contract was executed.

[4] The real question on this phase of the case is not whether appellant knew that the corporation was a party, but whether, before an agent will be released from liability on a contract executed on behalf of a corporation, the contract must not only disclose the name of the principal but must also, on its face, disclose the fact that the agent is signing in a representative capacity. In the present case, had Schwebel appended the preposition "by" immediately before his signature, there would be no doubt at all that the contract would have disclosed, on its face, not only that appellant was dealing with the corporation, but that Schwebel was signing as an agent and not as a principal. Where that appears on the face of the contract the corporation is liable and the agent is not. Armour & Co. v. R. Rosenberg & Sons Co., 36 Cal.App. 773, 775, 173 P. 404; Greve v. Taft Realty Co., 101 Cal.App. 343, 281 P. 641. But, says appellant, the word "by" does not appear in this signature, and therefore Schwebel must be conclusively presumed to have signed in his individual capacity, even though the evidence is susceptible of the interpretation that Schwebel signed as an agent. To support this somewhat startling conclusion appellant mainly relies upon the case of Otis Elevator Co. v. Berry, 28 Cal.App.2d 430, 82 P.2d 704. That case stands for no such rule. In that case the contract was for the repair of an elevator located in a hotel operated by the "Berry Hotels System," a corporation. Plaintiff addressed an offer to the "Hotel Berry Systems." Defendant accepted the offer as follows: "Signed and accepted in duplicate, Sept. 17, 1926. B. S. Berry." B. S. Berry was secretary of the company and was authorized to enter into contracts on its behalf. Over objection, the trial court admitted oral evidence that Berry signed the contract as agent of the corporation, and that plaintiff knew that this was the fact. The appellate court held that the finding to this effect was supported by evidence, but that the evidence had been erroneously admitted. Berry argued that an ambiguity was created because the offer was addressed to the "Hotel Berry Systems", and then signed "B. S. Berry." The court held that there was no ambiguity, and that extrinsic evidence should not have been admitted. In this connection the court stated in 28 Cal.App. at pages 432, 433, 82 P.2d at page 705: "The rule is that where a person signs his own name to a written contract, without qualification and without disclosing that he acts solely as agent, extrinsic evidence is inadmissible to prove that he acted solely as agent and was not a party to the contract. * * * An agent, who has signed his own name unqualifiedly, may introduce extrinsic evidence to show that he is not a party to the contract, only where the contract itself contains some phrase or provision which shows that he was acting in a representative capacity. A.L.I., Restatement of the Law, Agency, § 323, subds. 2 and 3, and cases cited in the

California Annotations thereto. Applying this rule to the instant case, it is apparent that no such ambiguity existed. The mere fact that the proposal was addressed to the defendant's principal is not enough, for the contract might also have been intended to bind the agent as well. Aside from the address, there is no reference in the contract to defendant's principal and there is no clause in the contract which, either expressly or by implication, indicates that defendant acted in a representative capacity. Defendant signed his name without indicating the identity of his principal, or even the fact that he was acting as agent. Under these circumstances, he cannot now assert that he is not a party to the contract."

Appellant also cites Patterson v. John P. Mills, etc., Inc., 203 Cal. 419, 264 P. 759, which was also a case where the defendant signed a contract in his own name, and nowhere on the contract did the name of his principal appear. The court stated in 203 Cal. at page 421, 264 P. at page 760: "The contract does not disclose the name of the principal, and under such circumstances the plaintiff was entitled to hold the defendant."

[5] The rule of these cases, and others that might be cited to the same effect, is not here applicable. In the Patterson case there was no indication at all that the contract was with another person. In the Berry case the acceptance signed by the defendant was not ambiguous. There was no indication at all that Berry was signing other than as an individual. The parol evidence rule, under such circumstances, prohibits the introduction of oral evidence to vary the terms of the written instrument. Broy v. Calaveras Central Gold Mining Co., 18 Cal. App.2d 371, 64 P.2d 456.

[6] In the instant case the contract was drafted on a letterhead on which the name of the corporation was emblazoned. The signature disclosed that The Feldheym Co., Inc., was a party to the contract. Immediately below the corporate name appears the written signature of Schwebel. To any person reading the document it would appear that Schwebel was signing for the corporation. To say the least, the signature is ambiguous, and parol evidence was admissible to explain it.

The Restatement of Agency is in accord with these views. Section 155 reads as follows: "In the absence of manifestations to the contrary therein, an unsealed written instrument is interpreted as the instrument of the principal and not of the agent if, from a consideration of it as a whole, it appears that the agent is acting as agent for a principal whose name appears therein as such."

In the comments following this section are several statements directly applicable in the instant case. They are as follows:

"a. If the integration of a contract is contained in a single document, the entire document, including the heading, body, and signature, is considered, * * * No part of a document is necessarily more important than any other part for the purpose of determining the parties thereto * * *

"c * * * Thus, the printed heading of stationery carrying the principal's name may be sufficient to indicate that a letter signed only in the agent's name is intended to be only the principal's letter."

Section 156 reads as follows: "In the absence of a manifestation to the contrary therein, an unsealed written instrument is interpreted as the instrument of the principal and not of the agent if, in the signature of description of the parties, the name of the principal and agent both appear, the agent indicating his agency."

In a comment to this section it is stated: "If the name of the principal is followed by the name of the agent without more, the arrangement of the names or the way in which the promise is made may indicate that the agent is not a party. If this does not appear, the inference is that the agent is a party; *extrinsic evidence that the agent was acting only for the principal is, however, admissible under the rule stated in* § *323(2)."* (Italics added.)

Section 323(2) reads as follows: "If the fact of agency appears in an integrated contract, not sealed nor negotiable, and there is no unambiguous expression of an intention either to make the agent a party thereto or not to make him a party thereto, extrinsic evidence may be introduced to show the intention of the parties."

[7] The rule of these sections is clearly applicable in the instant case. We therefore hold that, so far as the form of the signature is concerned, the finding that Schwebel signed as agent of the corporation, is amply supported by admissible evidence.

[8] The next contention of appellant is that under the facts the trial court, as a matter of law, should have found that the corporate entity was but the alter ego of Schwebel, and was being used for an improper purpose. In other words, as a matter of law, appellant wants this court to disregard the corporate entity, and so remove the protection usually granted to stockholders in a corporation. Appellant makes several arguments on this issue, but they can be boiled down to two in number. He first contends that he was "deceived" into believing that he was dealing with Schwebel as an individual, and did not know that he was dealing with a corporation. In this connection he refers to his own testimony to this effect. But the trial court has found otherwise and such finding, as already pointed out, is amply supported.

[9, 10] The second contention of appellant on this issue is that this corporation was underfinanced to such an extent that it constituted a fraud on persons dealing with it, and for that reason, and for that reason alone, as a matter of law, the corporate entity should be disregarded. The evidence on this issue is most unsatisfactory. The state corporation department authorized the company to sell to Schwebel and Feldheym an aggregate of 10 shares of stock at par ($100 per share) for cash. These 10 shares were purchased, five shares by each party, and the $1,000 so secured paid to the company. This sum, plus $221.82 advanced by Schwebel, constituted the sole capital of the company. No representation as to the extent of the capital of the company was made by Schwebel. The status of the capital of the company was a matter of public record. No evidence was introduced by either side (and the burden was on the plaintiff) as to what would constitute a reasonable capital for such a company. Practically no evidence was introduced as to the nature or amount of business transacted. All we know is that the corporation was engaged in buying and selling groceries, and that during the fall of 1946 this appellant entered into nine or ten deals with the company on which he deposited over $19,000, and that all such deposits, except the $3,125 involved in the present transaction, were returned by the company to appellant. What other transactions were entered into by this company, what and how much were involved, what amount of capital was reasonably necessary to carry out the deals, etc., was not developed. What caused the company to default on this contract, or what caused it to go out of business does not appear. There is not one word of evidence that any portion of the $3,125 deposit ever came to Schwebel personally, or that he profited therefrom. The trial court has found that the corporation was not used by Schwebel as a device to avoid his individual liabilities. Under such circumstances, and keeping in mind that the burden of proof on this issue was on plaintiff, we do not think that this court is required to hold, or should hold, that, as a matter of law, the corporate entity should be disregarded.

[11, 12] The laws as to when the courts will pierce the corporate veil is easy to state, but hard to apply. One of the most recent cases to restate the law on the subject is Stark v. Coker, 20 Cal.2d 839, 129 P.2d 390. In that case the Supreme Court *affirmed* a judgment of the trial court disregarding the corporate entity, holding that the evidence was sufficient *to support* the action of the trial court. The court stated the applicable general rules as follows in 20 Cal.2d at page 846, 129 P.2d at page 394:

"The conditions under which the corporate entity may be disregarded, or the corporation be regarded as the alter ego of the stockholders, necessarily vary according to the circumstances in each case inasmuch as the doctrine is essentially an equitable one and for that reason is particularly within the province of the trial court. Only general rules may be laid down for guidance. The basic rule was recently stated by this court in Watson v. Commonwealth Ins. Co., 8 Cal.2d 61, 68, 63 P.2d 295, 298:

" 'The two requirements are that there be such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist and that adherence to the fiction of separate existence would, under the circumstances, promote fraud, or injustice. On the second score it is sufficient that it appear that recognition of the acts as those of a corporation only will produce inequitable results.' "

In Hollywood Cleaning & Pressing Co. v. Hollywood Laundry Service, 217 Cal. 124, 17 P.2d 709, another leading case on the subject, the rules are summarized as follows in 217 Cal. at page 129, 17 P.2d at page 711: "Whatever may be the rule in other jurisdictions, the rule is well settled in this state that the mere fact one or two individuals or corporations own all of the stock of another corporation is not of itself sufficient to cause the courts to disregard the corporate entity of the last corporation and to treat it as the alter ego of the individual or corporation that owns its stock. In addition it must be shown that there is such a unity of interest and ownership that the individuality of such corporation and the owner or owners of its stock has ceased; and it must further appear that the observance of the fiction of separate existence would, under the circumstances, sanction a fraud or promote injustice. Bad faith in one form or another must be shown before the court may disregard the fiction of separate corporate existence." See, also, Erkenbrecher v. Grant, 187 Cal. 7, 200 P. 641, and Norins Realty Co. v. Consolidated Abstract & Title Guaranty Co., 80 Cal.App.2d 879, 182 P.2d 593, for other good statements of the general rule.

In most of the cases where this problem has been discussed, including Stark v. Coker (see quote supra), it has been held that the problem is primarily one for the trier of the facts, and is not a question of law. Thus in H. A. S. Loan Service, Inc. v. McColgan, 21 Cal.2d 518, 524, 133 P.2d 391, 394, 145 A.L.R. 349, it is stated: "Plaintiff argues that in order to authorize the disregard of a corporate entity the evidence must be convincing and satisfactory and that a presumption of separate entity is present. However that may be, such rules are for the guidance of the trier of fact, and the rule on appeal is the same as in other cases; the conclusion of the trier of fact will not be disturbed if it is supported by substantial evidence. The same principle is pertinent in analogous instances involving the proof of fraud. See 12 Cal.Jur. 834."

[13] With these rules in mind, we turn directly to the problem here presented, namely, whether, as a matter of law, it should be held that this corporation was so under-financed that to recognize the corporate entity would be to work a fraud on creditors of the company. There can be no doubt that the fact, if such be the fact, that a corporation is organized with an obviously inadequate capital setup, such fact may be considered in determining whether the corporate entity should be disregarded. Professor Ballantine in his work on Corporations (1946 Ed.) at p. 302 has the following to say on this subject: "If a corporation is organized and carries on business without substantial capital in such a way that the corporation is likely to have no sufficient assets available to meet its debts, it is inequitable that shareholders should set up such a flimsy organization to escape personal liability. The attempt to do corporate business without providing any sufficient basis of financial responsibility to creditors is an abuse of the separate entity and will be ineffectual to exempt the shareholders from corporate debts. It is coming to be recognized as the policy of the law that shareholders should in good faith put at the risk of the business unincumbered capital reasonably adequate for its prospective liabilities. If the capital is illusory or trifling compared with the business to be done and the risks of loss, this

is a ground for denying the separate entity privilege." (The problem is generally discussed in Hanson v. Bradley, 298 Mass. 371, 10 N.E.2d 259; Eastern Products Corporation v. Tennessee Coal, Iron & R. Co. 151 Tenn. 239, 269 S.W. 4, 40 A.L.R. 1483; 51 Harv.L.Rev. 1373; 31 Cal.L.Rev. 426.) The problem usually arises where a parent company, itself adequately financed, inadequately finances a subsidiary, and thus the stockholders seek to secure double insulation from liability, or where a stockholder seeks to become a preferred creditor of the corporation, or where some direct element of fraud is present. Dixie Coal Min. & Mfg. Co. v. Williams, 221 Ala. 331, 128 So. 799; Mosher v. Salt River Valley Water User's Ass'n, 39 Ariz. 567, 8 P.2d 1077; Christian & Craft Grocery Co. v. Fruitdale Lumber Co., 121 Ala. 340, 25 So. 566; Shea v. Leonis, 14 Cal.2d 666, 96 P.2d 332; Hanson v. Bradley, 298 Mass. 371, 10 N.E.2d 259; see general discussion 39 Yale Law Journal 193; Latty, Subsidiaries and Affiliated Corporations (1936), chapters V and VIII. The rule is applied, if applied at all, with great caution as to one-man corporations.

[14] We think the proper rule is that inadequate financing, where such appears, is a factor, and an important factor, in determining whether to remove the insulation to stockholders normally created by the corporate method of operation. But in such a case it is incumbent upon the one seeking to pierce the corporate veil to show by evidence that the financial setup of the corporation is just a sham, and accomplishes injustice. In the instant case the plaintiff made no such showing. He not only failed to show, as a fact, that the corporation was inadequately financed, but failed to show any causal connection between the financing and the injury. We cannot say, under the evidence, that the finding that the corporate form of business was not adopted for the purpose of injuring third persons is unsupported.

The judgment appealed from is affirmed.

WARD and BRAY, JJ., concur.

---

87 Cal.App.2d 534

CARPENTER v. FITCH et al.

Civ. 16166.

District Court of Appeal, Second District,
Division 3, California.
Sept. 13, 1948.

1. Appeal and error ⟹102

An order sustaining a demurrer to a complaint without leave to amend is not appealable. Code Civ.Proc. § 963.

2. Appeal and error ⟹870(5)

Order sustaining a demurrer to a complaint without leave to amend may be reviewed by way of appeal from the judgment thereafter entered in the action. Code Civ.Proc. § 963.

◆

Appeal from Superior Court, Los Angeles County; Allen W. Ashburn, Judge.

Action by W. L. Carpenter, doing business as Argonne Van & Storage Company and Argonne Van Lines, against Floyd Fitch and others. From the judgment and from an order sustaining a demurrer to the second amended complaint without leave to amend, plaintiff appeals.

Appeal dismissed.

W. L. Carpenter, in pro. per.

Arthur C. Webb, of Los Angeles, for respondents.

WOOD, Justice.

Plaintiff appeals from the judgment and from the order sustaining a demurrer to the second amended complaint without leave to amend.

[1, 2] No judgment was made or entered in the above entitled action, and of course there was no judgment from which an appeal could be taken. The trial court made an order sustaining defendants' demurrer to the second amended complaint without leave to amend. Such an order is not appealable. Code Civ.Proc., sec. 963; Braren v. Reliable Carpet Works, Inc., 125 Cal.App. 489, 491, 13 P.2d 972; Ross v. O'Brien, 1 Cal.App.2d 496, 498, 36 P.2d

1108; Pulvermacher v. Los Angeles Co-Ordinating Committee, 61 Cal.App.2d 704, 711, 143 P.2d 974. The method of reviewing such a ruling on demurrer is by way of appeal from the judgment thereafter entered in the action. Braren v. Reliable Carpet Works, Inc., supra, 125 Cal.App. at page 491, 13 P.2d 972.

The appeal is dismissed.

SHINN, P. J., and VALLEE, J., concur.

87 Cal.App.2d 382

PEOPLE v. REINGOLD et al.

Crim. No. 4213.

District Court of Appeal, Second District, Division 1, California.

Sept. 2, 1948.

Hearing Denied Sept. 30, 1948.

1. Criminal law 🔑510

Where proof of guilt of defendant of crime charged rests primarily and solely upon the testimony of an accomplice, corroboration of testimony of accomplice is an essential prerequisite to conviction. Pen.Code, § 1111.

2. Criminal law 🔑511(1, 2)

Under statute providing that a conviction cannot be had upon testimony of an accomplice unless "corroborated", the corroboration is not sufficient if it requires interpretation and direction to be furnished by the accomplice's testimony to give it value, or if it merely casts a grave suspicion upon the accused, and corroborative evidence to be sufficient and of the required substantial value must tend directly and immediately to connect defendant with the offense charged against him. Pen.Code, § 1111.

See Words and Phrases, Permanent Edition, for all other definitions of "Corroborated".

3. Criminal law 🔑508(1)

An accomplice who confesses his own infamy may be a witness.

4. Criminal law 🔑511(3)

Under statute providing that a conviction cannot be had upon the uncorroborated testimony of an accomplice, the testimony of accomplice need not be corroborated by direct evidence, but the entire conduct of defendant may be looked to for corroborating circumstances, and, if from those circumstances the connection of the accused with the crime may be fairly inferred, the corroboration is sufficient. Pen. Code, § 1111.

5. Criminal law 🔑511(4)

Circumstance that defendant knew that victim of a robbery possessed a large valuable ring which was stolen during robbery, and that one of the robbers kept demanding the "big ring" was not corroboration of testimony of alleged accomplice of defendant necessary to sustain conviction on testimony of accomplice. Pen.Code, § 1111.

6. Criminal law 🔑511(4)

Testimony of a threat allegedly made to victim of robbery by defendant after victim refused to purchase a valuable ring from defendant's jewelry establishment and later acquired the same ring from another jewelry firm, was not corroboration of testimony of alleged accomplice in robbery necessary to sustain conviction on testimony of accomplice. Pen.Code, § 1111.

7. Criminal law 🔑511(4)

The fact that defendant was acquainted with one of the robbers, would not be sufficient corroboration of testimony of alleged accomplice of defendant to sustain conviction for robbery on testimony of accomplice. Pen.Code, § 1111.

8. Robbery 🔑24(1)

Possession by a defendant of a weapon identified as similar to one used in the commission of a robbery is substantial evidence connecting a defendant with the crime.

9. Criminal law 🔑511(4)

Where in order to give evidence that defendant possessed a gun similar to that used in robbery any effect as tending to connect defendant with the robbery, it was necessary to interpret the evidence in light of the testimony of accomplice, the evidence was not corroborative of the testimony of accomplice within statute precluding conviction on uncorroborated testimony of accomplice. Pen.Code, § 1111.

10. Criminal law ⚿348, 351(1, 2), 511(2, 6, 7)

Circumstances such as fright, possession of stolen property, false or misleading statements made to arresting officers or others with relation to material facts, for purpose of misleading or warding off suspicion, may be received in criminal prosecution as indicating a consciousness of guilt, and may be considered as corroboration of an accomplice, but when utilized to corroborate testimony of an accomplice, the circumstance relied upon must tend to connect the accused with the specific offense for which he is being prosecuted. Pen.Code, § 1111.

11. Criminal law ⚿511(7)

Where defendant did not personally participate in robbery, false denials made by defendant to police that defendant did not possess or own a gun did not tend to show that previous to the robbery wherein a gun similar to gun owned by defendant was used, defendant had advised and encouraged commission of the robbery, and therefore did not tend to connect defendant with the crime and did not constitute corroboration necessary to sustain conviction upon testimony of accomplice. Pen. Code, § 1111.

12. Criminal law ⚿511(7)

Where defendant went with police officers to search defendant's business premises where a gun similar to gun used by others in a robbery was found in a locked desk, that defendant after admitting officers to premises put his keys in his pocket and denied having the keys to the desk until they were found in his pocket by officers, would not tend to connect defendant with the advising and encouraging the commission of the robbery so as to constitute corroboration necessary to sustain conviction upon testimony of accomplice. Pen.Code, § 1111.

13. Criminal law ⚿511(2)

Defendant's connection with the offense required to be established under statute precluding a conviction upon the uncorroborated testimony of an accomplice cannot be accomplished by piling suspicious circumstance upon suspicious circumstance, nor by building up conjecture upon conjecture. Pen.Code, § 1111.

14. Criminal law ⚿308

One is presumed to be innocent of crime.

15. Criminal law ⚿511(4)

Where jury knew nothing about affidavit presented on defendant's motion for a separate trial which was sworn to by defendant's brother, in which it was averred that brother and others planned and carried out robbery without participation of defendant, and jury was not entitled to know anything about affidavit, defendant's failure to produce brother as a witness in robbery prosecution could not be considered as an incident corroborating testimony of alleged accomplice as tending to connect defendant with the advising and encouraging the commission of the robbery so as to sustain conviction upon testimony of accomplice. Pen.Code, § 1111.

16. Criminal law ⚿788

In robbery prosecution, trial court properly instructed jury that neither prosecution nor defense was required to call as witness all persons shown to have been present at any of the events involved in evidence, or who might appear to have some knowledge of the matters in question.

17. Criminal law ⚿1134(3)

On appeal from robbery conviction, district Court of Appeal had duty to determine whether evidence corroborating testimony of an alleged accomplice tended to connect the defendant with the commission of the robbery and could weigh the evidence in determining sufficiency of evidence to corroborate alleged accomplice. Pen.Code, § 1111.

18. Criminal law ⚿511(4)

Proof of mere suspicious circumstances and of opportunity to commit a crime does not constitute corroboration sufficient to sustain a conviction upon the testimony of an accomplice. Pen.Code, § 1111.

19. Criminal law ⚷511(1)

In robbery prosecution, evidence exclusive of testimony of alleged accomplice did not constitute substantial proof that defendant either advised or encouraged the commission of the robbery, and therefore did not constitute the corroboration of testimony of accomplice necessary to sustain conviction on testimony of accomplice. Pen.Code, § 1111.

20. Criminal law ⚷508(9)

Where prosecution presented the testimony of an alleged accomplice, notwithstanding prosecution had dismissed charges against accomplice of armed robbery and kidnapping by force, testimony of accomplice could be viewed in the light of the reward extended to him, insofar as the motives arising therefrom might prompt him in the giving of his testimony. Pen. Code, § 1111.

21. Criminal law ⚷633(1)

Courts must be watchful for the constitutional and individual rights of the citizen and against any stealthy encroachments thereon.

22. Criminal law ⚷407(2)

Where defendant had consistently denied any involvement in charged robbery when questioned by police officers, an accusatory statement made to defendant while under arrest was not admissible.

23. Criminal law ⚷781(1)

Where an accusatory statement was erroneously admitted into evidence in robbery prosecution against a defendant whose alleged connection with robbery was in advising and encouraging its commission, and prosecutor's argument to jury included statements which were damaging to defendant and which would not have been permissible had accusatory statement been eliminated from record, failure to give requested instructions correctly embodying law as to limited purposes for which evidence of accusatory statements are receivable in evidence was error.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Maurice Monte Reingold, Gail Reingold, Albert Greenburg, and Joe Miller were jointly charged wtih robbery and with kidnapping for the purpose of robbery, and from conviction of robbery of the first degree, Maurice Monte Reingold appeals.

Appeals dismissed, judgment and order denying motion for new trial, reversed, and cause remanded.

Jerry Giesler and Ward Sullivan, both of Los Angeles, for appellants.

Fred N. Howser, Atty. Gen., and Walter L. Bowers, Asst. Atty. Gen., for respondent.

WHITE, Justice.

In an indictment returned by the grand jury of Los Angeles County, the above named defendants were jointly charged in count I with the crime of robbery, and in count II with the crime of kidnapping for the purpose of robbery, relating to the offense alleged in count I.

Defendant Maurice Monte Reingold filed a motion to quash and set aside the indictment, a motion that the court of its own motion, dismiss the indictment under section 1385 of the Penal Code, a demurrer to the indictment, and a motion for a separate trial from his codefendant. He likewise filed a request made to the district attorney to ask for a dismissal of the indictment under the provisions of section 1385 of the Penal Code. His motions to quash and dismiss the indictment were denied, his demurrer overruled, and his motion for a separate trial denied without prejudice, whereupon he entered his pleas of not guilty to each count of the indictment. Subsequently, when the cause was called for trial defendant Maurice Monte Reingold renewed his motion for a separate trial and the same was again denied.

Defendant Gail Reingold changed his plea from not guilty to guilty as to count I, and, on motion of the district attorney, counts I and II of the indictment were severed for trial, and the cause proceeded to trial on count I as to defendants Maurice Monte Reingold, Albert Greenburg and Joe Miller.

During the course of the trial, count I was dismissed as to defendant Greenburg, and he testified as a witness for the people.

At the conclusion of the trial the jury returned verdicts finding defendants Maurice Monte Reingold and Joe Miller guilty of robbery as charged in count I of the indictment, finding the offense to be robbery of the first degree, and further finding that said defendants were armed at the time of the commission of the offense. Count II of the indictment was subsequently dismissed.

Defendant Maurice Monte Reingold moved for a new trial, which motion was denied. He prosecutes this appeal from the verdict of the jury finding him guilty of the crime of robbery in the first degree; from the verdict finding that at the time of the commission of said robbery he was armed with a deadly weapon; from the judgment of conviction, and from the order denying his motion for a new trial.

As grounds for a reversal, appellant urges:

I. That the verdict is contrary to the law and to the evidence.

II. That the court erred in reference to alleged accusatory statements:

(a) In permitting one such alleged statement to remain in the record; and

(b) Having left one such statement in the record, in failing to instruct the jury in accord with request of appellant, advising the jury how and for what purpose to consider such statement.

III. That the court abused its discretion in failing to grant appellant a trial separate and apart from his codefendants.

Epitomizing the testimony adduced at the trial, the record reveals the following: Appellant was a man some 55 years of age, married and the father of a daughter, residing in the City of Beverly Hills, Los Angeles County, in his own home, which was free from debt; that he was engaged in a successful jewelry business located at Wilshire Boulevard and Beverly Drive, one of the most prominent corners in the City of Beverly Hills, where he had been doing business for some 7½ years under the firm name of M. Reingold, Inc. That appellant was a man of considerable means, and not involved in financial difficulties on April 2, 1947, the date of the robbery charged against him. That appellant had a brother, Gail Reingold, a named codefendant, who was a man about 60 years of age and employed by appellant in his store as a salesman at a salary of $200.00 per week with a bonus at the end of each year, and likewise a special bonus upon the consummation by him of the sale of any particularly important or valuable item of jewelry.

Mrs. Sadie Genis, the victim of the robbery, lived with her husband in an outside apartment consisting of the second and third floors facing on the street at 9543 Charleville Drive, three blocks from appellant's jewelry store, in the City of Beverly Hills. She had known appellant Maurice Monte Reingold, better known as Moe Reingold, and his brother Gail, for several years. During this interval she had patronized appellant's store and purchased various articles of jewelry from him and his brother. She testified that appellant had told her that his brother was a member of the firm and could be dealt with the same as if she were dealing with appellant. It appears from the record, according to the testimony of Mrs. Genis, that defendant Gail Reingold, brother of appellant, was a social acquaintance of herself and her husband, had played gin rummy at the Genis' home on at least one occasion, and that the victim and her husband had accompanied defendant Gail Reingold and his fiancee to dinner on another occasion.

In the fall of 1946, Gail Reingold telephoned Mrs. Genis that he had a "quick buy", that some client of theirs had lost money on the stock market and needed cash quickly. He asked her if he could bring a ring up to the house, to which she agreed. Gail Reingold then took the ring to Mrs. Genis' apartment. According to her testimony he represented that it was a 21 karat diamond and told her that he wanted $40,000.00 or $45,000.00 for the ring. She told him she could not purchase it without taking the matter up with her husband and having it appraised. Gail Reingold thereupon left the ring with her for that purpose. According to the testimony of Mrs. Genis, Gail Reingold told her that the ring had been originally purchased at the cost of $60,000.00 from Jack, Starr and Frost in New York and now belonged to a moving picture outfit in Los Angeles County. After negotiations back and forth, and following appraisal of the ring by Mrs. Genis and her husband, the former made an offer of $30,000.00, which defendant Gail Reingold attempted to get her to raise by an additional $1,500.00, which he told her he must make for himself. Mrs. Genis refused, and made a final offer of $30,000.00, which finally was accepted. When Mrs. Genis came into the store to make out a check and inquired as to whom she should make the same payable, according to her testimony, appellant told her to make it out to M. Reingold, Inc. Previously, according to testimony of Mrs. Genis, defendant Gail Reingold had told her there was no tax attached to the purchase because it was bought from a private party. Consequently, according to her testimony, when she was requested to make the check payable to M. Reingold, Inc., she said "Mr. Reingold, does not this involve a tax feature? This is supposed to be a private party. If I make it out to you, that involves the tax feature." Thereupon she telephoned to her husband, and it will suffice to say that following such conversation Mrs. Genis refused to go through with the purchase of the ring, and the same was returned by appellant to Harry Winston Company, New York jewelers, to whom it belonged, and who had left it with appellant to be sold on consignment. If so sold, Harry Winston Company was to receive $18,500.00 for the ring.

Subsequently, Mrs. Genis learned that Harry Winston Company owned the ring, and in the latter part of November, or in December of 1946, she purchased the ring from the owners for $19,000.00, plus the tax, which she paid, a total amount of $22,800.00.

Sometime between January 6 and 15, 1947, Mrs. Genis received a bill in the mail from appellant for other purchases made by her and went to the store to consult him about the same. According to her testimony, at that time both appellant and his brother Gail were in the store and Mrs. Genis informed them that she had purchased the ring from the Winston Company for some $8,000.00 less than the Reingold brothers had offered to sell it. After some conversation, according to Mrs. Genis, Gail Reingold left the store and appellant then upbraided her, calling her a "son-of-a-bitch" and telling her that "she would never get away with it if it was the last thing he did."

There was testimony that appellant was acquainted with his codefendant Miller since about November, 1930, when the latter, then going under the name of Harris, called upon appellant at his jewelry store, then located in the Title Guarantee Building in downtown Los Angeles.

Defendants Miller and Greenburg had been acquainted with each other for "a few years", having met in New York City.

Defendant Greenburg came to Los Angeles sometime about August or September, 1946, with his wife, and engaged in the restaurant business in Hollywood. Just prior to Christmas of that year defendant Miller called to see Greenburg at his restaurant and soon thereafter commenced calling upon the latter quite often.

Early in the year 1947, defendants Greenburg, Miller and Gail Reingold met in a cafe on Sunset Boulevard. On that occasion Gail Reingold said he knew a woman to whom he had attempted to sell a ring, that she didn't buy it from him, but eventually purchased it. At this meeting, according to the testimony of Greenburg, defendant Gail Reingold made arrangements with him "to take her".

According to the testimony of defendant Greenburg, on the morning of April 2, 1947, he and defendants Miller and Gail Reingold met; Gail Reingold informed his codefendants that Mrs. Genis was in her apartment and that Miller and Greenburg should go up there and "they would get her." According to Greenburg, he told Gail Reingold that he had no gun, whereupon Reingold walked in the direction of appellant's store and came back in a few moments with a .32 Colt automatic.

Thereupon, defendants Greenburg and Miller entered the apartment of Mrs. Genis in broad daylight, during the morning of April 2, 1947, and robbed her. During the course of the robbery defendant Miller assaulted Mrs. Genis with his gun, striking her on the head, thereby causing her to suffer severe head injuries. During the course of the robbery, jewelry of the value of approximately $125,000.00 was stolen. There is testimony that during the robbery one of the bandits demanded to know where the "big ring" was, and also told her that he followed her in Phoenix, Arizona, and was familiar with her jewelry.

We do not deem it necessary to further set forth the testimony concerning the robbery and subsequent events as given by defendant Greenburg, who testified for the prosecution after the charge against him had been dismissed, other than to say that, according to his testimony, defendant Gail Reingold had employed him and Miller to commit the robbery, and paid them $5,000.00 therefor; that the jewelry of the estimated value of $125,000.00 was turned over to Gail Reingold; that the latter supplied Greenburg with a gun on the morning of the robbery, which Greenburg testified he used in the robbery and later returned to defendant Gail Reingold at the latter's home. According to the testimony of defendant Greenburg, the gun was similar in size and caliber to the gun found in appellant's desk on the night of his arrest. Greenburg further testified that some three weeks after the robbery he read in the papers of the value of the jewels stolen, and claimed to have been "double-crossed" by defendant Gail Reingold, since the latter had told him he had sold the jewelry for $7,500.00. That Greenburg called on Gail Reingold and asked for more money, whereupon the latter asked him to come to the store the next day and he would give him $200.00 additional. That he went to the store the next day, waited for Gail Reingold for an hour, became impatient and went into the store, at which time he testified appellant spoke to him asking if he could help him. That Greenburg then said, "Sure, you can help me. It's a fine double-cross you guys gave me." That appellant looked at him and asked, "What do you mean?" to which Greenburg replied, "You know what I mean. Where is that brother of yours?" That appellant stated his brother would arrive shortly and remarked, "You got your money, didn't you?" That about that time defendant Gail Reingold walked in, told appellant that he had promised Greenburg a couple of hundred dollars and asked appellant to get for him. That the latter then produced two $100.00 bills, gave them to Greenburg, saying, "What is the matter with you? You are too hot for around here. Why don't you get smart to pourself and stay away from here."

About July 10, 1947, an attorney representing Gail Reingold reported to the police that some man had come to his office that day and left a package containing the jewelry stolen in the robbery, which the attorney delivered to the Beverly Hills Police Department.

On the morning of July 17, 1947, about 9 o'clock, appellant was arrested while on his way from his home to his office. He was held in the Beverly Hills Jail all that day, was constantly questioned and requestioned, during which inquisition he was accused of complicity in the robbery of Mrs. Genis, all of which he emphatically denied. He testified that he was booked and taken into the showup room, was not permitted to telephone to his wife and daughter or to his store, nor his attorney, throughout the day. That he was accused of being acquainted with his codefendants, the robbers Greenburg and Miller, all of which he denied.

Testifying as a witness in his own behalf, appellant denied ever having personally had any dealings with Mrs. Genis or with ever having personally sold her any jewelry, that he had not seen her more than eight times in his life. He denied having ever talked with her about the "big ring" or having told her to make out the check of same to M. Reingold, Inc. He denied ever using any abusive langauge to Mrs. Genis or making any statement to the effect that he would get even with her if it was the last thing he ever did.

Appellant also denied that he had ever seen his codefendant Greenburg in his jewelry store at all or that any of the aforesaid conversation between himself and Greenburg occurred. He denied absolutely that he had ever supplied Greenburg with $200.00 or that his brother had obtained that amount or any other money from him to give to Greenburg.

On the evening of the day when appellant was arrested, he was taken, with his permission and acquiescence, to his store about 9 o'clock in the evening of the company of three police officers, whereupon he opened the store vaults to permit the officers to search for the stolen jewelry, but the same was not found. The officers testified that appellant made false statements during the day of his arrest and also on that evening as to not owning a gun. That he stated he did not possess a gun, nor did he have one in the store, but that when they entered the store appellant opened the desk and a .32 caliber automatic gun was lying there, that appellant made certain false statements in reference to the ownership of the gun, and with reference to his knowledge of its being there. In connection with this incident, which will be more fully treated hereinafter, appellant, on his part, testified to his state of mind, of fright, fear and confusion in regard to the circumstances surrounding the statements as to the gun, and also concerning an episode regarding certain questions, which will be referred to later.

Appellant concedes that the evidence in the case at bar clearly established without contradiction that defendants Albert Greenburg and Joe Miller committed the offense of robbery as charged in count I of the indictment, and in a daylight robbery in the City of Beverly Hills obtained from the victim some $125,000.00 worth of jewelry, in the course of which robbery the victim was brutally beaten about the head and severely injured. That it is further clearly established, in view of the plea of guilty of the codefendant Gail Reingold to this charge of robbery, that he was equally guilty of the same with the said two codefendants Greenburg and Miller.

As to appellant Maurice Monte Reingold we are confronted with a situation wherein there is no direct evidence connecting him with the crime of which he was convicted, for the reason he did not actually participate in the robbery. Therefore he could be convicted only on the ground that though inactive during the commission of the offense, he had previously advised and encouraged the holdup. The only direct evidence that appellant knew of the contemplated robbery or that he had previously advised and encouraged it is supplied by the witness Greenburg. And this evidence consisted only of a conversation Greenburg had with appellant subsequent to the perpetration of the robbery, wherein the former attributed to the latter a certain statement, to be later discussed, indicating that appellant, subsequent to the commission of the offense, and at the time of the conversation, had some knowledge that the crime in question had been committed. The witness Greenburg concededly being an accomplice, his testimony must be corroborated, pursuant to the provisions of section 1111 of the Penal Code, which, so far as here pertinent, reads: "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. * * *"

[1] Where, as here, proof of guilt of the crime charged rests primarily and solely upon the testimony of an accomplice, the statute makes imperative corroboration of the testimony of such an accomplice as an essential prerequisite to the conviction of the accused.

As to what constitutes sufficient corroboration of the testimony of an accomplice, we have the following rule enunciated by our Supreme Court in the case of People v. Morton, 139 Cal. 719, 724, 73 P. 609, 611, wherein the following language taken from Welden v. State, 10 Tex.App. 400, is quoted with approval:

"* * * Eliminate from the case the evidence of the accomplice, and then examine the evidence of the other witness or witnesses with the view to ascertain if there be inculpatory evidence—evidence tending to connect the defendant with the offense. If there is, the accomplice is corroborated; if there is no *inculpatory* evidence there is no corroboration, though the accomplice may be corroborated in regard to any number of facts sworn to by him." And in the

Morton case, supra, the Supreme Court places its imprimatur upon the rule announced in Simms v. State, 8 Tex.App. 230, as follows: "The evidence must tend directly and immediately to connect the defendant with the commission of the offense." In other words, to be of any avail, the corroboration, however strong in all other respects, must point to the connection of the defendant with the commission of the crime.

While it is true that the corroborative evidence is sufficient if it, of itself, tends to connect the defendant with the commission of the offense, although it is slight, and entitled, when standing by itself, to but little consideration, nevertheless, the rule is firmly established in our law that more is required by way of corroboration than mere suspicion or even grave suspicion. People v. Braun, 31 Cal.App.2d 593, 600, 601, 88 P.2d 728, and cases therein cited; People v. Shaw, 17 Cal.2d 778, 803, 809, 112 P.2d 241; People v. Lima, 25 Cal.2d 573, 579, 580, 154 P.2d 698.

[2] We may, therefore, epitomize the requirements of section 1111 of the Penal Code by saying, first, that the corroboration is not sufficient if it *requires interpretation and direction* to be furnished by the accomplice's testimony to give it value; second, that the corroborative evidence to be sufficient and of the required *substantial* value *must tend directly and immediately* to connect the defendant with the offense charged against him; and, third, that the corroborative evidence is insufficient when it merely casts a grave suspicion upon the accused.

We use advisedly the word "substantial" with reference to the value to which the corroborative evidence must rise, for, as said in People v. Janssen, 74 Cal.App. 402, 410, 240 P. 799, 802: "The legislature, acting within the scope of its authority, has provided that, to justify the conviction of a defendant, there must be *substantial* corroboration of the testimony of an accomplice. The lawmaking body doubtless had a good reason for this rule of evidence, and based it on what it conceived to be a *sound public policy*. The judicial department may not ignore the rule without unwarrantably invading the rights of the accused". (Emphasis added.) See also People v. Sciaroni, 4 Cal.App. 698, 700, 89 P. 133; People v. Dail, 22 Cal.2d 642, 655, 140 P.2d 828.

[3] While the law in its anxiety to prevent the guilty from escaping punishment for their crimes permits an accomplice who confesses his own infamy to be a witness, it also recognizes the strong motives that undoubtedly actuate such a witness to prove the defendant on trial to be guilty of the offense, and to palliate as much as possible his own guilt. And with equal solicitude for the protection of the citizen, the law watches with jealous scrutiny the testimony of an accomplice, and will not permit any person to be convicted solely by the testimony of an accomplice, but requires substantial corroboration of his statements from independent sources.

With the foregoing legal principles in mind, we now turn to the record to discern in what respects, if at all, the testimony of the accomplice Greenburg was corroborated.

It may serve to clarify an understanding of respondent's claimed sufficiency of the corroborative evidence to here summarize the testimony of the accomplice which was sought to be corroborated.

At the outset it is conceded that Greenburg at no time prior to the commission of the crime met or talked with appellant, and according to the former's testimony, his only contacts were with his codefendants Miller and Gail Reingold, who he claimed laid out the plans for the commission of the robbery. The only mention of appellant by the accomplice Greenburg relating to a time prior to the commission of the robbery was his statement that appellant's brother in his meetings "kept saying before he can give us everything he would have to consult with his brother."

The only other reference to appellant by Greenburg in the latter's testimony related to a time after the robbery. In that regard, the accomplice Greenburg testified that after he and his codefendant Miller had stolen the jewelry from the victim, he delivered it to Gail Reingold at the latter's home; that later Gail told him he had sold the jewelry for $7,500.00 and that he was giving Miller and Greenburg $5,000.00, or two-thirds of what he had sold it for; that some time later he, Greenburg, read something in the newspaper about the value of the jewelry taken, wherein it was referred to as a $100,000.00 jewelry robbery; that he then went to the home of Gail on the night that this appeared in the paper, about three weeks after the robbery; complained to him about his "cut" and demanded more money; that he then asked Gail for $1,000.00 and Gail told him to come to the store the next day about one o'clock.

With reference to what transpired at the store, according to the testimony of the accomplice Greenburg, we herewith set forth such testimony from the reporter's transcript:

"Q. Now, the next day did you go to the Reingold store in Beverly Hills? A. I did.

"Q. Did you go there alone? A. All alone.

"Q. Was Gail in the store? A. No, sir.

"Q. How long did you wait around there for Gail, if you did wait for him? A. A good hour, hour and a half.

"Q. What did you do then? A. Well, I got disgusted of waiting.

"Q. Did you go in the store? A. I kept parading up and down in front of the store, and then I finally went into the store.

"Q. Who did you see in the store? A. And I walked in and I just looked around, Moe—Mr. Moe Reingold walked up to me—

"Q. Will you keep your voice up, please Mr. Greenburg. A. Moe Reingold walked up to me and he asked me if he could help me. I said, 'Sure you can help me. It's a fine double-cross you guys gave me.' He looked at me. He says, 'What do you mean?' I says, 'You know what I mean.' I says, 'Where is that brother of yours, Gail?' He says, 'Well, he should be here shortly.' He says, 'Your business is with Gail.' And he said, *'You got your money, didn't you?'* to that effect, and as we were talking Gail walked in, so Gail walked right up to us and he told his brother, he said, 'I promised this guy a couple of hundred dollars. Can you get—will you get it for me? With that Gail went and he got $200.00 and he gave it to me, two hundred-dollar bills, each one was a hundred-dollar bill.

"Q. Did Gail or Moe give you those two one-hundred dollar bills? A. Moe give it to me.

"Q. Moe gave them to you? A. That's right.

"Q. Before Gail joined the conversation between you and Moe was anything said by anybody about your hanging around? A. *Yes. Moe told me, he says, 'What's the matter with you? You are too hot for around here. Why don't you get smart to yourself and stay away from here.'*" (Emphasis added.)

The significant and particularly inculpatory portion of the foregoing testimony lies in the words allegedly uttered by appellant, "You got your money, didn't you?"

On cross-examination, the accomplice Greenburg was shown a transcript of his testimony given before the Grand Jury on July 15, 1947, some three months after the perpetration of the robbery, wherein the witness testified that when he stated to appellant, "It's a fine double-cross you and your brother gave me", appellant said, "What are you talking about? I don't know what you are talking about." The witness admitted he so testified before the Grand Jury.

Following the reading of excerpts from Greenburg's grand jury testimony to him, the following occurred:

"Q. Now, in that relation of that conversation in July, which was just several months after that, you said nothing, did you, about Moe saying to you, 'You have been paid', did you? A. I didn't get that question.

"Q. *I said, when you testified before the Grand Jury in July, just several months after the occurrence of the event, you did not say anything about Moe, as you testified today, about Moe having said to you in the store there, 'You have been paid'; you didn't say anything about that, did you?* A. *It didn't come to me then.*

"Q. *It has come to you since, is that it?* A. *Well it came to me since, sure.*" (Emphasis added.)

We attach some importance to the inculpatory testimony given by the accomplice at the trial and not mentioned by him before the grand jury shortly after the commission of the robbery because of the state of mind of the witness as evidenced by him at the trial when, in answer to a question whether he meant what he had said, that he had gone on the witness stand and involved himself in the robbery in question without making any arrangements for immunity, he said, "I was willing to do that, *and more,* for the reason that I was double-crossed." (Emphasis added.)

When asked if he had given no thought to what the consequences might be for him for implicating himself in a statement concerning the robbery, made to police officers in New York, the witness replied:

"A. I didn't give it no thought. I felt that whatever I told Mr. Borders (Beverly Hills police officer present in New York) I can always deny it if it comes down to it.

"Q. Your sole thought, then, was to get even with the Reingolds, even if you yourself got hurt in the process? A. I didn't care, I really didn't care. I was never double-crossed in my life."

To us it seems a reasonable challenge to credulity to assume that had the accomplice Greenburg ever had any knowledge of a connection with appellant in the planning or consummation of the robbery, he would have waited around the jewelry store for more than an hour for the arrival of Gail Reingold and that when the accomplice finally entered the store, that he would make no approach to appellant but wait until the latter "walked up to me and he asked me if he could help me."

We might here pause to remember that if the "evidence corroborative of an accomplice must tend directly and immediately to connect the defendant with the commission of the offense" (People v. Lima, 25 Cal.2d 573, 579, 154 P.2d 698; see also People v. Ciani, 104 Cal.App. 596, 601, 286 P. 459; People v. Fagan, 98 Cal. 230, 233, 33 P. 60), it must necessarily follow that the testimony of the accomplice must tend to connect the defendant with the specific offense charged against him. All of the testimony given by the accomplice herein is consistent with the supposition that appellant only knew of the robbery after its commission, or that he was simply a receiver of stolen goods, knowing them to have been stolen. It is difficult to reconcile the testimony of the accomplice herein with the conclusion that appellant had, previous to the commission of the offense, advised and encouraged its commission. So much for the testimony of the accomplice himself.

Assuming however, that the testimony given by the accomplice was sufficient to warrant a conclusion by the jury that appellant was an aider and abettor in the commission of the offense of which he was convicted, we now turn to the circumstances relied upon by the prosecution as sufficient corroboratory evidence of the testimony given by the accomplice. They are as follows:

"(1) Appellant's knowledge of victim's possession of the large 18½ karat diamond ring, coupled with the fact that at the time of the robbery Miller kept demanding the 'big ring'.

"(2) Appellant's threats against Mrs. Genis when he found she had purchased this large diamond ring elsewhere. (His denial of the same.)

"(3) Appellant's acquaintance with the defendant Miller. (His denial of the same.)

"(4) Appellant's possession of a gun identical with that used in the robbery. (His denial of the same.)

"(5) Appellant's attempt to keep his desk keys, where the gun was found, from the officers.

"(6) Appellant's falsehoods: (a) that he had no dealings himself with Mrs. Genis and that she did not tell him she had purchased the ring elsewhere; (b) that he did not tell Mrs. Genis to whom to make the $30,000 check payable; (c) that he made no threat to Mrs. Genis; (d) that he had never seen the defendant Miller until at the time of this trial in the courtroom; (e) that he did not have any gun; (f) that the gun found in his desk drawer was not his and he had never seen it before and had no knowledge of it; (g) that his employee Slack shared the desk with him and the gun probably belonged to Slack.

"(7) Appellant's failure to produce testimony."

[4] With commendable candor, the attorney general does not contend "that each of these circumstances standing alone constitutes sufficient legal corroboration", but asserts that some of them do, and that "when taken altogether and the entire conduct of the appellant considered, his connection with the crime may be justly inferred—is, in fact, convincing—and that the corroboration is sufficient." In support of these claims, respondent relies upon the holding that "The law is well settled that the testimony of the accomplice need not be corroborated by direct evidence. The entire conduct of the defendant may be looked to for the corroborating circumstances, and, if from those circumstances the connection of the accused with the crime may fairly be inferred, the corroboration is sufficient." People v. Nikolich, 93 Cal.App. 356, 358, 269 P. 721, 722.

But, neither in this case nor in any of the others cited by respondent do we find any holding militating against the basic rules hereinbefore announced by us for determining whether the corroborative evidence satisfies the requirements of section 1111 of the Penal Code.

We deem it a fair statement to say that an examination of the decisions will show that the evidence in each case must be considered in the light of these established rules, applied to its particular facts, and a determination reached accordingly.

[5] The first two circumstances relied upon by respondent as corroborative evidence may be considered together—appellant's knowledge of the victim's possession of the large 18½ karat ring, coupled with the fact that at the time of the robbery, his codefendant Miller, one of the robbers, kept demanding the "big ring". The circumstances surrounding the acquisition of the ring are hereinbefore set forth in the statement of facts and need not here be repeated. Respondent concedes that "this circumstance does not of itself constitute sufficient legal corroboration", and "fails to rise above a mere suspicion of guilt." We do not think it should be dignified as raising even a slight suspicion of guilt. To attach any evidentiary value to this knowledge on the part of appellant would be equivalent to saying that anyone possessing like knowledge would be a possible suspect. Respondent however, argues that such knowledge on the part of appellant constitutes a link in the chain of corroborative evidence which when taken as a whole satisfies the legal requirements of sufficient corroboration. With this we cannot agree because it amounts to no inculpatory evidence at all, either standing alone or viewed in conjunction with the other circumstances relied upon by respondent.

[6] As to the threat allegedly made to the victim by appellant after she had refused to purchase the ring from his jewelry establishment and had acquired it from a New York firm, and in connection with which the victim testified that when she informed appellant of her purchase of the ring, "He called me a son-of-a-bitch and told me I would never get away with it if it was the last thing he did", we find ourselves in accord with the view of the trial judge, who, in ruling upon the motion for a new trial, said, "So far as the testimony as to the threat as to which Mrs. Genis testified indicating a motive, I do not feel that that would corroborate the testimony of an accomplice. I mention that because I believe that would be one of the things counsel would probably call to my attention, and as to that I would agree with him. The effect of that would be merely as tending to furnish some corroboration of the general picture, but not to corroborate the accomplice."

[7] As to respondent's claim of acquaintance on the part of appellant with his codefendant Miller, one of the robbers, which was denied by the former, the attorney general in his brief states, "Our courts have more than once stated that mere acquaintanceship or association of a defendant with the actual perpetrator of a crime does not of itself constitute sufficient corroboration. We admit without question that it does not constitute sufficient corroboration." Respondent then relegates this circumstance to the same category as

appellant's knowledge of the victim's possession of "the big" diamond ring and his threat against her. There can be no question that it is insufficient corroboration merely to connect a defendant with the accomplice or other persons participating in the crime, but evidence independent of the testimony of the accomplice must tend to connect a defendant with the crime itself, and not simply with its perpetrators. It is not with the thief that the connection must be had but with the commission of the crime itself. People v. Long, 7 Cal.App. 27, 33, 93 P. 387; 12 Corpus Juris, section 231, p. 638, 639; 16 Corpus Juris, section 1446, p. 708; 15 C.J.S., Conspiracy, § 93, p. 1150; 22 C.J.S., Criminal Law, § 812, p. 1397; 1 Encyl. of Evidence 107.

The fourth circumstance relied upon by respondent to corroborate the testimony of the accomplice is entitled, "Appellant's possession of a gun identical with that used in the robbery. (His denial of the same.)"

In this regard, the accomplice Greenburg testified at the trial that Joe Miller, his codefendant who participated in the robbery, was armed with a .22 revolver and that on the morning of the robbery he, Greenburg, did not have a gun but that before they went to Mrs. Genis' apartment Gail Reingold supplied him with a .32 Colt automatic.

With reference to this gun Greenburg testified that at his first meeting with Gail Reingold in the presence of Miller, at Victor's Restaurant on Sunset Boulevard, during the course of the conversation he, Greenburg, had said that he didn't have a gun and that Gail replied, "Don't worry about a gun, I will get you a gun"; that Miller had a .22 caliber automatic which Greenburg identified on the witness stand and which was received in evidence; that on the morning of the robbery, when Miller and he first drove to Beverly Hills, they only had the one gun—the .22; that they parked the car and Miller went to find the apartment of Mrs. Genis, could not locate it, came back and called up Gail Reingold; that Gail came over and met Miller and that Gail then went down to the apartment building; that Gail came back and told Miller and Greenburg that the woman was in her apartment, that he heard her talking on the telephone; Greenburg then testified that he then told Gail, "How about a gun, I have no gun", and Gail said, "All right, walk up the street and I will go back and bring you a gun"; that Gail went on up Beverly Drive; passed out of his view when he was walking on Charleville Drive, which is where Mrs. Genis lived; that when next he saw Gail the latter was not on Wilshire Boulevard but either on El Camino or Beverly Drive; that when Gail returned he came up to them and gave Greenburg a gun; Greenburg testified that Gail gave him a black .32 Colt revolver.

On cross-examination, in reference to this episode, Greenburg testified with reference to his position on El Camino, that from where he was situated when looking across to Beverly Drive one cannot see the appellant's store.

At the trial a black .32 Colt revolver was introduced into evidence. It was found by police officers in a locked center drawer of appellant's desk at his store when officers took him there to search the premises. However, with reference to its identification as the weapon used by Greenburg in the robbery, the latter did not testify at the trial that it was the identical weapon. He went no further than to say, "This looks like the gun I received that morning." It would do violence to the record to say that the weapon was identified as one of the guns used in the robbery. In fact respondent's brief, in that connection, contains the concession, "Admittedly the gun in question was not *positively* identified as one of those used in the robbery."

In connection with the question of identification of the gun taken from the desk drawer at appellant's store, although the police officers knew they were going to find the gun in appellant's desk drawer, they did not have the same examined to ascertain whether or not there were any of the fingerprints of the accomplice Greenburg, the codefendant Gail Reingold, or appellant on the gun. They did take this precaution with reference to the .22 automatic allegedly used by the codefendant Miller in the robbery.

[8] Respondent cites numerous cases in support of the claim that possession by a defendant of a weapon identified as *similar* to one used in the commission of a robbery has always been considered substantial evidence *connecting a defendant with the crime.* This is undoubtedly the law, but it is worthy of comment that in each of the cases cited by respondent, the appellant therein was *an actual participant* in the crime, and therefore, any weapon found in his possession, under his control, or near him would be proper to consider, whether similar or not. In the instant case, appellant was not an actual participant in the robbery and the burden rested upon the prosecution to inculpate him in the crime by connecting him with it through evidence sufficient to corroborate the testimony of the accomplice.

[9] The insufficiency of the evidence that appellant possessed a *similar* gun to connect him with the crime lies in the fact that in order to give such evidence any effect as tending in that direction, it seems from every angle necessary to interpret and explain this claimed "corroboration" in the light of the testimony of the accomplice Greenburg. His testimony is required to give it any direction to the alleged crime before it can be said to connect appellant with the commission thereof. This does not measure up to the requirements of the statute, which insists that testimony offered in corroboration of the testimony of an accomplice shall of itself tend to connect the defendant with the offense charged. People v. Davis, 210 Cal. 540, 554, 293 P. 32; People v. Shaw, supra, 17 Cal.2d page 805, 808, 112 P.2d 241; People v. Braun, supra, 31 Cal.App.2d page 600, 88 P.2d 728.

When appellant's office manager Fred Slack was produced as a witness at the trial, he testified that he had never put the gun in the desk, had never seen it before as far as he knew, that he never had access to the drawers in the desk nor did he ever have a key to the same.

At the trial appellant admitted the weapon was his and that he had owned it for about 29 years. Concerning his statements made to the officers regarding the gun, appellant testified that at the time he was taken to his store and when the officers found the gun, "I was in such a frame of mind from fright and nervousness, and I couldn't believe my eyes when they pulled the gun out of the drawer, I hadn't seen it for years, and I became very panicky and frightened, because I remembered that I told the officers that I didn't own a gun, and when I saw that gun I don't know what I said, I may have said anything."

When interrogated as to whether appellant was nervous on the night in question, police Sergeant Borders testified, "Oh yes."

As to the occurrences on the day now in question, appellant testified that he was the owner of 90% of the stock of his jewelry corporation; that the business had no financial difficulties of any kind, and was very successful. That the corporation was the owner of a lease which was entered into some seven and one-half years prior to the trial and would not expire for eight years thereafter, that the rental for the store was $500.00 per month, and that the present appraised value of the leasehold shows a present rental value of $2,000.00 to $2,500.00 per month, making the value of the lease approximately $150,000.00 to $175,000.00. That on April 2, 1947, the date of the crime charged against him, appellant's business had a value of $350,000.00.

Appellant testified that he was arrested about 9:30 o'clock on the morning of June 17, 1947, while on his way from his home to his business. That he was taken to the Beverly Hills jail, where, according to his testimony, he was constantly accused of complicity in the crime of robbing Mrs. Genis, all of which it is conceded he steadfastly denied. That he was told his bail would be fixed at $100,000.00, that the chief of police said he was going to ruin appellant's business, that four or five uniformed officers would be placed in front of his store, that three or four more would be placed inside and no one would be allowed to come into the store. That the chief of police advised him that the stolen merchandise would be found in appellant's store, whereupon the latter offered to go with the chief to the store to search the same. That he was fingerprinted and photographed, was accused of furnishing money and guns to the thugs who perpetrated the robbery of Mrs. Genis. That his many requests for permission to telephone his wife at home, his place of business and his attorney were denied. That he was given nothing to eat throughout the day. That he was taken to the "showup" room, where there were many bright lights and where he was compelled to mount a platform. That the chief of police then compelled him to "right face" and "left face".

It was following a day of such experiences that an officer approached appellant in his cell and "wanted to know if my proposition early in the morning that they didn't have to have a search warrant still held good, and could they come down to my place of business and search my store?", to which appellant replied, "Why, of course." Thereupon, appellant was taken to his store by the officers, where he unlocked the front door, directed the officers to his office and at their request unlocked the center drawer in his office desk, from which the officers extracted the .32 Colt automatic here in question.

As we view the situation surrounding the discovery of the gun, and statements to the officers in connection therewith, we are impressed that considerable force is given to appellant's claims that when questioned concerning his possession of a weapon he was suffering mental anguish, was highly nervous, and that his statements were motivated by distress of mind and fear, as he claims, rather than by consciousness of guilt as claimed by respondent, when it is remembered that in the course of the first conversation with appellant on the morning of his arrest the officers asked him if he kept a gun—an automatic or a revolver—at his home or at his place of business, that when appellant replied that he did not, the officers told him it was not a violation of the law to possess a gun and asked if he desired to change his story and admit having a gun, to which he replied that he had no gun and had not possessed one for years. Also, when it is remembered that later in the day Police Sergeant Borders again asked appellant if he owned a gun, especially an automatic, telling him the police had information that he had left one for years in a desk drawer, to all of which appellant again replied that he had no gun. And finally, as the officers were taking appellant to his store and just as they were about to enter, they again questioned him about a gun, advising him they were going in to search the premises, that they were informed he had a gun in the drawer of his desk, and that if such was the case he had better tell them about it. But appellant replied, "You won't find anything in there, particularly a gun."

It challenges credulity, does some violence to reason, and does not conform to the usual propensities of people, that appellant, if in his normal senses, should insist that there was no gun in his desk, when, as he testified, he had kept a gun for many years. A reasonable interpretation under the facts here presented would tend to sustain appellant's claim that he was in a distraught state of mind, confused, upset and befuddled to the point that, as he testified, "I don't know what I said, I may have said anything."

[10] It must be conceded that circumstances such as fright, possession of stolen property, false or misleading statements made to arresting officers or others with relation to material facts, for the purpose of misleading or warding off suspicion, may be received in evidence as indicating a consciousness of guilt, and may be considered as corroboration of an accomplice. But as to such circumstances, when utilized to corroborate the testimony of an accomplice, there must be present one very vital and essential element which is missing here. And that is that the circumstance relied upon, whatever it may be, must tend to connect the accused with the specific offense for which he is on trial. Therefore, in the instant case, unless the circumstances relied upon for "corroboration" furnish inculpatory evidence—that is, evidence tending to connect appellant with the specific crime involved, viz., the robbery of Mrs. Genis, it is not legal and sufficient corroboration.

[11] In the case now under review, it is conceded that appellant did not personally participate as an actor in the robbery of Mrs. Genis, and was absent from the scene of its perpetration. And, as heretofore

pointed out, he could only be convicted on the ground that though not present he had previously advised and encouraged the robbery. There is no direct evidence, other than by the accomplice, that appellant knew the robbery was contemplated or that he knew on the morning of his arrest that a robbery had been committed, much less that he had previously advised and encouraged it. Though it be assumed that the false statements as to the ownership or possession of a gun tends strongly to show that appellant knew or at least suspected that the weapon had been used in the Genis robbery, such statements do not tend to show, though they might be regarded as creating a suspicion, that previous to the robbery he had advised and encouraged its commission. In the case at bar, the corroborating circumstances must tend immediately and directly to connect appellant with advising and encouraging the robbery of Mrs. Genis. The statements made by appellant relative to his possession or ownership of a gun are consistent with the supposition and conclusion that he only knew of the robbery, or of the use of the gun in the robbery, if it was so used, after the commission of the crime, or that he had received some of the jewelry taken in the robbery, knowing it had been stolen. People v. Ciani, supra, 104 Cal.App. page 603, 286 P. 459; People v. Fagan, supra, 98 Cal. page 234, 33 P. 60; People v. Frank, 132 Cal.App. 360, 372, 22 P.2d 792.

However suspicious appellant's statements concerning the gun may be regarded, the cases are legion that suspicious circumstances and conduct are not sufficient to constitute corroborative testimony tending to connect an accused with the commission of the specific offense charged. The circumstances here relied upon concerning the gun do not of themselves, nor taken in conjunction with other corroborative circumstances, rise to the requirements of section 1111 of the Penal Code.

[12] The next link in the claimed chain of corroborative circumstances has to do with an incident which occurred at appellant's store on the evening when the officers took him there to make a search of the premises. In this regard, Police Sergeant Borders testified that when they booked appellant at the Beverly Hills jail about 10:30 o'clock on the morning of his arrest, they asked him to empty his pockets, and that he took out one set of keys and other objects, which were placed on the desk; that after appellant had done this a further search was made of him and that another set of keys was found in his left-hand trousers pocket; that Borders asked him about this second set of keys, as to what they were for, and he said they were for his business office, his store and his desk.

Sergeant Borders further testified that on the night when they went to the store with appellant they had his keys and property in their possession, and asked him for the key necessary to open the store, that appellant picked from his property the keys to enter the store; that this was the bunch of keys he had referred to as the second bunch of keys when they first searched him that day; that appellant opened the door to the store, and after he had done that and directed them to his private office, and after they found the drawer to the desk locked, that they asked appellant for the keys, that he answered that he had given them back to one of the officers, that they searched appellant and located the keys in his trousers pocket; that appellant then picked the key out of the bunch which opened his desk, and it was unlocked in his presence.

[13, 14] Much of what we have herein stated with reference to the circumstances surrounding the discovery of the gun is applicable to the key incident. Appellant took the keys to his desk out of his property package before leaving the jail and gave them to the officers. In his testimony he admitted he put the keys in his pocket but denies stating that he did not have the keys, and on the contrary testified that when the officers were unable to open the desk drawer with the chain of keys one of them had, that he reached into his pocket, took out the keys he had therein and opened the drawer. But assuming the correctness of the officers' testimony, what could appellant have expected to gain by keeping the keys in his pocket? Here was a wooden

desk that Sergeant Borders testified could have been opened with a chisel, appellant had already admitted the officers to his store and had authorized them to search the same without a search warrant. We thoroughly agree with respondent's statement, "Admittedly this situation in itself is a very minor circumstance in the chain of corroboration", if it is even that. As we read the record in this regard, we are impressed that whether appellant put the keys in his pocket, believed he had turned them back to the officers, or that they were taken from his pocket, is highly immaterial, and certainly not corroborative of the testimony of the accomplice, and does not, even by way of suspicion, tend to connect appellant with advising and encouraging the commission of the specific offense charged against him. The connection with the offense required to be established by section 1111 of the Penal Code cannot be accomplished by piling suspicious circumstance upon suspicious circumstance, nor by building up conjecture upon conjecture. While it is true, as contended by respondent, that the law does not require that the evidence necessary to corroborate the testimony of an accomplice shall tend to establish the precise facts testified to by the accomplice, it does require that such evidence must be held insufficient unless it tends to connect the accused with the specific crime for which he is on trial. And a veritable forest of cases are authority for the statement that the corroborating evidence is never sufficient if it merely creates a suspicion or even a grave suspicion. This because of the statutory presumption that one is innocent of crime. True, if from the proven circumstances the connection of a defendant with the crime charged may be fairly inferred, the corroboration is sufficient, but it must be remembered that an inference must be founded on a fact legally proved, and "such a deduction from that fact as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of the person whose act is in question, the course of business, or the course of nature." (Code of Civ.Proc., sec. 1960.) And if in arriving at an indicated conclusion it is found necessary that one inference be made to depend upon a precedent inference, such a course of reasoning is not permitted by law, Hamilton v. Pacific Electric Ry. Co., 12 Cal.2d 598, 601, 86 P.2d 829.

The next circumstance relied upon by respondent as corroborative of the testimony of the accomplice is appellant's testimony that he had never seen his codefendant Miller until he saw him in the courtroom. In contradiction of this testimony, the prosecution presented testimony from a former secretary of the appellant that in November, 1930, the codefendant Miller came into the office of the appellant, giving the name of Harris, and asking to see appellant. That the former's presence in the office was made known to the latter, and in a few moments appellant called his secretary and instructed her to send the codefendant, then known as Harris, into appellant's office, which she did, that the codefendant Miller remained with the appellant some ten minutes. Again, with praiseworthy frankness, the attorney general in his brief states of and concerning this testimony, "Our courts have more than once stated that mere acquaintanceship or mere association of a defendant with the actual perpetrator of a crime does not itself constitute legal corroboration. We admit without question that it does not constitute sufficient corroboration. It is in the same category as appellant's knowledge of Mrs. Genis' possession of the big diamond ring and as his threat against her. These are but minor circumstances but they are piling up." To us it appears to be an attempt to pile up mere suspicion upon suspicion, inference upon inference, speculation upon speculation, and conjecture upon conjecture. As heretofore pointed out, what the law requires is evidence independent of the testimony of the accomplice which tends to connect the accused not simply with the perpetrators of the offense charged, but with the crime itself. People v. Long, supra, 7 Cal.App. page 33, 93 P. 387; 1 Encyl. of Evidence, 107; People v. Josephs, 143 App.Div. 534, 128 N.Y.S. 257; 26 N.Y.Crim. 85.

Respondent next urges what is termed, "One more incident, which ordinarily might be considered a minor bit of corroboration, but which in the present case and in conjunction with the other circumstances already mentioned, is, to say the least, highly illuminating. We refer to appellant's failure to produce his own brother as a witness."

Respondent urges that some degree of importance attaches to this "incident" because, in his motion for a separate trial, after his brother and codefendant Gail Reingold had pleaded guilty, appellant presented an affidavit sworn to by his said brother in which it was averred that the latter in conjunction with his codefendants Greenburg and Miller had alone planned and carried out the robbery without any participation or even knowledge thereof on the part of appellant, and that the latter was wholly innocent.

[15, 16] The foregoing affidavit and the averments therein contained were not before the jury. The affidavit was submitted to the court preceding the trial, and outside the presence of the jury. It is not contained in the reporter's transcript of proceedings had at the trial and is not reviewable on appeal. Whatever motives might have influenced counsel for appellant in not calling the latter's brother as a witness are not now before us. Suffice it to say that the jury knew nothing about the foregoing affidavit, were not entitled to know anything about it, and, therefore, it cannot properly be considered in relation to the question of corroboration of the accomplice. Furthermore, the court in this case, as in all criminal cases, properly instructed the jury that "neither the prosecution nor the defense is required to call as witnesses all persons who are shown to have been present at any of the events involved in the evidence, or who may appear to have some knowledge of the matters in question in this trial; * * *".

[17] Concerning respondent's contention that since the decision in the case of People v. Newland, 15 Cal.2d 678, 104 P.2d 778, it is no longer the prerogative of a reviewing court to weigh the evidence and disturb the finding of the jury on the sufficiency of the corroborative evidence (citing People v. Collier, 111 Cal.App. 215, 227, 230, 295 P. 898) cannot be sustained. In determining the sufficiency of evidence to corroborate an accomplice, we are not confronted with a conflict in the evidence as to the guilt of the defendant, but the duty rests upon us to determine whether the corroborative evidence in its entirety does, in the language of the statute, tend to connect the defendant with the commission of the offense. And, as was said in People v. Linde, 131 Cal.App. 12, 15, 20 P.2d 704, 706, "The difficulty of properly solving the problem is enhanced by reason of the fact that a reviewing court must, in the final analysis, place itself in the position of the triers of fact and weigh the evidence for the purpose of discovering whether it complies with the requirements of the statute."

A careful examination of the many cases involving the question of the legal sufficiency of the evidence presented as corroborative of the testimony of an accomplice, including the recent case of People v. Trujillo, 32 Cal.2d 105, 194 P.2d 681, will disclose that all the reviewing courts of this state necessarily have reviewed and weighed such evidence in order to determine whether or not the requirements of the statute have been complied with. In this connection, and illustrative of what we have in mind, we need refer only to the cases of People v. Robbins, 171 Cal. 466, 154 P. 317; People v. Kempley, 205 Cal. 441, 271 P. 478; People v. Davis, 210 Cal. 540, 293 P. 32; People v. Shaw, supra; People v. Braun, supra. In each of these, and many other cases, it will be noted that the court carefully considered and weighed each and all of the circumstances urged as constituting corroborative evidence for the purpose of determining whether or not they tended to connect the accused therein with the crime charged, and as to whether or not such circumstances measured up to the required *substantial* corroboration.

[18] Time has not mellowed, nor have the decisions of the appellate tribunals of this state weakened the solicitude of the courts that a person shall not be convicted on "suspicious circumstances" and that proof of mere suspicious circumstances and of opportunity to commit a crime are never sufficient to justify a conviction upon the testimony of an accomplice. As was so cogently stated in People v. Robbins, supra,

171 Cal. page 470, 154 P. page 319. "The rule in this behalf is well and tersely stated in 12 Cyc., at page 456, where it is said: 'It is necessary that the evidence corroborating an accomplice shall connect or tend to connect the defendant with the commission of the crime. Corroborative evidence is insufficient where it merely casts a grave suspicion upon the accused. It must not only show the commission of the offense and the circumstances thereof, but must also implicate the accused in it. * * * But where the circumstances, when proved, taken separately or collectively, are consistent with the innocence of the accused, there is no corroboration, and a verdict of conviction thereon will be set aside.'"

[19] Upon a consideration of the entire record, which we have carefully read, we are forced to the conclusion that when the testimony of the accomplice is eliminated from the case, as it must be for the purpose of determining the question of corroboration (People v. Robbins, supra; People v. Davis, supra; People v. Kempley, supra; People v. Braun, supra; People v. Shaw, supra), the other evidence in the case falls far short of furnishing substantial proof that appellant either advised or encouraged the perpetration of the robbery here in question. Conceding that it arouses a suspicion, even a grave suspicion, that is insufficient to establish the corroboration required by the statute. In other words, the evidence herein is not the type of evidence which tends directly and immediately to connect appellant with the specific crime charged against him. In order to give it effect even as tending in that direction it seems that every point necessary to interpret and explain this "corroboration" in the light of the testimony of Greenburg requires his testimony to give direction to the crime charged, before it can be said to connect appellant with the commission thereof. An unbroken line of decisions in this state affirms the rule that the law requires that testimony offered in corroboration of the testimony of an accomplice shall *of itself* tend to *directly and immediately* connect an accused with the crime charged against him. As was said in People v. Morton, 139 Cal. 719, 724, 73 P. 609, quoting from Childers v. State, 52 Ga. 106, speaking of defendants convicted on the testimony of an accomplice, "It may be these men are bad, guilty men, but if they are convicted it ought to be under the rules of law. To justify this verdict would be, in our judgment, to make the best men in the land subject to the danger of conviction by any guilty scoundrel who might attack them."

[20] In the case now engaging our attention, the accomplice, upon the witness stand, acknowledged his own infamy. He admitted that he "had a number of convictions", including a felony conviction in the State of New Jersey upon a charge of having brought a stolen automobile into that state, and another in the State of New York upon a charge of robbery. We do not make reference to these matters as supporting a conclusion that the testimony of the accomplice ought not to be believed by the jury, but simply by way of emphasizing the obligation resting upon us to critically examine other evidence in the record which it is claimed meets the standard of corroborative evidence required by section 1111 of the Penal Code. We do not question the right of the prosecution to present the testimony of an accomplice, notwithstanding that, as in the instant case, they dismissed two serious charges against him, namely, armed robbery, and kidnapping by force. However, in availing themselves of that right they must expect, as was said by this court in People v. Braun, supra, 31 Cal.App.2d page 603, 88 P.2d page 732 "the testimony of such a witness to be viewed in the light of the reward extended him, in so far as the motives arising therefrom might prompt him in the giving of his testimony."

Strikingly applicable to the case now engaging our attention do we find the further language used by this court in People v. Braun, supra, 31 Cal.App.2d page 603, 88 P.2d page 732: "Whether guilty or innocent, the appellant was entitled to have his case fairly tried according to the established rules of law, and as said by a learned judge, 'Though unfair means may happen to result in doing justice to the prisoner in the particular case, yet justice so attained is unjust and dangerous to the whole community.' Hurd v. People, 25 Mich. 405.

The doctrine that respect for the law cannot be inspired by withholding the protection of the law is one which recognizes no exceptions.

[21] "Illegitimate and unconstitutional practices get their first footing by silent approaches and slight deviations from established legal modes of procedure. In a strong dissenting opinion delivered by Mr. Justice Sutherland of the Supreme Court of the United States, in Associated Press v. National Labor Relations Board, 301 U.S. 103, 57 S.Ct. 650, 659, 81 L.Ed. 953, we are counseled to 'withstand all beginnings of encroachment. For the saddest epitaph which can be carved in memory of a vanished liberty is that it was lost because its possessors failed to stretch forth a saving hand while yet there was time.' The acquittal of a guilty person is truly a miscarriage of justice, but the conviction of an innocent person through relaxation of those fundamental legal principles such as the one with which we are here concerned, would be a tragedy. It is the duty of the courts to be watchful for the constitutional and individual rights of the citizen and against any stealthy encroachments thereon."

While the foregoing conclusion at which we have arrived concerning the legal insufficiency of the evidence relied upon to corroborate the testimony of the accomplice Greenburg requires a reversal, we are disposed to give consideration to appellant's second ground for a reversal for the guidance of the trial court in the event of a retrial of this cause.

It is appellant's contention that the trial court erred in permitting one alleged accusatory statement to remain in the record, and in failing to instruct the jury as to the weight and effect of accusatory statements as requested by appellant. Insofar as the particular statement is concerned, the record reflects that it was made to the chief of police on the day appellant was arrested and following the previous conversations wherein appellant had unequivocally and emphatically denied to the chief any connection with or participation in the Genis robbery.

It appears from the record that during the trial considerable testimony was offered through Detective Sergeant Borders and Chief Anderson of the Beverly Hills Police Department as to conversations had with appellant subsequent to his arrest, and which it was the claim of the prosecution constituted what are known as accusatory statements. Timely objections were made by appellant in each instance and all were overruled. As the trial was drawing to a close and just prior to the commencement of arguments to the jury, the court, on motion of appellant, struck all this testimony from the record save and except one conversation. The particular testimony which was permitted to remain in the record is as follows:

"Q. By Mr. Henderson (Deputy District Attorney): When you and Moe were alone in your office, Chief, what did you say to him and what did Moe say to you? A. I said that I was very disappointed that a man of his caliber would be involved in a vicious crime like this one here. I stated he should be ashamed of himself; he had the most prominent corner in the city of Beverly Hills; he had a wonderful home in the north part of the city, and for him to be a part of such a crime was a disgrace to him and to the jewelry profession, or business; that he had been a headache for years as far as I was concerned.

"Mr. Giesler: I move to strike that as not within the issues, 'as far as I am concerned, he has been a headache for years'.

"The Court: I think it is part and parcel of the conversation and tends to shed some light as to the nature of the conversation and part of the attendant circumstances. The motion to strike is denied. A. (Continuing.) I asked him why didn't he admit the offense, get the jewelry back, as I had the information of the entire crime, how it was committed; that I had been in New York City, I talked to a person who was familiar with it, and I related the facts that I had regarding the crime.

"Q. By Mr. Henderson: What did Mr. Reingold say? A. He said, 'What do you think I am—some punk?' He says, 'You are talking to a businessman.' He said, 'You can't talk that way to me.' He gave me quite a bit of an argument; the substance of it was that who was I, the chief of police to question a man of his standing in the community."

[22] The order striking the testimony that was eventually barred from the record was made upon the ground that since the appellant had consistently denied the accusations when first made he was not called upon to deny them continuously and repetitiously thereafter. The stricken evidence was recognized by the trial court as being inadmissible under the holding in People v. Simmons, 28 Cal.2d 699, 172 P.2d 18; and People v. Spencer, 78 Cal.App.2d 652, 178 P.2d 520. In ruling that the foregoing conversation was admissible, the court stated, with reference to it: "Well, I think we have an accusation here as to being involved, and a response on page 311, which is an equivocal response and not a denial; that relates to being involved and doesn't involve the proposition of 'fingering' the job and so forth. I still think that should remain in." It is therefore manifest that the trial court regarded the statement as an accusatory one, and so designated it. Appellant having consistently denied any involvement in the crime when previously questioned by both Chief Anderson and Sergeant Borders, the surrounding circumstances in connection with the testimony now under consideration were not such as to render the evidence admissible. People v. Simmons, supra; People v. Spencer, supra.

[23] Appellant offered several instructions correctly embodying the law as to the limited purposes for which evidence of accusatory statements are receivable in evidence. Each of these preferred instructions were refused by the court on the stated ground, "Accusatory statement stricken from record before argument", and, "such evidence was stricken from the record." Such refused instructions were vital to the proper consideration of the evidence by the jury and should have been given in view of the ruling of the court permitting the one accusatory statement to remain in the record.

Any doubt as to the prejudicial effect of the court's ruling admitting into evidence as an accusatory statement the testimony above quoted is at once removed when consideration is given to the use to which evidence was put by the deputy district attorney in his argument to the jury. From the closing argument of the prosecutor to the jury, we quote the following:

"You know, if we were to convict Greenburg and if we were to convict Miller and the higher ups went free, what have we accomplished? *The Millers and the Greenburgs are the 'punks' as described to you by Moe Reingold. The 'punks' roam this country. They can be bought for a dime a dozen; but when you get one higher up, one who is the brains of the outfit, you have destroyed a large number of these 'punks', because they cannot dispose of the proceeds of their robbery,* and they don't know the source of the valuable jewels, they don't know the persons who have them and where they have them or when they have them.

"We speak very often of the 'rich man's justice', and the 'poor man's justice'. Very often when we convict the so-called 'punk', people say, 'What have they done? They have convicted the underdog, the poor muscle man, the man who commits the crime, but the brains of the outfit, the man with the money still roams free'. Oh, we hear that kind of criticism time and time again. And so it happens that once in a great while we are fortunate enough to bring you the brains of the outfit, the monied man, the higher up. It does not happen very often but once in a while we are fortunate to have some evidence to present to you.

"I will not stultify myself and I will not insult your intelligence by telling you that the evidence against the defendant Moe Reingold is overwhelming. It is not overwhelming; but at the same time it is far more than we usually can get against the brains of the outfit, and that is necessarily so. *The punk, the muscle man* goes out to commit a crime and he exposes himself; he is in full view of the victim. As a result the victim can identify that punk, that muscle man, but the brains of the outfit, who deals with his lieutenant, never exposes himself even to a muscle man, and certainly not to the victim. *And so of necessity you can never get the same quantity of evidence against the brains, the higher up, that you do against the muscle man, the punk.*

"But even though the quantity of evidence is not the same as you have against that muscle man, yet the type, the character, the quality of the evidence is such that you decent American jurors can say, 'We are convinced beyond a reasonable doubt that that monied man, that brains, that higher up is guilty.'" (Emphasis added.)

Had the challenged testimony been eliminated from the record as it should have been, the deputy district attorney could not have used it as he did with its obvious irreparable and damaging effect to appellant.

In fairness to the trial judge, it should be noted that following his ruling by which testimony as to accusatory statements was stricken from the record, he stated to counsel outside the presence of the jury, "I think the subject matter intended to be stricken here is covered pretty well in what has transpired here in the courtroom. If there appears in the record remaining any testimony in regard to an accusation, accusing Mr. Reingold of this crime, it will be understood by counsel that that matter has been stricken and is stricken from the record and is not to be argued, and I think neither side will argue it."

When the jury was returned into court, the trial judge instructed them as follows:

"During the period you have been up in the jury room, court has been in session and certain portions of the testimony have been stricken from the record.

"Included in the testimony of Chief of Police Anderson and Sergeant Borders of the Beverly Hills Police Department as to several conversations had with the defendant Maurice Reingold, was testimony of a statement accusing the defendant Reingold of having 'fingered', planned and arranged or having been implicated in the robbery which is charged in the indictment, and the testimony of these officers to the effect that upon the first making of this accusation it was denied by the defendant Reingold, and that when in another conversation which was had soon after the accusation was repeated defendant made no verbal response, the jury is advised that the testimony as to these accusations has been entirely stricken from the record and from the testimony in this case, and the jury is now instructed to put the testimony so stricken entirely out of their consideration, to entirely disregard it and not to consider it for any purpose whatsoever."

Undoubtedly, this instruction would have effectively protected appellant's rights had not the one foregoing accusatory statement remained in the record, which afforded the prosecutor an opportunity to comment thereon, as heretofore narrated, to the manifest prejudice of appellant.

We deem it unnecessary to consider appellant's final contention that the court abused its discretion in refusing to grant him a trial separate and apart from his codefendants. This we say because it appears from the record that the indictment has been dismissed as to defendant Greenburg, defendant Miller was found guilty as to count I, and count II was dismissed as to him and defendant Gail Reingold, the latter having pleaded guilty to count I. Thus, if a retrial ensues, appellant will be the sole remaining defendant.

For the reasons herein stated, the attempted appeals from the guilty verdict and the verdict finding that at the time of the offense appellant was armed with a deadly weapon are dismissed. The judgment and the order denying appellant Maurice Monte Reingold's motion for a new trial are, and each is, reversed, and the cause remanded for a new trial.

YORK, P. J., and DORAN, J., concur.

Hearing denied; SHENK, EDMONDS, and SPENCE, JJ., dissenting.

87 Cal.App.2d 544

PEOPLE v. LOPEZ et al.

Cr. 4218.

District Court of Appeal, Second District, Division 3, California.

Sept. 13, 1948.

Rehearing Denied Sept. 23, 1948.

Hearing Denied Oct. 11, 1948.

1. Criminal law ⚷238

Testimony on preliminary examination did not establish as a matter of law that witness was an accomplice whose uncorroborated testimony would be insufficient to establish reasonable cause for holding defendant for trial for robbery and conspiracy to commit robbery. Pen. Code, § 995.

2. Criminal law ⚷238

On preliminary examination, evidence established probable cause for belief that defendant was guilty and warranted filing of information charging defendant with robbery and conspiracy to commit robbery. Pen.Code, § 995.

3. Criminal law ⚷511(1)

Evidence sufficiently corroborated testimony of accomplice to sustain conviction for robbery and conspiracy to commit robbery.

4. Criminal law ⚷511(1)

Evidence corroborating testimony of an accomplice need not be strong or sufficient itself to establish guilt.

◆

Appeal from Superior Court, Los Angeles County; William R. McKay, Judge.

Edward W. Kwok, William Lopez, and Richard Lopez were jointly charged with robbery and conspiracy to commit robbery, and Kwok appeals from conviction of both offenses.

Judgment and order denying motion for new trial affirmed and attempted appeal from order denying motion to set aside the information dismissed.

Samuel A. Miller and John J. Barnwell, both of Los Angeles, for appellant.

Fred H. Howser, Atty. Gen., and Henry A. Dietz, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

Edward W. Kwok, William Lopez and Richard Lopez, were jointly charged by information with robbery from the person of one Ellen Berry of jewelry of the value of $8,400 and $15 in money, and by the same information of conspiracy to commit said robbery. On motion of the district attorney the charges were dismissed as to William Lopez and he testified for the state. Defendants Kwok and Richard Lopez were tried without a jury and convicted of both offenses. Kwok appeals.

The sole ground of the appeal is insufficiency of the evidence at the preliminary examination to justify the filing of the information, and insufficiency of the evidence at the trial to prove the commission of either offense.

Defendant Kwok made a motion under section 995, Penal Code, to set aside the information upon the ground that he had been committed without reasonable or probable cause. This motion was denied. The argument presented here attacks this ruling on the theory that one Jose Vargas was an accomplice in the crimes and that his testimony which tended to implicate Kwok was entirely uncorroborated and further, if he were not an accomplice, that his testimony and that of the other witnesses wholly failed to establish probable cause for the belief that Kwok was guilty. In re Martinez, 36 Cal.App.2d 687, 98 P.2d 528. The evidence at the preliminary developed the following facts: Kwok, a Chinese, was an auctioneer and had been employed by the Gregory Auction Company of Los Angeles for six years. Mrs. Berry had purchased many articles of jewelry from him, of a total value of $6,000 or $8,000. For some two years or more she had been an almost daily attendant of the auction sales, and made a practice of wearing valuable rings and a diamond wrist watch. On August 21, 1947, in the late afternoon, while she was pursuing her customary way to her apartment on foot, she was set upon by William and Richard Lopez on the street, knocked down, rendered unconscious and robbed of her rings and watch. The Lopez boys, who are cousins, fled in a small truck. Jose Vargas was a friend of defendant Kwok, with whom he had been in a venture some months before in the purchase and disposal of a stock of drugs and sundries. Vargas testified that he had introduced the Lopez boys to Kwok some weeks before the robbery; that on August 20th Kwok asked Vargas to arrange for the rental of a truck, telling Vargas that he desired to move some goods to Chinatown; Vargas did not have the financial ability to do this and so informed Kwok; on the following morning Kwok and Vargas went to a rental establishment where they met William Lopez; Kwok rented a truck in his own name, made the required deposit and turned the truck over to Vargas, who drove it away, accompanied by William. Nearby, they picked up Richard Lopez and drove to Vargas' home, then to his sister's home, where Vargas turned over the truck to the Lopez boys in the early afternoon. These boys drove around until it was time for Mrs. Berry to be on her way home and they then parked the truck on the street, where they waited for her and committed the robbery. Vargas also testified that the same evening he and the Lopez boys met at Vargas' home where he saw William Lopez hand over to Kwok a handkerchief, the contents of which he did not notice. He denied all knowledge of the proposed robbery but he gave no explanation of the fact that he had let the Lopez boys have the truck, other than that he had no use for it at the time. The stolen jewels were not recovered. Vargas was arrested on suspicion of robbery and was released after the police investigation. William and Richard Lopez retained the truck after the robbery, had an accident with it the same night, were arrested and held on suspicion of theft of the truck. Kwok appeared at police headquarters with the owner of the truck and procured the release of the boys. Kwok stated to one of the officers that the Lopez boys were working for him, hauling some stuff to a place he was building in new Chinatown. When asked by the officer the address of the place Kwok said it had no address and that the boys had his permission to use the truck. The Lopez boys had made confessions which were introduced at the preliminary examination.

[1, 2] It is earnestly insisted that the only reasonable conclusion from the testimony given by Vargas is that he was an accomplice in the commission of the offenses; that his testimony was wholly without corroboration and insufficient to establish sufficient cause for holding Kwok for trial. We cannot agree with this contention. The question whether Vargas was an accomplice was one of fact, and in our opinion it was not an unreasonable inference that he assisted in renting the truck for Kwok and for the use of the Lopez boys, without knowledge of the fact that it was proposed to be used in the perpetration of the robbery. There was no evidence other than that which has been related which tended to show that he had knowledge that the Lopez boys were planning the robbery. In testifying at the preliminary Vargas denied that he had turned the truck over to the boys with the consent or at the direction of Kwok. The truth of this testimony might well have been questioned by the court, since Vargas gave no reasonable explanation of his action. But even so, this circumstance was reconcilable with ignorance as to the plans of the Lopez boys for using the truck. It may be worthy of note that after the police investigation of the story told by Vargas he was released from custody, presumably for the reason that no additional evidence was discovered which would tend to connect him with the commission of the offenses. The evidence did not establish as a matter of law that Vargas was an accomplice. In addition to his testimony there was significant circumstantial evidence. The robbery was carefully planned. It was not the sort of crime to be conceived and carried out by two young Mexican boys. Kwok was the one who knew of the practice of Mrs. Berry to wear her valuable rings and that she would be an easy victim of a robbery. Unquestionably, the Lopez boys intended to use the truck to make their escape after the robbery had been committed, and it would appear strange indeed that they would have conceived the idea of getting the use of a

truck through the assistance of Kwok. Vargas and Kwok had rented a truck upon a former occasion and it would seem that one or the other of them suggested that they follow the same practice, namely, that Kwok rent the truck and Vargas drive it. Kwok's statement to the officer as to the use he intended to make of it was unsatisfactory, if not wholly false, and his statement to other officers that the Lopez boys were working for him tended to prove that he had rented the truck for their use. It is to be remembered that when Kwok arranged to rent the truck William Lopez was present with Vargas and rode away in the truck, and Richard Lopez was picked up nearby. We do not find that the evidence was insufficient to warrant the committing magistrate in holding the defendant Kwok to answer or to warrant the filing of the information against him.

[3, 4] It was stipulated at the trial that the testimony given at the preliminary might be received in evidence, and that additional evidence might be offered by the people and defendants. Vargas testified at the trial that Kwok had directed him to deliver the truck to the Lopez boys. At the commencement of the trial the charges were dismissed as to William Lopez. His testimony in the main corroborated that of Vargas, and it added nothing to the testimony of Vargas himself which tended to connect the latter with the offenses. William testified that when he and Richard were introduced to Kwok by Vargas that Kwok promised them employment; that some two weeks before the robbery he gave William a check for $50 stating that he, William, would be furnished employment and that he would be working for Kwok. This check, payable to cash, was introduced in evidence together with testimony that it had been cashed and the money given to a woman to whom, William testified, he had turned over the check to be cashed. Kwok testified that the check had been given to Vargas, but this was denied by Vargas. The check did not bear the endorsement of either William Lopez or Vargas. William also testified that some ten days before the robbery Kwok had suggested it and promised him $200 if he would bring back Mrs. Berry's rings and watch; that when Mrs. Berry was seated in the auction room, close to Kwok, the latter held up her hand to exhibit the rings and to identify her to William; that Kwok drove William out to the vicinity of Mrs. Berry's apartment, some ten blocks from the auction house, explained her habits of returning home from the auction room, followed the boys in his car on occasions when they were trailing Mrs. Berry, picked them up when they lost track of her and assisted them in finding her, and gave explicit directions as to what they were to take from her when they robbed her. William also testified that he reported to Kwok that they had been prevented from committing the robbery by the presence of other persons and that Kwok had urged him to try again; that he, William, remonstrated over the use of violence upon Mrs. Berry in the robbery, saying that he thought she was too old to "take it"; that he also told Kwok they would have difficulty in escaping after the robbery and that they would need a car parked nearby, and that Kwok then arranged to rent a small truck to be used in their escape. The details of the rental of the truck, of the robbery and of the meeting with Kwok after the robbery, were all arranged on the evening before the robbery and were carried out as arranged. William testified that the rings and wrist watch were delivered to Kwok wrapped in a handkerchief at the time and under the circumstances testified to by Vargas. He also testified that he and Richard were each to receive $200 from Kwok for committing the robbery, that they had several meetings with Kwok in Chinatown after the robbery, demanded to be paid, but received on one occasion only $50 and on another, $25, and the promise from Kwok that they would be paid in full when he had disposed of the rings; that Kwok stated the rings were so valuable it was hard to dispose of them, and that he offered one of them to the boys in payment for their services, which offer was refused. The Lopez boys both testified that they were drinking heavily for some days both before and after the robbery. They were arrested on a bus headed for the Mexican border. The trial judge believed that the testimony of William Lopez was in all re-

spects a true account of the manner in which the robbery was planned and executed. We find in the record no reason whatever for disagreement with this conclusion. The story of William was consistent with all the circumstantial evidence. It was plausible, and the evidence as a whole indicated strongly that the boys were acting under the direction of one of superior intelligence and cunning. There was an abundance of evidence to corroborate the testimony of William. Such corroborative evidence, of course, need not be strong, or sufficient of itself to establish guilt. People v. Yeager, 194 Cal. 452, 229 P. 40; People v. Negra, 208 Cal. 64, 280 P. 354.

The judgment and order denying motion for new trial are affirmed. The attempted appeal from the order denying motion to set aside the information is dismissed.

WOOD and VALLÉE, JJ., concur.

---

87 Cal.App.2d 563

GOTCHER v. GOTCHER et al.

Civ. 16291.

District Court of Appeal, Second District, Division 1, California.

Sept. 15, 1948.

Rehearing Denied Sept. 30, 1948.

Hearing Denied Nov. 8, 1948.

1. Husband and wife ⚷47(1)
Vendor and purchaser ⚷244

In action to quiet title, evidence supported finding that quitclaim deed, conveying realty involved to plaintiff as her separate property, was duly executed and delivered by her husband for valuable consideration and recorded, so that defendant acquired no title to realty under husband's subsequent deed conveying it to defendant.

2. Deeds ⚷211(3)

In action to quiet title, evidence was insufficient to support finding that plaintiff fraudulently procured insertion of her name as joint tenant in deed conveying realty involved to plaintiff and her husband by fraudulent trick and promise to assist husband in care and sale of realty with real purpose of getting such hold on title thereto that she would finally get realty away from him.

3. Escrows ⚷8(2)

Where escrow, in which deed, conveying realty to one whom grantors had given option to purchase it, was deposited, was not completed, but cancelled, and funds deposited therein were withdrawn, assignee of grantee's interest in option acquired no title to realty.

4. Husband and wife ⚷293

A husband's quitclaim deed, conveying realty to his wife as her separate property, was not void as in violation of restraining order, procured by wife in separate maintenance action, against husband's conveyance of property, as such order, being solely for wife's benefit, could be waived by her, and neither husband nor one to whom he subsequently conveyed realty could be heard to complain of any such violation.

5. Husband and wife ⚷272(1)

Whether realty, conveyed by quitclaim deed to woman living with grantor as his wife after their divorce, was grantor's separate property, so as to vest title thereto in third person, to whom he subsequently conveyed it, as against former wife, was immaterial, where evidence supported finding that grantor voluntarily transferred his interest in realty to grantee in quitclaim deed for good and valuable consideration.

6. Appeal and error ⚷1071(6)

Where plaintiff in action to quiet title pleaded her chain of title to realty involved and trial court found all allegations of complaint to be true, defendant's complaints as to form of findings and absence of more specific findings are unavailable on appeal from judgment for plaintiff, as more specific findings would have been adverse to defendant.

◆

Appeal from Superior Court, Los Angeles County; Louis W. Kaufman, Judge.

Action by Ruby R. Gotcher against John D. Gotcher and Catherine A. McKenna to quiet title to realty. From a judgment for plaintiff against defendant McKenna, she appeals.

Affirmed.

Catherine A. McKenna, in pro. per.

Theodore Rosenthal, of Los Angeles, for respondent.

WHITE, Justice.

Defendant Catherine A. McKenna has appealed from a judgment adverse to her in an action brought by Ruby R. Gotcher to quiet title to real property located in the City of Los Angeles. Defendant John D. Gotcher was not served with summons and did not appear, and at the trial the action was dismissed as to him.

The property in question was conveyed by a grant deed from Cornelia Christie, dated January 2, 1946, recorded January 23, 1946, to "John D. Gotcher and Ruby R. Gotcher, Husband wife, as joint tenants." On March 11, 1947, John D. Gotcher executed and delivered a quitclaim deed to "Ruby R. Gotcher, a married woman, as her sole and separate property, and in her separate right." This deed was recorded March 13, 1947.

In answer to plaintiff's complaint, defendant Catherine A. McKenna alleged that under the deed from Cornelia Christie all that was conveyed or intended to be conveyed to plaintiff "was a continguent right to one-half of the net profits, to be realized, only upon a sale of the land for an amount over and above the purchase price, upkeep, repairs, taxes, interest on Trust deed to Cornelia Christie, in the sum of $10,500.00, all of which amounts were paid by and from the separate funds and monies of the said John D. Gotcher." She further denied that John D. Gotcher made or intended to make any conveyance to Ruby R. Gotcher, and asserted that in connection with a proposed sale, the plaintiff "represented and stated to John D. Gotcher, that if he would execute and place in escrow a quitclaim deed to Ruby Gotcher that it would expidite the closing of the sale. That relying on such representations made by the said Ruby Gotcher, John Gotcher did execute a quitclaim deed to Ruby Gotcher, to be placed in the escrow and to be used only for the purpose of consummating the said sale * * * That the sale was not made and the deed was not delivered to Ruby Gotcher, as a conveyance, or to be a conveyance to her of any interest in the property, and further alleges that plaintiff Ruby Gotcher secured possession of the said quitclaim deed without the knowledge or consent of the said John D. Gotcher, and caused it to be recorded * * * and without any consideration of any kind to him for the said deed. That said John D. Gotcher did not know that said quitclaim deed had been so wrongfully secured from the escrow and recorded * * * until on or about 1st day of May, 1947, * * *." The answer contained the further allegation that "this defendant Catherine A. McKenna, now is and has been since the 30th day of April, 1947, the owner in fee of all of title and interest of the said John D. Gotcher, and which he ever had or formerly owned in the said real property, which said deed was made for a valuable consideration, and has been duly recorded * * *."

The trial court found that the quitclaim deed from John D. Gotcher to Ruby Gotcher was executed and delivered for a valuable consideration and thereby conveyed all of his interest in the property to Ruby R. Gotcher as her separate property; and further found that all averments of the answer inconsistent with plaintiff's complaint were untrue.

The property here involved, a rooming house, was purchased for $13,500, of which $3,000 was paid in cash, the cash representing money saved from the earnings of John D. Gotcher while in the merchant marine. The note and trust deed securing the balance were executed by both Mr. and Mrs. Gotcher. It was agreed that Mrs. Gotcher was to run the rooming house. At the end of the purchase the house was under lease to a lessee who owned the furniture. In May, 1946, Mr. and Mrs. Gotcher purchased the lease and the furniture and took possession of the property, making their home there. They paid $2,000 for the furniture and lease, securing $1,500 of this amount from a finance company by a loan on the furniture, both Mr. and Mrs. Gotcher executing the note and mortgage. In December, 1946, they granted to S. Angus an option to purchase the property and furniture and deposited a deed in escrow, but the escrow was never closed nor the deed delivered.

In February, 1947, Mrs. Gotcher brought an action for separate maintenance against Mr. Gotcher, and a temporary restraining order was issued restraining Mr. Gotcher from conveying the property. Thereafter, to quote from respondent's brief, "the parties got together and John D. Gotcher executed a quitclaim deed to respondent, in consideration of respondent's joining with said John D. Gotcher in executing a bill of sale covering the furniture, to Dag Var, and thereby obtaining for John Gotcher $3,000.00."

[1] Appellant contends that the findings of fact are mere conclusions of law, that the court failed to find on material issues raised by the answer, and that the evidence, without conflict, required that findings be made in her favor. It is urged that the evidence requires a finding that the insertion of the name of Mrs. Gotcher as a joint tenant with Mr. Gotcher was procured by fraud; that the quitclaim deed of March 11 from Mr. Gotcher to Mrs. Gotcher likewise was fraudulently secured, fraudulently taken from an escrow file and recorded. It is to be noted in this connection that these claims are not being urged by Mrs. McKenna's grantor, John D. Gotcher, as he did not appear in the action. We find in the record evidence to support the express finding of the trial court that the quitclaim deed of March 11 was duly executed and delivered by Mr. Gotcher for a valuable consideration, and recorded March 13, 1947, and it necessarily follows that Mrs. McKenna acquired no title by virtue of the subsequently executed deed to her of April 30, 1947. On March 7, 1947, Mr. and Mrs. Gotcher agreed in writing as follows:

"It is agreed and understood that Mr. John Gotcher is to receive a $1600.00 note plus $1400.00 in cash—making a total of $3,000.00 for his equity in property and furniture of 933 So. Bonnie Brae St. upon signing of quit deed to said property. He is signing an agreement of sale on furniture and lease on said property with this understanding, handled by Mill-Edwards-Mill Brokers—handled by Wm. H. Knox."

The testimony of Mr. Knox, the salesman who drew the foregoing agreement, as well as other testimony, was to the effect that all Mr. Gotcher wanted was to get his money out of the venture; that to do so it was necessary to secure the cooperation of his joint tenant. The husband and wife were constantly at odds, and the outcome was that Mr. Gotcher executed the quitclaim deed and in return received $3,000, partly in cash and the balance represented by the $1,600 note. The agreement above quoted negatives appellant's contention that Mr. Gotcher made only a conditional delivery of the quitclaim deed.

[2] There is no merit to the claim that the insertion of Mrs. Gotcher's name as a joint tenant in the deed from Mrs. Christie was procured by fraud. Mr. Gotcher himself testified, "* * * Ruby and I talked it over, and she said she would run the place and take care of it while I worked, and so that is when I made up my mind to buy the property. * * * Mrs. Christie asked me there at the escrow table if I didn't think it would be nice to make a joint tenancy with me and maybe she (Mrs. Gotcher) would be more interested in running the place and keeping it up, so I decided after a couple of seconds and said, 'Yes' * * *." Mr. Gotcher further testified that the purpose of the transaction was to take the place and resell it, and "I was to get back the $3,000 for the down payment, and we would pay Mrs. Christie off, pay the furniture off, and what was profits we would divide between us."

It is urged that Mrs. Gotcher had secured the property in her name as a joint tenant by trick and promise to Mr. Gotcher that she would assist in the care and the sale thereof, when her real purpose was to get such a hold on the title that she would finally get it away from him. There is no substantial evidence to support a finding that such was her purpose.

[3] Although she did not set it forth in her answer, appellant also claims title through an assignment by S. Angus of his interest in the option to purchase given by Mr. and Mrs. Gotcher, dated December 21, 1946. Mr. Angus never acquired any title. Although a deed to him had been deposited in escrow, the escrow was not completed, but canceled, and the funds deposited withdrawn.

[4] Appellant makes the point that the quitclaim deed was void because it was in violation of the restraining order. There is no merit to this contention. The order was procured by Mrs. Gotcher and was solely for her benefit, and could be waived by her. Further, if there was, technically, a violation, neither Mr. Gotcher nor his grantee can be heard to complain, since Mr. Gotcher could not take advantage of his own wrong.

[5] Appellant introduced evidence that Mr. and Mrs. Gotcher had been divorced in Oklahoma in 1928. It appears that after the divorce they again lived together in Oklahoma as well as in California, and at the time of the transactions hereinbefore related were holding themselves out as husband and wife. It is urged by appellant that as there was no marriage there could be no community, and that the property was therefore the separate property of Mr. Gotcher. This contention becomes immaterial because the record discloses substantial evidence to support a finding that John D. Gotcher made a voluntary transfer of his interest for a good and valuable consideration, and the court so found.

[6] Appellant's complaint as to the form of the findings and that more specific findings should have been made can be of no avail. The plaintiff pleaded her chain of title, and the court found all the allegations of her complaint to be true. It is apparent that had more specific findings been made they would have been adverse to appellant.

The judgment is affirmed.

YORK, P. J., and DORAN, J., concur.

---

87 Cal.App.2d 501

WASHER v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N et al.

(two cases).

Civ. 16477.

District Court of Appeal, Second District, Division 1, California.

Sept. 13, 1948.

Rehearing Denied Sept. 30, 1948.

Hearing Denied Nov. 12, 1948.

1. Judgment ⚿199(1)

A judge has not only the right but the duty to grant a judgment notwithstanding a verdict in a proper case. Code Civ.Proc. § 629.

2. Judgment ⚿199(3)

The trial court has the power to enter a judgment notwithstanding the verdict when court could and should have in the first instance directed a verdict. Code Civ.Proc. § 629.

3. Judgment ⚿199(3)

So far as the sufficiency of evidence is concerned, the same rules apply in the case of the motion for judgment notwithstanding the verdict as apply in the case of a motion for a directed verdict. Code Civ. Proc. § 629.

4. Trial ⚿139(1), 141

A trial court may direct a verdict where evidence is undisputed, or is of such conclusive character that the court, in exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it.

5. Libel and slander ⚿110(1)

In libel and slander action against bank and its personnel director by former employee to recover damages because of issuance of statement of personnel director, in response to questions of newspaper reporters concerning order of National Labor Relations Board directing bank to reinstate former employee to his position, that former employee had admittedly falsified his expense account and had been guilty of insubordination, records of proceedings of the board and Circuit Court of Appeals in favor of former employee had no bearing.

6. Judgment 🔑199(1)

The granting or denial of a motion for judgment notwithstanding the verdict involves the exercise of a sound judicial discretion. Code Civ.Proc. § 629.

7. Appeal and error 🔑934(1)

When passing on an appeal from a judgment notwithstanding the verdict for plaintiff, reviewing court must review the testimony in light most advantageous to plaintiff, resolve all conflicts in plaintiff's favor, and give plaintiff benefit of every fact pertinent to issues involved, which can reasonably be deduced from the evidence. Code Civ.Proc. § 629.

8. Appeal and error 🔑934(1)

If it appears on appeal, viewing testimony in light most favorable to plaintiff, that there is substantial evidence to support every essential element of plaintiff's case, judgment notwithstanding verdict for plaintiff is erroneous. Code Civ.Proc. § 629.

9. Judgment 🔑199(1)

Where it was manifest in action to recover for alleged libel and slander contained in statement that plaintiff had falsified his expense account and was guilty of insubordination, that expense account rendered by plaintiff was false, and that plaintiff was guilty of insubordination, defendants were entitled to judgment notwithstanding verdict for plaintiff. Code Civ. Proc. § 629; Civ.Code, § 45.

10. Libel and slander 🔑56(1)

Where employee submitted to employer an expense account showing $4 for meals and $5 for lodging for two-day business trip, though employee stayed at a private home with friends and made no actual payments to them but reciprocated by entertaining the friends, employer's statement to newspapers that employee had admittedly falsified his expense account was not libelous. Civ.Code, § 45.

11. Libel and slander 🔑56(1)

Employee, who exhibited openly a defiant attitude toward his employer after the employer transferred him to a small town branch after employee attempted to unionize employer's employees, was guilty of "insubordination", and therefore employer's statement to newspapers that employee was insubordinate was not libelous. Civ.Code, § 45.

See Words and Phrases, Permanent Edition, for all other definitions of "Insubordination".

12. Libel and slander 🔑54

The truth is a complete defense to an action for libel or slander. Civ.Code, § 45.

13. Libel and slander 🔑54

To establish the truth of a libelous publication, defendant in libel action need only show that the publication was substantially true. Civ.Code, § 45.

14. Libel and slander 🔑19

In determining whether an article is libelous, it must be considered in its entirety, and it must not be divided into segments and each portion treated as a separate unit. Civ.Code, § 45.

15. Libel and slander 🔑121(1)

An award of $80,000 punitive damages, for alleged libelous statements that plaintiff had admittedly falsified his expense account and had been guilty of insubordination, was excessive.

◆

Appeals from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Action by Edward C. Washer against the Bank of American National Trust & Savings Association, a national banking association, and A. Fenton, to recover damages for alleged libel and slander. From a judgment for defendants notwithstanding verdict for plaintiff, the plaintiff appeals, and, from original judgment in plaintiff's favor based on the verdict, the defendants appeal.

Judgment notwithstanding verdict affirmed, and prior judgment based on verdict reversed.

Vincent W. Hallinan and William H. Mackay, both of San Francisco, for appellant Edward C. Washer.

Louis Ferrari, G. D. Schilling and Kenneth M. Johnson, all of San Francisco, for appellant Bank of America.

Herbert W. Erskine, of San Francisco, for appellant A. Fenton.

DORAN, Justice.

The action herein was instituted by Edward C. Washer, formerly an employee of the Bank of America, to recover damages for libel and slander involved in the admitted publication by the Bank through its personnel director and vice president, A. Fenton, of the following statement:

"We cannot see how this institution could possibly reinstate anybody who has admittedly falsified his expense account, who has been guilty of flagrant insubordination, and who has called the inhabitants of the community in which he was working 'yokels' and 'country bumpkins', and labelled the town 'Siberia.'

"The next move is up to NLRB, which must go to court for an order of enforcement. If necessary, we will contest Washer's reinstatement to the highest court in the land."

The above statement was delivered by respondents to the Associated Press, other news services, and to San Francisco newspapers, for publication as the Bank's comment on an order of the National Labor Relations Board directing the Bank to reinstate Washer in its employ, and was widely published. In this connection it may here be noted that the court order for enforcement, mentioned in the publication, was approved in National Labor Relations Board v. Bank of America, 9 Cir., 130 F.2d 624; Washer was reinstated in July 1943, and was paid $5500 representing earnings from the time of discharge in November, 1937 to the date of reinstatement. It further appears that in October, 1943, Washer was discharged by the Bank for proper cause.

Disclosed by the record herein are the following facts leading up to Washer's discharge from employment, the publication of the alleged libel, and the present action: In March of 1935, plaintiff, a non-practicing lawyer, secured a position in the Bank's trust department in Los Angeles at a salary of $125 per month. In April, 1937, the Wagner Act, 29 U.S.C.A. § 151 et seq., creating the National Labor Relations Board, was held constitutional, and protected by the provisions of the Act, Washer proceeded in an attempt to unionize the bank's employees. Thereafter plaintiff was sent to Chico, California, for the stated purpose of acquiring small town branch experience, and assigned clerical duties. On November 6, 1937, the Bank's Vice President and Senior Trust Officer, W. J. Kieferdorf, requested that plaintiff come to San Francisco. The conference required a two days' stay in San Francisco, and according to plaintiff's testimony, Kieferdorf then advised Washer to practice law or to seek employment in some other bank; plaintiff's union labor activities were also a subject of discussion. Thereafter, Washer presented to the bank an expense account of $15.12, made up of $6.12 for railway fare, $4 for meals, and $5 for lodging. Upon a request by the Bank for a more complete itemization, plaintiff advised the bank, as found by the trial judge in a memorandum opinion filed at the time of granting defendants' motion for judgment notwithstanding the verdict, "that his failure to itemize his expenses was due to the fact that he did not stay at a hotel, but stayed with friends at a private home, and thus became obligated to them, and had reciprocated by entertaining them." Thereafter, on November 24, 1937, the Bank approved and paid the expense account. About this same time Washer mailed 5,000 circular letters to bank employees, setting forth, according to the memorandum opinion, "his personal history, and the disciplinary plight he found himself in, stranded in the 'Siberian' town of Chico, all because of his union organization."

Edward C. Washer was, on November 27, 1937, discharged from the service of the Bank; in June, 1938, the National Labor Relations Board issued a complaint against the Bank, alleging unfair labor practices in Washer's discharge; the Bank alleged as reasons for such discharge, plaintiff's "unsatisfactory service, lack of qualification, the rendering of a false expense account, and insubordination and insolence to superior officers." The alleged defamatory publication, as hereinbefore indicated, followed the N. L. R. B. decision against the Bank, and was made, as found by the trial court, when "the Press, who were about to publish an article upon the decision, solicited Mr. A. Fenton, Vice President and Personnel Director, asking whether he desired to publish a statement on the part of the bank to accompany the press story, and express the views of the bank as to the decision."

In addition to the judicial and other proceedings hereinbefore referred to, the Washer case came before the Supreme Court of this state in Washer v. Bank of America, 21 Cal.2d 822, 136 P.2d 297, 155 A.L.R., 1338, after an appeal from a judgment for defendants upon the sustaining of demurrers to the complaint. The judgment was there reversed, the court holding that a statement charging the falsification of a bank employee's expense account tended to injure the employee in occupation, and was to that extent actionable per se. There have been two trials of the case upon its merits before different juries. The second trial resulted in a verdict of $60,000 compensatory damages, together with an award of $75,000 as exemplary damages against the Bank and $5,000 against the defendant Fenton. On the first trial the verdict appears to have been $15,000 less, after which a new trial was granted, the trial judge being of the opinion that the verdict was "clearly excessive when viewed in the light of the evidence.

After the second trial a motion for judgment notwithstanding the verdict was granted, upon the ground, as stated in the trial judge's "Memorandum Opinion," that "This Fenton article, published as an addendum and part of the new article of the press, far from being libelous, could be interpreted to mean nothing more than an opposition to the National Labor Relations Board ruling on those asserted issues raised before the Board, with a purpose to contest and prove them before the court. The publication of August 7th, 1939 was a reiteration of published charges made in defense of the Bank's position in an official proceeding authorized by law, with an avowment to maintain these charges as defenses through the courts of the land." In passing on the motion, the trial judge also found that "The verdict in this case is excessive, and would appear to be influenced by passion and prejudice." Both parties have now appealed; the plaintiff from the judgment notwithstanding the verdict, and the defendants under the provisions of Rule 3(b) (2), Rules on Appeal, 22 Cal.2d 2, from the original judgment in plaintiff's favor based upon the verdict of the jury.

As indicated in the foregoing statement, the controversy between Washer and the Bank of America has occupied the time, attention and efforts of many courts, judges, administrative tribunals, and others over a period of more than ten years. The record also indicates that, in one way or another, Washer's alleged labor union activities and the decision of the National Labor Relations Board that the Bank had violated the Wagner Act in discharging the employee, have overshadowed all else, and, in effect, have beclouded the real issues in the present action. It must at all times be remembered that in no sense is the present controversy what is commonly termed a battle between management and labor;—it is neither more nor less than a libel and slander action.

[1] The immediate and most important question raised on this appeal is, obviously, whether the trial judge was justified in vacating the verdict of the jury which was in Washer's favor, and rendering a judgment non obstante veredicto in favor of the defendant Bank. That it is not only the right but the duty of a judge to grant such a judgment in a proper case, goes without saying. Section 629 of the Code of Civil Procedure provides that "When a motion for a directed verdict, which should have been granted, has been denied and a verdict rendered against the moving party, the court, at any time before the entry of judgment, either of its own motion or on motion of the aggrieved party, shall render judgment in favor of the aggrieved party notwithstanding the verdict."

[2-4] As stated in Re Estate of Arnold, 16 Cal.2d 573, 107 P.2d 25, and elsewhere, the trial court has power to enter a judgment notwithstanding the verdict when it could and should have in the first instance

directed a verdict, and so far as the sufficiency of evidence is concerned, the same rules apply as in the case of a motion for a directed verdict. It is likewise settled that the trial court may direct a verdict "where the evidence is undisputed, or is of such conclusive character that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it." Wilkinson v. United Railroads, 195 Cal. 185, 204, 232 P. 131, 138, quoting from Davis v. California Street Cable R. R. Co., 105 Cal. 131, 38 P. 647.

One of the outstanding features of the instant case is that the record reveals no substantial conflict of evidence in reference to any vital issue. There is, for example, no conflict whatsoever as to what was published, nor in regard to the circumstances under which the alleged defamatory publication was made. And there can be no doubt that the publication was intended to mean, and does mean, exactly what it says; no more and no less.

[5] Both parties to this appeal have, to a considerable extent, wandered from the main issue in treating the matter as a labor controversy rather than a libel case, and to that extent the briefs filed are not helpful. In the appellant Washer's briefs much stress is laid upon the previous holdings in plaintiff's favor by the National Labor Relations Board and the approval of such decision in 130 F.2d 624. As pointed out by the trial judge in granting the judgment notwithstanding the verdict, such decisions have no bearing whatsoever upon the issues in the present libel action and determine nothing in respect thereto. Therefore the records in those proceedings have no proper place in the instant appeal. And in like manner it may be said that the verdict of the jury rendered in the first trial of the libel action, has no bearing upon the present appeal.

[6] The granting or denial of a motion for judgment notwithstanding the verdict, being governed by the same rules as apply to a directed verdict, involves, as was said in Wilkinson v. United Railroads, 195 Cal. 185, 204, 232 P. 131, 138, previously cited herein, "the exercise of a sound judicial discretion".

[7-9] When passing upon an appeal from a judgment notwithstanding the verdict, it is the duty of a reviewing court to review the testimony in the light most advantageous to the plaintiff; to resolve all conflicts in plaintiff's favor, and as well to give plaintiff the benefit of every fact pertinent to the issues involved which can reasonably be deduced from the evidence. If from such consideration it appears that there is substantial evidence to support every essential element of plaintiff's case, the verdict of the jury cannot be set aside, and a judgment notwithstanding the verdict is erroneous. But where, as in the case at bar, it is manifest that reasonable minds can draw but one inference, and that inference points inevitably to the falsity of the expense account rendered by plaintiff to defendant bank, as well as the truth of the charge of insubordination, then the law will step in and forbid a recovery under the verdict. From a review of the record herein it appears as a matter of law that no reasonable conclusion is legally deducible from the evidence other than would sustain a verdict for the defendants, and that any other holding by the trial court would have been so lacking in evidentiary support that an appellate court would be impelled to reverse it upon appeal. The trial court was therefore justified in taking the case from the jury and rendering the decision.

Libel, as defined by Section 45 of the Civil Code, "is a false and unprivileged publication by writing, printing, (etc.) * * * which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation." In granting the motion for a judgment notwithstanding the verdict, the trial court found, and such is the evidence, that Washer did actually render a false expense account to the Bank, and one known to be false. Washer had not, as was thereafter admitted in letters to the Bank, expended $4 for meals and $5 for lodging in connection with the trip; the lodging had been with friends, and Washer, for the avowed purpose of liquidating a supposed social obligation, had entertained such friends.

[10] The expense account filed, then, was not a true statement of what had happened, but constituted an arbitrary, artificial, and entirely untrue version. That the total expense item was, as Washer claims, nominal or reasonable for such a trip, or that the Bank finally paid the same, does not in any manner alter the above facts. Since Washer, in a letter to the Bank dated November 23, 1937, clearly admitted that the expense account as filed, was incorrect, it cannot be said that the Bank's published statement referring to the employee "who has admittedly falsified his expense account," was a false statement. And obviously, if it was not a false statement, it was not libel under the code section defining that tort.

The same may likewise be said in respect to the Bank's alleged libelous publication that Washer had been "guilty of flagrant insubordination." The term "insubordination," acording to Webster, means "disobedience to authority"; the new Standard Dictionary defines it as meaning "not subordinate or obedient; not submitting to authority; rebellious, mutinous. These definitions seem to quite clearly describe Washer's conduct towards the employer Bank. The insubordination referred to was, of course, correlated to the incident of the expense account, and, as found by the trial court, "Though the account was paid, the Plaintiff never obeyed the request to prepare a descriptive statement of expenses. In an institution of 8,000 employees, where respect for and obedience to rules is necessary for the orderliness and rhythm of business and employment relation, refusal—and persistent refusal to so abide, is insubordination; and the more so when the recalcitrant in his refusal belittles and chides his senior officer".

Even when most favorably considered, Washer's general rebellious attitude displayed not only in reference to the expense account, but otherwise, clearly shows that the charge of "flagrant insubordination" was substantially true. For example, one of plaintiff's letters, dated November 17, 1937, characterizes Vice President Kieferdorf's letter as "one of a series of petty annoyances," and criticizes "the vice president and senior trust officer of America's largest bank" for correspondence "regarding such a petty detail" as the expense account in question. Another letter to Kieferdorf sarcastically mentions "my past experiences with other 'friends' among the officers of the Trust Department, coupled with my present 'enviable' position," and asks, "am I to be critized for not appreciating help which must be described as invisible, intangible, and inedible?" That such letters were intended to be as insolent as the language imports is evident from the writer's testimony that "I certainly wanted to tell him what I thought, and I was angry." Washer, according to the testimony, was "just plain mad at them (the Bank)."

Again, plaintiff's rebellion at being transferred to the branch bank at Chico, California, otherwise denominated as "Siberia," is made clearly apparent. To Vice President Kieferdorf, Washer said: "You are not going to make a yokel out of me"; to Vice President Brandt was written, "I hate this hell-hole," again referring to Chico; Washer wishes to "get out of the sticks." The plaintiff "had refused to be transferred to branches prior to that." At the first trial Washer claimed to be "the only employee who was in a position to *defy* the Bank of America," there referring to union activities. (Italics added.)

[11] In addition to the so-called "petty annoyance" and "inedible" letters, referred to above, and many corroborative episodes, must be remembered the circular or "broadside" prepared by Washer and sent to some 5000 bank employees and 495 branch banks, hereinbefore mentioned. That the plaintiff employee openly exhibited a defiant, insubordinate attitude toward the employer bank can hardly be doubted. And, under these circumstances the publication in question cannot be deemed libelous.

[12, 13] There can be no disagreement with the assertion in Davis v. Hearst, 160 Cal. 143, 195, 116 P. 530, 552, that "the truth, whenever discovered, is a complete

defense to the defendant." And in Hearne v. De Young, 119 Cal. 670, 674, 52 P. 150, 499, and elsewhere, the correlative proposition is laid down that, to establish the truth of a publication, the defendant need only show that the alleged libelous statement was substantially true. Although the defense was pleaded in the instant litigation, and obviously was a most important issue, appellant Washer's briefs apparently evade this question. Much of the Washer briefs has reference to the matter of supposed malice on the part of the Bank, and the supposed general honesty and good faith on the part of the employee. But this matter of malice, or the lack of it, becomes entirely immaterial if the published statement is substantially true, as it appears to be in this case.

[14] It is also true that, as stated in Stevens v. Storke, 191 Cal. 329, 334, 216 P. 371, 373, "In determining whether or not, under this definition, (Section 45, Civil Code) an article is libelous, it must be considered in its entirety. It may not be divided into segments and each portion treated as a separate unit." And, as found by the trial court, the article in question, "published as an addendum and part of the news article of the press, far from being libelous, could be interpreted to mean nothing more than an opposition to the National Labor Relations Board ruling." Obviously, it would be an absurdity, contemplated neither by the Wagner Act nor by any other valid enactment or decision, to hold that an employer should be penalized by way of damages for publishing, as a part of a news article announcing a N. L. R. B. decision, its intended opposition to the order made, and the reasons why the Bank felt that the employee, Washer, should not be reinstated.

[15] In reference to the judgment rendered, the trial court correctly found that: "The verdict in this case is excessive, and would appear to be influenced by passion and prejudice. * * * In fact, in his several employments since the alleged libel, he has earned much more than priorly. * * * An award of $80,000 punitive damages can only be the product of an impassioned mind." It may be added that, not only could an excessive verdict result from passion and prejudice, but the same non-judicial condition of mind could likewise produce a finding of libel where, actually, under the law, no such finding was justified. Such being the case, it must be repeated that it was not only the right, but the duty of the trial judge to set aside the verdict herein and render a judgment consonant with law and evidence.

The Bank's appeal from the original judgment in plaintiff's favor, taken, as aforesaid, under the provisions of Rule 3(b)(2), is ipso facto disposed of by the decision herein reached affirming the judgment notwithstanding the verdict. It is therefore unnecessary to enter into a discussion of the various assignments of error presented by the appellant bank.

The judgment notwithstanding the verdict is affirmed, and the prior judgment based on the jury's verdict is reversed.

YORK, P. J., and WHITE, J. concur.

Hearing denied; PEEK and BRAY, JJ., sitting pro tem. in place of EDMONDS and CARTER, JJ.

87 Cal.App.2d 558

CAIRO v. CAIRO.

Civ. 3907.

District Court of Appeal, Fourth District, California.

Sept. 14, 1948.

1. Divorce 🔑27(1)

Where wrong complained of by injured spouse is grievous mental suffering with no claim of bodily injury, the grievous mental suffering is the ultimate fact which alone will entitle party to divorce, and, unless such mental suffering is established as a result of acts of other party, judgment awarding divorce cannot be sustained.

2. Divorce 🔑109

Where acts complained of as constituting extreme cruelty as grounds for divorce are such as to inevitably cause grievous mental suffering, trial judge is justified in drawing inference of such suffering from those acts.

3. Divorce ⚷27(7)

Husband's statements that he loved another woman, unkindness to wife, and demands that she get a divorce, with resulting nervousness of wife, justified granting wife a divorce for husband's extreme cruelty.

4. Divorce ⚷127(4)

In contested divorce cases, rule requiring corroboration as to at least a considerable number of important and material facts has as its principal object prevention of collusion between parties, and, when it is clear from evidence that there is no collusion, court is justified in granting decree upon evidence which is only slightly corroborated if otherwise court is satisfied that prevailing party is entitled to decree.

5. Divorce ⚷130

In wife's contested action for divorce on grounds of extreme cruelty, wife's testimony that husband told her he was in love with another woman was sufficiently corroborated by note admittedly signed by husband and by wife's witness testifying that he knew about husband and woman in another city and saw him with her on street and at her home on several occasions.

6. Husband and wife ⚷263

Evidence may be admitted to show that husband and wife intended to take property as community property even though they accepted a deed drawn to them as joint tenants.

7. Husband and wife ⚷14(3)

Property held as community property cannot also be held in joint tenancy.

8. Pleading ⚷377

Where divorce complaint alleged that real property was community property and there was no denial of that fact, no additional proof was necessary to establish property as community property. Code Civ.Proc. § 462.

9. Divorce ⚷249(3)

Where wife's divorce complaint alleged that real property was community property and there was no denial of that fact and evidence conclusively established that it was purchased out of community funds and intended to be community property although held in names of husband and wife as joint tenants, court properly awarded property to wife as community property. Civ.Code, § 146, subd. 1; Code Civ.Proc. § 462.

Appeal from Superior Court, San Diego County; Joe L. Shell, Judge.

Action by Rebecca H. Cairo against Ralph H. Cairo for divorce. From the judgment, defendant appeals.

Judgment affirmed.

Edwin M. Campbell, of San Diego, for appellant.

Robert W. Conyers and Davies, Burch & Conyers, all of San Diego, for respondent.

GRIFFIN, Acting Presiding Justice.

Plaintiff brought this action against defendant for a divorce on the grounds of extreme cruelty. The parties were married in Mexico in 1930, and separated in 1947. There were no children.

The complaint alleges the "community property" to be "an automobile, house and lot and miscellaneous household furniture and furnishings." Divorce and equitable division of the community property is sought.

Defendant answered and denied the general allegations as to cruelty but failed to deny the allegations as to the community property above mentioned.

The court granted the divorce and found that the "community property of the parties consists of a house and lot held in the names of plaintiff and defendant as joint tenants, though actually the community property of the parties * * * household furnishings and furniture and a 1946 Plymouth automobile." It awarded all of the property to the plaintiff save the automobile.

[1] Defendant and appellant now argues first that the finding of extreme cruelty and grievous mental suffering is not supported by the evidence, citing such cases as

Negley v. Negley, 82 Cal.App.2d 355, 186 P.2d 151, and Traux v. Truax, 62 Cal.App.2d 441, 145 P.2d 88, wherein the rule is stated to be that where the wrong complained of by the injured spouse is grievous mental suffering with no claim of bodily injury, the grievous mental suffering is the ultimate fact which alone will entitle the party to a divorce, and unless such mental suffering is established as a result of the acts of the other party, a judgment awarding a divorce cannot be sustained. Secondly, that plaintiff's testimony is not sufficiently corroborated, citing Gleason v. Gleason, 13 Cal.App.2d 231, 56 P.2d 973, 974, holding in effect that there must be corroboration as to "at least a considerable number of important and material facts."

In the opening statement to the trial judge, counsel for plaintiff announced: "This is a divorce action. I think the chief contest will be over the distribution of the community property which consists of a home which is not paid for, there being $2300 owing on it, and an automobile worth perhaps $1500 or some $2,000 * * * and the question of whether or not the plaintiff is entitled to support."

At the trial Mrs. Cairo testified generally as to her husband's conduct that: "Well, he has—he told me he was in love with another woman and still in love with her and living with her. They live down in Tijuana. He buy furniture and he bought car for her and he buy the furniture for her"; that this was going on for about a year or two; that "He was awful mean to me all the time. Maybe that is why, because he was in love with that woman. He tried to make me tire and nervous, too"; that he mortgaged their car and bought furniture for the other woman; that when her husband went to see the other woman a few months ago he left a note to her written in Spanish. This note, admittedly signed by the defendant, was received in evidence and, as interpreted, reads: "I am trying to be good to you but as you see it is not possible. All I do is make you suffer without you being worthy of me. It hurts me very much but it must be our destiny. Who knows? Forgive me that I have been so bad. I don't want to offend you but nevertheless I do it. Rebecca, I think that I am only worthy of your hatred and not of your love. You have been very good. I know that and I know that I don't pay any attention to you. I don't know why. I only can tell you that I won't be back until Sunday. I let you know because I can't go without telling you this. * * * In telling you this I feel myself to be the most ungrateful man. This must be my end."

She then testified that she was notified by some friend about her husband's activity with a woman in Tijuana; that she went to the woman's home and saw defendant's car parked outside, at night time; that all lights were turned out and "everybody was asleep"; that later her husband told her that he never lived in Tijuana and that she told him about this occasion and "that why I was mad"; that as to her physical condition she was "very nervous" and had difficulty in working on account of it. When asked the cause of her nervousness she replied: "Well, sometimes a customer laugh and I cry too"; that she was compelled to work, caring for children and working in the fish cannery; that defendant took her money and paid on the home which they bought in 1942 for $3015, and on the furniture which they bought when they were first married; that the furniture is now worth about $100.

The agreement of sale as to the real property was received in evidence as defendant's exhibit. Plaintiff stated that defendant now wants to sell the real property and wanted one-half of the proceeds; that she refused because she had no place in which to live; that defendant has argued with her for years; that he "had very, very bad temper * * * and everything I say, everything I do was wrong to him. He always mean to me"; that he swore at her and took dishes, tools and a medicine case out of the house when she was not home.

A witness called by plaintiff testified that he knew about defendant and the woman in Tijuana; that he saw him with her on the street and at her home on several occasions; that he told plaintiff about it and took her over there "so she would see."

A neighbor testified as to the quarreling between plaintiff and defendant on several occasions; that during the war defendant wanted a divorce and he sent plaintiff to Mexico; that she later returned; that they lived in the same house but not as husband and wife; that one week Mr. Cairo would want a divorce and the next week he didn't want one.

Defendant testified that he received $12 per day and was in charge of the kitchen in a large hotel; that he wrote the letter in evidence but did not know why his wife wanted to bring that matter up in court. He claimed that he was only rooming at the house in Tijuana until he could find an apartment.

[2, 3] Negley v. Negley, supra, relied upon by defendant, also states the rule to be that where the acts complained of were such as to inevitably cause grievous mental suffering, a trial judge is justified in drawing the inference of such suffering from those acts, citing cases. It appears to us that the evidence generalized above sufficiently establishes acts of extreme cruelty. The trial judge was justified in drawing the inference of grievous mental suffering from the acts of the defendant which were established by the evidence. Tompkins v. Tompkins, 83 Cal.App.2d 71, 74, 75, 187 P.2d 840.

[4, 5] In contested cases the rule as to corroboration appears to be that the principal object of the corroboration rule is to prevent collusion between the parties and when it is clear from the evidence in a contested action that there is no collusion the court is justified in granting a decree upon evidence which is only slightly corroborated if otherwise the court is satisfied that the prevailing party is entitled to a decree. See, also, McGann v. McGann, 82 Cal.App.2d 382, 186 P.2d 424. There was sufficient corroboration as to some of the material facts related by the plaintiff.

[6, 7] During the trial, counsel for defendant moved to amend his pleadings to conform to the proof regarding community property. He desired to show by the proposed amendment that the property was being purchased under a joint tenancy contract. The trial court denied the motion, stating that the findings "should recite or can recite * * * that the property which is in joint tenancy on record is, as a matter of fact, community property." No other or further request for an amendment was made. The force of defendant's argument, in this respect, is predicated upon the holding in Tomaier v. Tomaier, 50 Cal.App.2d 516, 519, 123 P.2d 548, 549, indicating that a trial court has "no power to divide the property held in joint tenancy as though it were in fact community property." The dicta thus quoted is disapproved in Tomaier v. Tomaier, 23 Cal.2d 754, 757, 146 P.2d 905, where it was held that evidence may be admitted to show that the husband and wife intended to take property as community property, even though they accepted a deed drawn to them as joint tenants; that if the evidence establishes that property is held as community property, it cannot also be held in joint tenancy, for certain incidents of the latter are inconsistent with incidents of community property.

[8] Since the complaint alleged the real property to be community and there is no denial of that fact no additional proof of that fact is necessary. Sec. 462, C.C.P.; Beatty v. Pacific States Savings & Loan Co., 4 Cal.App.2d 692, 698, 41 P.2d 378.

[9] This same question arose in Tompkins v. Tompkins, supra. It was there said, 187 P.2d at page 844:

> "* * * that even though the real property awarded by the trial court to plaintiff did stand in the names of the parties as joint tenants, the complaint alleges and the answer admits that it is community property. There is no evidence in the record to the contrary. If the parties so intend, property taken by a husband and wife as joint tenants is community property. * * * Since defendant in his answer to the complaint admits the real property to be community property its treatment as such by the trial court was proper."

The evidence conclusively shows that it was purchased out of community funds; that defendant never attempted to dispute the admitted fact that the property was actually and was intended to be community property. All of the parties, throughout the trial, considered the real property as community property, and the trial court had the right, under the cause of action alleged, to assign the community property to the respective parties in such proportion as the court deemed just. Sec. 146, subd. One, Civ.Code; Crouch v. Crouch, 63 Cal.App.2d 747, 147 P.2d 678. The evidence sufficiently supports the trial court's finding in this respect.

Judgment affirmed.

MUSSELL, J., concurs.

---

87 Cal.App.2d 499

O'LAVERTY v. O'LAVERTY.

Civ. 16327.

District Court of Appeal, Second District, Division 1, California.

Sept. 13, 1948.

Husband and wife 🔑232(3)

In action to quiet title and for an accounting, where wife refused to live with husband at new home and, after he left, old property was sold on execution obtained on a judgment against both husband and wife, and property was subsequently acquired by wife, evidence sustained findings that wife acquired the property through fraudulent scheme, to deprive husband of title thereto.

Appeal from Superior Court, Los Angeles County; Elmer W. Heald, Judge.

Action for declaratory relief, to quiet title, and for an accounting by Edward J. O'Laverty, special administrator of the estate of David O'Laverty, etc., against Jessie O'Laverty. Judgment for plaintiff, and defendant appeals.

Affirmed.

Jesse Bach Porter, of Los Angeles, for appellant.

Gregory M. Creutz, of Los Angeles, for respondent.

DORAN, Justice.

This is an appeal from the judgment. The action is for declaratory relief to quiet title and for an accounting. The court found for plaintiff and defendant appeals.

The record reveals that appellant and respondent were married in 1922; at that time defendant Jessie O'Laverty was 35 years old and plaintiff and respondent David O'Laverty was 67. At the time of trial of the within action David O'Laverty was 92. When the parties were married and thereafter, plaintiff was retired and living on a pension. From 1922 until about 1930 they lived together. In 1930 David O'Laverty completed a new house at another address and as recited in respondent's brief, "requested his wife Jessie O'Laverty to move with him into said new home from 144 Venice Boulevard, but his wife Jessie O'Laverty then and thereafter failed and refused and continued to fail and refuse to move into the new home in Inglewood and continued ever after to stay and live at 144 Venice Boulevard, and that Jessie O'Laverty remained at 144 Venice Boulevard while David O'Laverty early in 1930 moved into and occupied said home in Inglewood * * *." About 1930 David O'Laverty went to Oregon and remained there for several years. As pointed out by the respondent, "There was no evidence that when defendant refused to go with David O'Laverty and live with him in the new home in Inglewood, or at any time thereafter, that David O'Laverty agreed to support defendant living separate and apart from him."

While David O'Laverty was living in Oregon, Jessie O'Laverty defaulted in certain rental payments as a result of which one Katherine C. Carr, the landlord, obtained a judgment against Jessie O'Laverty and David O'Laverty who at that time was still living in Oregon and had been declared an incompetent. A couple of years later

David O'Laverty's property was sold by the Marshal to Katherine C. Carr to satisfy said judgment. The proceedings herein were commenced years later when the foregoing situation was discovered.

It would serve no useful purpose to recite the findings which on all issues were for plaintiff David O'Laverty. It is sufficient to note that in a memorandum decision the trial court observed that the real property involved in the action "was obtained by defendant, Jessie O'Laverty, by fraud and through a fraudulent scheme, plan and device on the part of said Jessie O'Laverty to deprive, and with intent to deprive, said David O'Laverty of the title to said real property."

The findings are supported by the evidence. The appeal is without merit.

The judgment is affirmed.

YORK, P. J., and WHITE, J., concur.

87 Cal.App.2d 576

DI GIORGIO v. DI GIORGIO.

Civ. 3709.

District Court of Appeal, Fourth District, California.

Sept. 16, 1948.

1. Divorce 🔑332

Where wife, awarded custody of a child by Florida divorce decree, subsequently filed an action in the superior court of city and county of San Francisco for increased support for child and father had venue changed to Kern county, where he resided, and sought custody of child by a cross-complaint, court had jurisdiction to award part-time custody of child to the father, though there was no allegation or proof that, at time of filing cross-complaint, child was a resident of Kern county, since wife was in court for whatever proper order the court might make, on whatever became equitable issues, in the cause instituted by her.

2. Divorce 🔑296

In dealing with care, custody, and education of minor childen of divorced parents, particularly of a child of tender years, trial court has extensive discretion in adapting its orders to conditions with a view to serving the best interests of the child and retains jurisdiction over its order in such respect.

3. Divorce 🔑312.6(5)

A reviewing court does not have jurisdiction to interfere with the exercise of discretion of the trial court with respect to the care, custody, and education of mionr children of divorced parents except in clearest instance of its manifest abuses.

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action by Ruth Pattison Di Giorgio against Joseph A. Di Giorgio for an equitable decree requiring defendant to pay a reasonable sum for the support of the party's child, whose custody was awarded to the plaintiff after a divorce. Defendant filed a cross-complaint for custody of the child. From the judgment plaintiff appeals.

Portion of judgment appealed from affirmed.

West, Vizzard & Howden and Gordon L. Howden, all of Bakersfield, for appellant.

Werdel & Di Giorgio and V. P. Di Giorgio, all of Bakersfield, for respondent.

GRIFFIN, Acting Presiding Justice.

In 1942 plaintiff filed an action No. 38,192 in Kern County, for divorce against defendant, and asked custody of the minor child of the parties. All parties lived there at that time. No service of summons was had.

On April 26, 1944, while both parties and the child were in Florida, the court there awarded the husband a divorce from his wife and found that she should be awarded the "exclusive custody" of the child (then seven years old) until he reached the age of 12 years, unless ordered otherwise by the court. The right of reasonable visitation by the father was permitted. The trial court there found that at that time, unless it was sooner shown that the child's welfare would require earlier change, the child's interest in "those things which are masculine and in which the father might be more helpful," i. e., "outdoor activity such as hunting, fishing, boating, golfing, etc.," circumstances might dictate a change of custody unto a worthy father; that $140 per month should be allowed to the mother for the minor's maintenance until the child was 12 years of age, or during the time she had the custody or until otherwise ordered, and that jurisdiction of the cause as to the care, custody and support of the child was reserved to that court. Judgment was entered accordingly.

Thereafter the parties returned to California. The father resumed his residence in Kern County and fully complied with the order for payment of support money for the child. The mother returned to San Francisco with the boy. On October 7, 1946, she commenced this action in the Superior Court of the City and County of San Francisco. She alleged that she and the child were residents of that city, and in her complaint she set up generally the terms of the Florida decree and alleged that since the rendition of that decree circumstances and conditions had changed and the needs of the minor were greater; that $140 per month was not sufficient to support and educate him; that defendant was wealthy and able to provide more money for his support. She prayed for an equitable decree requiring defendant to pay a reasonable sum therefor and "such other relief as to the court may seem meet and proper."

Defendant demurred to the complaint and filed a motion for change of venue to Kern County on the ground that his residence was in that county. Plaintiff opposed the motion and asked that the cause be retained in the city and county of San Francisco for the sake of convenience of witnesses and of the child. The action was transferred. There was no appeal from that order. On February 5, 1947, defendant filed in Kern County his answer to the complaint and also filed a cross-complaint in which he sought custody of the minor child.

On March 5, 1947, defendant husband appeared and answered the complaint in case No. 38,192, filed in 1942, and affirmatively asked custody of the child and moved to consolidate that action with the present action for the purpose of trial. On March 17 the court, for lack of prosecution, dismissed the former action.

Plaintiff demurred to defendant's cross-complaint in this action on the ground of lack of jurisdiction and moved to strike it. The demurrer was overruled and the motion denied. Thereafter, on October 9, 1947, this action went to trial on the pleadings thus framed. Plaintiff objected to the introduction of any evidence on the cross-complaint for lack of jurisdiction, which objection was overruled. After trial the court found generally that plaintiff, defendant and the minor child appeared in person and through their attorneys; that the parties were sworn and examined and the court discussed with the minor child his desires as to which parent he preferred to have custody of him; that he expressed the desire to be with his mother; that the minor would be 12 years of age on April 29, 1948; that the father was better able and qualified to give the child education and preparation for labor and business; that each party was a fit and proper person to have custody of him but the best interests of the child required that the father be given custody for nine months during the school term and the mother have custody for the three months vacation period subject to the right of reasonable visitation by each; that defendant pay $160 per month to plaintiff during the period the boy was with the mother for his support and maintenance. Judgment was entered accordingly. Plaintiff and cross-defendant appeals from that portion of the judgment depriving her of custody for the nine months period.

The first point raised is the question of jurisdiction of the Superior Court of Kern County to hear and decide the question of the custody of the minor child based upon the cross-complaint, where there were no allegations or proof that the child was, at the time of filing the cross-complaint, a resident of Kern County. It is contended that jurisdiction to determine the custody of the minor child, under the facts related, was a purely local matter, citing Titcomb v. Superior Court, 220 Cal. 34, 29 P.2d 206; and De la Montanya v. De la Montanya, 112 Cal. 131, 44 P. 354.

In the Titcomb case the parties had been previously divorced in Arizona. The decree was final and no attack was made upon it. The father brought an action in the Superior Court of Santa Clara County asking the court to award him the custody of the minor children. It was not an action for support. The complaint did not allege either that the minors were residents of or domiciled in Santa Clara County. Neither did it allege that the plaintiff had his residence in that county. The decision points out that there were two theories upon which that court could acquire jurisdiction: The first would be that the minor was physically present in that county but that no such allegation was made. The second theory that would give jurisdiction to that court would be if it could be alleged that the father was a resident of that county and, by fiction of law, that the residence of the father was the residence of the minor child. The court rejected both theories advanced by the plaintiff.

If the defendant husband, Mr. Di Giorgio, had originally brought a suit in Kern County to obtain custody of the child then residing with its mother in San Francisco, he would have been properly met with the jurisdictional question, but such is not the case.

Respondent here argues, and with some merit, that since the action filed in San Francisco seeking increased child support was an action in equity and of a personal and transitory nature, and since that court acquired original jurisdiction of the parties, and since that action was transferred to Kern County by proper order, from which no appeal was taken, the Kern County court, having properly acquired jurisdiction of the equitable action for one purpose it will, under well established rules, retain jurisdiction to the final adjustment of all differences between the parties arising from the cause of action presented, and the court's power is not limited to the relief requested by the plaintiff.

[1] Foy v. Foy, 23 Cal.App.2d 543, 73 P.2d 618, was an equity action instituted by the husband, attacking the provisions of a divorce decree as to the custody of the minor child and the order for payment of its support, rather than proceeding by motion in the divorce action. The court there said that under the issues presented it was the duty of the court, sitting in equity, to determine the issues of custody and support and not leave it to further litigation, and that a court of equity, in the exercise of its chancery powers, has inherent jurisdiction, independent of statute, to award and control the custody of children and, incident thereto, it may provide for the maintenance of a child pending the determination of its custody. See also, Flood v. Templeton, 152 Cal. 148, 92 P. 78, 13 L.R.A.,N.S., 579; Newport v. Hatton, 195 Cal. 132, 231 P. 987; Walsh v. Majors, 4 Cal.2d 384, 49 P.2d 598; Mergenthaler v. Mergenthaler, 69 Cal.App.2d 525, 160 P.2d 121; Sonnicksen v. Sonnicksen, 45 Cal.App.2d 46, 52, 113 P.2d 495. It would therefore seem quite proper under the original action instituted by plaintiff for modification of the Florida divorce decree seeking additional support for the minor child, for the defendant to appear and in defense of plaintiff's claim for such increased support and modification, offer to provide for the child in some proper training or military school, which offer was made in the trial of this action, and the trial court would, no doubt, have the authority to take this fact into consideration in determining the amount of support money due to plaintiff, if any, and would be authorized to award temporary custody of the child to the father during such period, as a part of the proper determination of the issue first presented. When plaintiff and appellant submitted to general equity jurisdiction, seeking a change in the divorce decree formerly entered, she was there for any proper order the court might make on whatever became equitable issues in the cause instituted by her.

The action of the trial court in refusing to dismiss the cross-complaint by reason of its claimed lack of jurisdiction must be sustained.

[2, 3] There was considerable testimony introduced by the parties to this action relating to the capabilities of the parties to care for and educate the child, and as to which party should have custody for this purpose. It has been uniformly held that in dealing with questions relating to the care, custody and education of minor children of divorced parents, particularly as to a child of the age of the minor here involved, there is confided to the trial court a very extensive discretion in adapting its orders to varying circumstances and conditions with the view to always serving the highest and best interests of the child and to retain jurisdiction over its order in this respect. A reviewing court does not have the power to interfere with the exercise of discretion except in the clearest instance of its manifest abuses. Swenson v. Swenson, 101 Cal.App. 440, 281 P. 674; Russell v. Russell, 20 Cal.App. 457, 129 P. 467.

The portion of the judgment appealed from is affirmed.

MUSSELL, J., concurs.

---

87 Cal.App.2d 550

PEOPLE v. McWILLIAMS.

Cr. 4241.

District Court of Appeal, Second District,
Division 3, California.
Sept. 13, 1948.

1. Criminal law 🔑1036(8)

In prosecution for mayhem, defendant's point that complaining witness' testimony that he lost sight in one eye was insufficient to prove that sight therein was destroyed, but that medical testimony was required to prove such fact, should have been raised in trial court to be available on appeal from conviction.

2. Criminal law 🔑455

In prosecution for mayhem, complaining witness' testimony that he lost sight in one eye and had not regained sight therein over seven months after injury was admissible as against objection that he was not a medical expert.

3. Mayhem 🔑5

In prosecution for mayhem, complaining witness' testimony that he had been wholly without sight in one eye for over seven months as result of injury inflicted by defendant was sufficient to prove that witness was permanently blind in such eye, in absence of contrary evidence, and no medical testimony was required to prove that there would be no restoration of vision in such eye.

4. Mayhem 🔑5

Evidence was sufficient to support conviction of mayhem.

5. Criminal law 🔑1177

Error, if any, in sentencing defendant to serve two prison terms of fourteen years and ten years concurrently on convictions of mayhem and assault with deadly weapon, respectively, in committing single act, was not prejudicial to defendant, as term for assault would be served while defendant was in custody under longer sentence for mayhem.

Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

Cornelius E. McWilliams was convicted of assault with a deadly weapon and mayhem, and he appeals.

Affirmed.

Gladys Towles Root, of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., Frank Richards, Deputy Atty. Gen., and William E. Simpson, District Atty., and Jera J. Sullivan and Robert Wheeler, Deputy Dist. Attys., all of Los Angeles, for respondent.

SHINN, Presiding Justice.

Defendant was convicted of the offenses of assault with a deadly weapon and mayhem, upon proof of the commission of a single act, namely, the throwing of a heavy water glass which struck the complaining witness, Davis, in the face, and destroyed the sight of his left eye. Separate judgments were rendered; defendant was sentenced to two terms in state prison to run concurrently and he appeals from the judgments.

The grounds of appeal are that the evidence was insufficient to prove the offense of mayhem for the reason that there was no expert medical testimony that the sight of the eye had been destroyed, and also that defendant was improperly convicted of two offenses arising out of a single act. The evidence was that the occurrence took place in a cafeteria on East Fifth Street in Los Angeles, while Davis was sitting in a booth with a female companion. These two testified that defendant, who was acquainted with Davis' companion, came to her table, spoke with her and pulled her nose. A quarrel ensued, defendant picked up a heavy water glass and Davis a table knife. The altercation was temporarily halted, but immediately thereafter, while Davis was seated at the table, he was struck in the eye by a water glass thrown by defendant. The water glass was broken, as were also the eye glasses of Davis which he was wearing at the time. The wound bled profusely and Davis was taken to the receiving hospital for treatment and from there to the County Hospital. A police officer testified that defendant when arrested admitted having had a fight with Davis. Although defendant denied at the trial having been in the cafeteria on the night in question, no contention is made on the appeal that the evidence was insufficient to prove the commission by him of the alleged act.

[1-3] The claim that the testimony of Davis was insufficient to prove that the eye had been destroyed is stated as follows: "It goes without saying that medical testimony of such a highly technical nature as that which concerns the eye and the various component parts thereof would be necessary for proof of this fact. Obviously a layman could not testify that his eye had been put out, especially in view of the fact that his testimony was only two months after the alleged assault." This point should have been raised, if at all, in the trial court. The testimony of Davis was given without objection, but if objection, had been made upon the ground that he was not a medical expert, it would have been ill-founded. Questioned as to what happened to his eyes, Davis testified that he "lost one * * * I have both of them but no sight in one * * * I still have my eye, but it is no good. It is just blank and I cannot see out of it." This testimony was given at the preliminary examination but, with other testimony, was admitted at the trial under stipulation. At the trial he testified that he had not regained the sight, that it was completely impaired and that he could not see a thing out of it. The latter testimony was given more than seven months after the date of the injury. No one could have been better qualified than Davis to testify that he had no sight in his left eye. The possibility that sight might eventually return after such a long period of complete blindness was not suggested at the trial. We can only infer that the appearance of the eye must have been such as to convince the participants in the trial that the loss of sight was permanent. Proof that a man has been wholly without sight in one eye for a period of more than seven months as a result of a traumatic injury to the eye must be deemed sufficient to prove that he is permanently blind in the injured eye, in the absence of evidence to the contrary. The contention that medical testimony was required to prove that there would be no restoration of vision appears to be an afterthought, and, in view of the evidence as to the nature of the injury, is without merit.

[4, 5] The evidence was sufficient to support the conviction of mayhem as to which the punishment provided is not to exceed 14 years in prison. The crime of assault with a deadly weapon is punishable by imprisonment for not to exceed ten years. Even if it should be conceded for present purposes that the two offenses could not be carved out of a single act, it

would not follow that the judgments should be reversed. The term of the sentence for the offense of assault with a deadly weapon will have been served while defendant is in custody under sentence for the offense of mayhem, which latter, for the purpose of comparison with the former, will be deemed to be for the maximum term of 14 years. Therefore, if there was error, it was not pejudicial. People v. Anderson, 75 Cal.App. 365, 242 P. 906; People v. Sharp, 58 Cal.App. 637, 209 P. 266. See also, People v. Pearson, 41 Cal.App.2d 614, 618, 107 P.2d 463; People v. Dallas, 42 Cal.App.2d 596, 604, 109 P.2d 409.

The judgments are affirmed.

WOOD and VALLEE, JJ., concur.

WEST KEY NUMBER SYSTEM

87 Cal.App.2d 471

CANTRELL v. BOARD OF SUP'RS OF LOS ANGELES COUNTY.

Civ. 16349.

District Court of Appeal, Second District, Division 1, California.

Sept. 10, 1948.

Hearing Denied Nov. 8, 1948.

1. Health 🔑31

Whether hog ranches other than applicant's were equally or more detrimental than applicant's to health and welfare of community was immaterial in determining whether applicant's permit to operate ranch should be revoked, so that county board of supervisors was not divested of jurisdiction to revoke permit because transcript of proceedings before zoning board showed affirmative answer of witness to question as to whether applicant's hog ranch was more detrimental to health and welfare than others, when in fact the answer was negative.

2. Health 🔑31

Revocation by county board of supervisors of permit to operate a hog ranch would be justifiable if the operation was detrimental to public health or was a nuisance, regardless of how many other hog ranches might be just as detrimental or more so.

3. Health 🔑31

Where, under ordinance, county board of supervisors could follow recommendation of planning commission that permit to operate a hog ranch be revoked, District Court of Appeal would not assume that revocation was prompted by a reading of transcript which contained an error in respect to answers of witness to question, rather than by the recommendation, in absence of showing that action of board was prompted by reading of transcript, and court would not assume that rancher was prejudiced by error.

4. Administrative law and procedure 🔑791
Certiorari 🔑68

The writ of review cannot be used to determine whether or not, in the opinion of the reviewing tribunal, the evidence was sufficient to support the decision complained of, provided the inferior tribunal or board had jurisdiction and record discloses substantial evidence to support the decision.

5. Health 🔑31

On appeal from judgment for county board of supervisors on writ of review to annul an order of board revoking, pursuant to authority granted by ordinance, a permit to operate a hog ranch, function of District Court of Appeal was to determine whether board was guilty of an abuse of discretion in revoking permit without competent and substantial evidence establishing just cause, and court could not judge of the intrinsic value of the evidence or weigh it.

6. Health 🔑31

Evidence predicated upon uncorroborated hearsay or rumor would not be "substantial evidence" which would preclude determination on writ of review that order of county board of supervisors revoking a permit to operate a hog ranch was not sustained by the evidence.

See Words and Phrases, Permanent Edition, for all other definitions of "Substantial Evidence".

7. Health 🔑31

Evidence sustained revocation pursuant to ordinance of permit to operate a hog ranch on ground that operation was detrimental to general health and welfare of the community.

8. Health 🔑31

Under authority of ordinance authorizing revocation of permit to operate a hog ranch if operation was detrimental to public health or safety or a nuisance, permit could be revoked on showing that operation was so offensive as to render the enjoyment of life and property in community uncomfortable, and that ranch was so conducted as to cause actual injury to health, was not required to be shown.

9. Health 🔑31

In proceeding for revocation of permit to operate a hog ranch on ground that operation was detrimental to general health and welfare of community, county board of supervisors could take judicial notice that the presence of large numbers of rats and flies is extremely detrimental to health of public.

10. Evidence 🔑9

Courts may take judicial knowledge of scientific facts which are commonly recognized.

11. Administrative law and procedure 🔑459
Counties 🔑47

In addition to the courts, certain boards and tribunals, such as the board of supervisors of Los Angeles county, established as they are for determining certain classes of rights, while not strictly courts, do partake of their nature, and may take juducial notice of certain matters.

12. Health 🔑31

Where county board of supervisors adopted a finding of the county planning commission that operation of hog ranch was detrimental to public health and safety, and revoked permit pursuant to authority conferred by ordinance, to revoke permit if operation was detrimental to public health or safety or was a nuisance, and finding was supported by substantial evidence, board was not required to find that operation of ranch was a nuisance.

13. Administrative law and procedure 🔑764
Constitutional law 🔑287
Health 🔑31

Where ordinance required recommendation and findings of county planning commission on hearing for revocation of permit to operate a hog ranch to be transmitted to county board of supervisors, and recommendation to revoke permit followed statement that after consideration of factual data and testimony presented, the commission determined that operation of hog ranch and dump were detrimental to health and the general welfare of community, operator of ranch was not prejudiced by failure to transmit formal findings and was not denied procedural due process.

14. Administrative law and procedure 🔑499
Health 🔑31

County planning commission, by recommending revocation of permit to operate a hog ranch, raised a presumption that the existence of the necessary facts had been ascertained and found.

◆

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Application by Isaah J. Cantrell for a writ of review to annul an order of the Board of Supervisors of Los Angeles County revoking a permit issued to Cantrell for the operation of a hog ranch. From an adverse judgment the applicant appeals.

Judgment affirmed.

Edward F. Perry, of Pasadena (John H. Poole, of Pasadena, of counsel), for appellant.

Harold W. Kennedy, Co. Counsel and Edward H. Gaylord, Deputy Co. Counsel, both of Los Angeles, for respondents.

WHITE, Justice.

Appellant applied to the Superior Court of Los Angeles County for a writ of review to annul an order of the Board of Supervisors (hereinafter referred to as the Board), revoking a permit issued to appellant for the operation of a hog ranch at Meridian Street and Bateman Avenue, in the Duarte district, County of Los Angeles.

Following a hearing thereon, judgment was entered in favor of respondent board. From such judgment appellant prosecutes this appeal.

The following are the facts disclosed by the agreed statement on appeal (Rule 6 of Rules on Appeal):

On April 1, 1947, respondent board of supervisors made its order revoking within six months thereafter, the foregoing permit, under authority granted it by Los Angeles county zoning ordinance No. 1494 (new series) (as amended) July, 1946.

The order of revocation was made following a recommendation of the Los Angeles County Planning Commission (hereinafter termed the commission) that said permit should be revoked because appellant's hog ranch was detrimental to the general health and welfare of the community. The commission's determination was made after a consideration of the factual data and testimony presented at a public hearing duly held by the zoning board of said commission on March 27, 1947.

When the cause was before the superior court it was stipulated that the transcript of proceedings had before the zoning board was erroneous in the following respect, to-wit, in answer to a question propounded to a witness as to whether the hog ranch of appellant, "is more detrimental to the health and safety, and the type of use more so, than any others you have seen?" the transcript records the answer as, "Yes," when in fact the answer was "No." The transcript contained this error when it was submitted by the zoning board to the commission and to respondent board in compliance with section 71 of the aforesaid county ordinance. The return to the petition for a writ of review does not show that any findings were made by the zoning board or by the respondent board.

It is first contended by appellant that respondent board was without jurisdiction to act because a true copy of the testimony was not forwarded to it as provided in said section 71 of the aforesaid ordinance which reads as follows:

"The Commission in recommending action by the Board of Supervisors on a permit shall transmit to the Board of Supervisors:

"(a) A transcript of the testimony before the Zoning Board unless the Commission itself heard the case, in which circumstance a transcript of the testimony before the Commission.

"(b) All reports and exhibits introduced in evidence.

"(c) All reports made to the Zoning Board or to the Commission."

The problem presented is whether the foregoing error in the transcript is such a failure of compliance with the ordinance as to deprive respondent board of jurisdiction to act.

[1, 2] There are two reasons why the aforesaid error in the transcript did not divest respondent board of jurisdiction to revoke appellant's hog ranch permit. First, it was immaterial whether other hog ranches were equally detrimental or more so than was appellant's, to health and safety. If the operation of appellant's hog ranch was in fact detrimental to public health or was a nuisance, then revocation of his permit was justifiable regardless of how many other hog ranches might be just as detrimental or more so. The question is not whether the operators of other hog ranches were being favored, but whether appellant's operation of his hog ranch was deleterious to the public health and welfare. Therefore, it cannot reasonably be assumed that respondent board would have come to a different decision had the aforesaid error not been made.

[3] Secondly, since under the ordinance respondent board had jurisdiction to follow the recommendation of the zoning board and commission and revoke appellant's permit, it cannot be presumed that they did read the transcript. There is nothing in the record to indicate that respondent board was influenced in its action by a reading of the transcript rather than because of the recommendation of the zoning board and commission. Under the circumstances here present, we cannot indulge in the supposition that any member of respondent board was misled by the error in the transcript. It has long been the rule as to statewide agencies that when

such agencies adopt the facts found and the decision recommended by a referee or one who is authorized to and does hear the evidence, members of the board constituting the state agency and who make a final decision are not required to review the record. Of course, an entirely different situation would be presented if the state board, disregarding and setting aside the findings and recommendation of the referee, undertook, without a review of the evidence, to appraise the same and make determinations based thereon. Hohreiter v. Garrison, 81 Cal.App.2d 384, 398, 184 P.2d 323, and cases therein cited.

We are persuaded that where, as here, respondent board adopted the recommendation of the zoning board and commission, the former of which was authorized to and did hold a public hearing, respondent board was not required to read the testimony adduced at such hearing, and in the absence of a showing that respondent board's action in revoking appellant's permit was prompted by a reading of the transcript rather than by the recommendation of the zoning board and commission, we cannot assume that appellant was prejudiced by the foregoing error appearing in the transcript.

It is next contended by appellant that there was no substantial evidence that his hog ranch was detrimental to the public health or safety, and that any such finding was, therefore, in excess of the board's jurisdiction.

Section 80 of the ordinance provides that the board may revoke a permit previously issued where the board finds that the use to which such permit is put is detrimental to the public health or safety or is a nuisance.

[4-6] The weight of authority is that the reviewing court has no right on a writ of review to judge of the intrinsic value of evidence, nor to weigh it. The writ cannot be used for the purpose of determining whether or not, in the opinion of the reviewing tribunal, the evidence was sufficient to support the decision complained of, provided the inferior tribunal or board had jurisdiction and the record discloses substantial evidence to support the decision. **Garvin v. Chambers, 195 Cal. 212, 232 P. 696.** Central Pacific R. R. Co. v. Board of Equalization, 43 Cal. 365; Winning v. Board of Dental Examiners, 114 Cal.App. 658, 300 P. 866; Fuller v. Board of Medical Examiners, 14 Cal.App. 2d 734, 742, 59 P.2d 171. It is our function to determine whether the board was guilty of an abuse of discretion in revoking a permit to conduct a legitimate business without competent and substantial evidence establishing just cause for revocation. There must be a basis in the evidence having rational probative force. For instance, evidence that is predicated upon mere uncorroborated hearsay or rumor cannot be dignified as substantial evidence.

At the public hearing held by the zoning board in the matter now engaging our attention, there was evidence that "* * * the feeding floors of both ranches (the hearing concerned two adjacent properties—one owned by appellant and the other by a Mrs. Wright) are so constructed or maintained so as to be rat harbors and there is evidence of rat infestation. There is a large pool of water standing between Mrs. Wright's hog ranch and the Cantrell Ranch along the side of the road. This water drains from the pens and stands stagnant. I have been there and there was considerable water standing. That is the health department's standpoint. We feel that the health problem involved is the fly-breeding and the rat odor which comes under the heading of a nuisance."

When at the hearing appellant's counsel asked the witness Paul Ballinger of the Los Angeles County Health Department, "You mentioned the matter of rat infestation. Is that attributed to the hog ranch or the dump?" the witness answered, "Both."

Arthur L. Beatty, Sanitarian for the Los Angeles County Health Department, testified:

"With the company of Mr. Savage, rodent control division, on the 10th of January on orders of the acting director, we made a survey of the entire area. In not only the two hog ranches but the adjacent areas and residential zones as well, we found evidence of rats. There were rats in the dump. It was poorly maintained.

There were piles of garbage mixed with trash, tin cans, and swill, offering excellent food material for rat infestation. At Mr. Cantrell's, we found evidence of rat burrows active around the small brooder pens and in the wash immediately to the end of it. The feeding slabs were not properly cleaned up. A rat could get under it. An inspection was made and there was a large amount under the feeding block. At the dump, garbage and swill from the feeding slabs is being dumped. You can't see a rat in the area, but they undoubtedly are there, As long as edibles and garbage are dumped without disposal, you are going to have rats."

When asked whether the hogs consume all the garbage given them, this witness replied:

"No, they do not. I have gone into hog ranches and have seen that the hogs will eat certain things and leave other—bones, etc., but the rats will eat anything."

Jacob Sanarjian of the Los Angeles County Health Department testified:

"On January 10, Mr. Ballinger and I made the investigation of rodent control, and at the hog farm we found conditions to be very poor. The hog farm cement slabs are poorly constructed. The wastes are dumped into an open field. These places adjoin each other. You might as well say they are one piece of land, spread out all over. The question if the hogs would eat all the garbage would not make any difference because the rats would be there eating the excreta. I would say that as long as they have the excreta piled up there will always be rats."

[7, 8] We are satisfied that the testimony abundantly establishes and supports the conclusion arrived at by the board that the maintenance of appellant's hog ranch constituted a menace to public health and safety. The testimony narrated above was sufficient to support a finding and conclusion that appellant's hog ranch interfered with the use, comfort and enjoyment of property in its immediate vicinity. In a proceeding such as is now before us, it is not necessary to show that the hog ranch in question was so conducted as to cause actual injury to health, but it is sufficient to show that the enterprise was so offensive as to render the enjoyment of life and property uncomfortable. Commonwealth v. Perry, 139 Mass. 198, 29 N.E. 656; Kimball v. Thompson, D.C., 70 F. Supp. 803, 808.

[9-11] We are further impressed that from the evidence adduced herein, the board could take judicial notice of the fact that the presence of large numbers of rats and flies is extremely detrimental to the health of the public. Courts may take judicial knowledge of scientific facts which are commonly recognized. Coughlin v. Great Western Power Co., 183 Cal. 548, 551, 191 P. 920; Roy v. Smith, 131 Cal. App. 148, 151, 21 P.2d 151. For example, the court has taken judicial notice that the geographic situation of the city and county of San Francisco and its marine traffic was such as to make constant vigilance against bubonic plague (spread by rats) necessary. Spreckels v. City and County of San Francisco, 76 Cal.App. 267, 274, 244 P. 919. And in addition to the courts, certain boards and tribunals, such as respondent board herein, established as they are for determining certain classes of rights, while not strictly courts, do partake of their nature, and they too may take judicial notice of certain matters. Anderson v. Board of Dental Examiners, 27 Cal.App. 336, 339, 149 P. 1006; Benton v. Industrial Accident Comm., 74 Cal.App. 411, 415, 240 P. 1021; Rich v. McClure, 78 Cal.App. 209, 213, 248 P. 275; Mann v. Board of Medical Examiners, 31 Cal.2d 30, 187 P.2d 1.

[12] Appellant next claims that the board erred in failing to make a finding as to whether the use complained of was (1) a nuisance, or (2) detrimental to the public health and safety as required by section 80 of the ordinance. In view of the fact that, as appellant concedes, "the board apparently adopted a finding by the commission that the said ranch was detrimental to the public health and welfare"; that the evidence supports such a conclusion on the part of the commission, and adopted by the board, it becomes unnecessary to discuss the claimed failure of the board to make a finding as to whether the hog ranch constituted a nuisance. Revocation

of the permit was authorized if the maintenance of the hog ranch was either detrimental to the public health or safety or was a nuisance.

Finally, appellant insists that the failure of the zoning board to report its findings as required by section 70 of said ordinance was a failure to follow procedural due process.

Section 70 provides:

"After a hearing the Zoning Board shall report to the Commission and the Commission shall report to the Board of Supervisors their respective findings as to whether the erection, construction, alteration, enlarging, moving, occupying or using of such building, structure, improvement or premises for the business, occupation or purpose designated in the manner set forth in the application or under restrictions or conditions will be a menace to or endanger the public health, safety or general welfare.

"The Zoning Board shall also recommend to the Commission and the Commission shall recommend to the Board of Supervisors the granting of such permit as applied for or under such restrictions or conditions as they find necessary to prevent such proposed use from becoming a menace to or endangering the public health, safety or general welfare, or shall recommend a denial thereof."

While the foregoing section has reference to the duties of the zoning board and commission following hearing upon an application for the issuance of a permit, section 84 of the ordinance provides that following a hearing upon the revocation of a permit the zoning board and the commission shall make the same reports and recommendations, accompanied by the same material, and in the same manner, as in the case of an application for a permit.

It is appellant's contention that two things are required of the zoning board, viz., (1) that it shall transmit findings, and (2) that it shall transmit recomendations. That only the latter was done.

"After consideration of all the factual data and testimony presented at the hearing, the commission determined that the operation of the hog ranch and dump were detrimental to the health and general welfare of the community." This was followed by the recommendation to respondent board that appellant's permit be revoked.

[13, 14] The foregoing language must be held to imply that the commission had found that detriment and injury to the health and general welfare of the community ensued from the operation of the hog ranch in question. And in connection with the action of such commission and board, composed usually of laymen, the fact that a certain action is taken or recommendation made raises the presumption that the existence of the necessary facts had been ascertained and found. Bartholomae Oil Corp., v. Seager, 35 Cal.App.2d 77, 80, 94 P.2d 614; Lindell Co. v. Board of Permit Appeals, 23 Cal.2d 303, 323, 144 P.2d 4; North Side Property Owners' Ass'n v. County of Los Angeles, 70 Cal.App.2d 598, 608, 609, 161 P.2d 613. We cannot perceive wherein appellant has been prejudiced by the absence of formal findings under the facts here present.

For the foregoing reasons, the judgment is affirmed.

YORK, P. J., and DORAN, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

---

87 Cal.App.2d 569

In re SCHWARTZ' ESTATE.

SCHWARTZ v. SCHWARTZ.

Civ. 16429.

District Court of Appeal, Second District, Division 1, California.

Sept. 15, 1948.

1. Executors and administrators 🔑21(2)

Finding, on appeal from order granting testator's widow letters of administration with the will annexed, that under antenuptial agreement widow had relinquished her right to succeed to any portion of estate of testator, became law of the case, in subsequent proceeding had in administration of estate, and probate court erroneously made an award to widow in her accounting proceeding of money as her community share in the estate of testator.

2. Constitutional law ⚿56, 315

Act purporting to validate an order which is void for want of jurisdiction would violate constitutional provisions forbidding an attempted exercise of judicial power and would therefore contravene due process of law.

3. Executors and administrators ⚿21(2)

An appointment of testator's widow as administratrix with the will annexed which was contrary to statutes prescribing exclusive method for appointment was in excess of jurisdiction of probate court. Probate Code, §§ 409, 422.

4. Executors and administrators ⚿29(4)

The statute providing that, where an order appointing an administrator is reversed on appeal for error, the lawful acts theretofore performed by administrator after qualification are as valid as though order was affirmed, did not cure jurisdictional defects in appointment of an administratrix with the will annexed. Probate Code, §§ 409, 422, 1241.

5. Executors and administrators ⚿22(2)

Where an appeal was taken from order granting letters of administration with will annexed, probate court had duty to appoint a special administrator with the will annexed.

6. Executors and administrators ⚿488

Where appointment of administratrix with the will annexed exceeded jurisdiction of probate court because made contrary to statutes providing exclusive method for appointment, the person appointed was entitled to compensation for services rendered the estate by her and her counsel during period preceding the filing of notice of appeal. Probate Code, §§ 409, 422.

7. Executors and administrators ⚿216(2)

Where petition for letters testamentary was contested, attorneys for petitioner who was appointed administratrix with will annexed were not entitled to payment from estate of fees for filing petition, appearances in court in connection with petition, and for services in unsuccessfully resisting an appeal taken from order of appointment.

8. Executors and administrators ⚿21(2)

Costs incurred in successfully prosecuting an appeal from order appointing an administratrix with the will annexed were taxable against person erroneously appointed and were not chargeable against the estate.

◆

Appeal from Superior Court, Los Angeles County; Harold B. Jeffery, Judge.

Petition by Minnie K. Schwartz for approval of her account enumerating acts performed by her as administratrix with the will annexed of the estate of Louis Schwartz, deceased, before order granting letters of administration with will annexed, was reversed on appeal. David Schwartz filed objections. From adverse orders, objector appeals.

Order in accordance with opinion.

Isador Gralla and Joe Wapner, both of Los Angeles, for appellant.

Robert N. Baker, of Santa Monica, and Robert J. Kelleher, of Los Angeles, for respondent.

WHITE, Justice.

Louis Schwartz died testate on October 3, 1945. He was survived by his widow, respondent herein, and several children of a previous marriage. The widow and appellant herein, son of the testator by the former marriage, each filed a petition for appointment as administrator with the will annexed. From an order granting letters of administration with the will annexed to the widow, and from a further order denying his petition for letters of administration with the will annexed, the son prosecuted an appeal to this court, resulting in a reversal of the orders appealed from and a remanding of the cause with directions to the court below to grant the petition of appellant son for probate of the last will and testament of his father, and to issue to said son letters of administration with the will annexed. In re Estate of Schwartz, 79 Cal.App.2d 301, 179 P.2d 863.

During the pendency of the foregoing appeal the widow continued to act in the capacity to which she was appointed by the probate court. After the remittitur was lodged in the court below, and on June 27, 1947, the widow filed her "first and final account, report of administratrix with will annexed, petition for fees of administration and her attorneys, and allowance of costs, instructions and discharge."

In her first and final account the widow enumerated certain acts performed by her during the first fifty-nine days after her purported appointment as administratrix and prior to the date when the appeal was taken from the order appointing her, and also set forth certain acts performed by her on behalf of the estate while the foregoing appeal was pending. She petitioned for the approval of her account and "that administrator's fees be fixed for your petitioner in the amount of $675 or such a reasonable amount as the court may determine; and that attorney's fees be fixed and allowed in the amount of $1,400 or such amount as the court may deem reasonable; that your petitioner be allowed to pay herself by way of costs in said appeal the sum of $168.30; * * *" and that the community property, consisting of $525 cash, belonging to the widow, Minnie K. Schwartz, be delivered to the said Minnie K. Schwartz.

Following a hearing on the issues joined by the account, petitions and the objections filed thereto on behalf of appellant herein, David Schwartz, the court rendered its decision as follows: "Approved the account; awarded to counsel for respondent Minnie K. Schwartz the sum of $800.00, awarded to respondent herein $675.00 for services rendered as administratrix with the will annexed; and awarded to respondent the sum of $525.00 representing one-half of certain claimed community property allegedly belonging to respondent widow."

The court disallowed the costs incurred by respondent on the former appeal in the sum of $168.30, and by a nunc pro tunc order subsequently entered, awarded to appellant herein, David Schwartz, the costs incurred by him in his successful appeal, but assessed the same against the estate. It is from the foregoing orders that this appeal is prosecuted.

Appellant first contends that the court erred in awarding to respondent the sum of $525.00, the same purportedly being one-half of the value of certain alleged community property of respondent and decedent. In this contention, appellant must be sustained. On the former appeal (In re Estate of Schwartz, supra [79 Cal. App.2d 301, 179 P.2d 865], the court had under consideration the antenuptial agreement executed by decedent and his wife, respondent herein, and which agreement contained the following provision: "That said party of the second part shall receive and accept from the estate of party of the first part, after his death, if she shall survive such party of the first part as his widow, the sum of Five Thousand ($5,000.00) Dollars, in place and instead of all rights, which, as widow of party of the first part, she might otherwise have, either as a homestead community interest or otherwise as a distributive share of the estate by operation of law, under present or future laws of the State, to be enacted, or in force and effect now or hereafter."

[1] The court held that the agreement in question made respondent herein a creditor of the estate. That by it she had released all claim in and to the property owned by her husband at the time of the marriage and also all interest he might have at the time of his death, and was therefore not entitled to succeed to the estate or any portion thereof. By the provisions of the agreement hereinbefore quoted, respondent herein explicitly agreed that for and in consideration of the receipt by her of the sum of $5,000.00 from the estate of her husband she relinquished "all rights, which, as widow of party of the first part, she might otherwise have, either as a homestead community interest or otherwise * * *". The decision rendered on the former appeal that respondent herein had relinquished her right to succeed to the estate of her husband or any portion thereof became the law of the case, and it was the duty of the probate court to proceed with the hearing on the first and final account and petitions filed

therewith upon the theory that the aforesaid issue was determined in favor of appellant herein by the former decision on appeal and that such determination was binding upon the trial court and conclusive of that question in subsequent proceedings had in the administration of the estate in question. The award to respondent widow of the sum of $525 as her community share in the estate of her husband was therefore erroneous.

Respondent's argument that her widow's share of the community property belonged to her upon the death of her husband (In re Estate of Brown, 54 Cal.App.2d 575, 579, 129 P.2d 713, 130 P.2d 188) is unavailing under the facts of the instant case. As heretofore pointed out, she explicitly waived and relinquished "* * * all rights, which, as widow of the party of the first part, she might otherwise have, either as a homestead community interest or otherwise or as a distributive share of the estate by operation of law * * *."

[2-4] Appellant next asserts that the appointment of the respondent as administratrix with the will annexed was in excess of the court's jurisdiction, and therefore void. Sections 409 and 422 of the Probate Code prescribe the exclusive method for appointment of an administratrix with the will annexed, and the appointment of respondent, being contrary to the applicable code provisions, was in excess of the court's jurisdiction. Whatever curative effect section 1241 of the Probate Code may have, it did not serve to cure defects concerning jurisdictional steps. Any legislative act purporting to validate an order which, as in the instant case, is void for want of jurisdiction, would violate constitutional provisions which forbid an attempted exercise of judicial power by the legislature, and would therefore contravene due process of law. Texas Co. v. Bank of America etc. Ass'n, 5 Cal.2d 35, 39, 40, 43, 53 P.2d 127.

[5, 6] However, we are not in accord with appellant's contention that respondent is not entitled to compensation for services rendered to the estate by herself and her counsel during the interim of 59 days following her purported appointment, and until the validity thereof was challenged by the filing of a notice of appeal. It is the appeal taken from the order appointing respondent as administratrix with the will annexed that suspended her powers and stayed proceedings in the court below. It is after the filing of the notice of appeal that all steps taken by one appointed to administer an estate are without authority and void. In re Estate of Hultin, 29 Cal.2d 825, 833, 178 P.2d 756; In re Estate of Stough, 173 Cal. 638, 642, 161 P. 1. When the appeal was taken it became the duty of the court to appoint a special administrator with the will annexed. In re Estate of Hultin, supra, 29 Cal.2d at page 833, 178 P.2d 756. We therefore hold that respondent is entitled to compensation for the services rendered by her and her counsel to the estate during the aforesaid 59 days interim preceding the filing of the notice of appeal.

[7] Appellant's contention that the attorneys for respondent administratrix with the will annexed, whose appointment was void, are not entitled to compensation for filing in her behalf a petition for letters testamentary, appearances in court in connection therewith, and for services in unsuccessfully resisting an appeal taken from the original order appointing her, must be sustained. It is the established rule in this state that where one makes application for the issuance of letters testamentary and is met with a contest he is not entitled to recover attorney's fees incurred in making the application and resisting the contest which ensued. Such a contest is purely a personal one, and not one prosecuted for or inuring to the benefit of the estate. The basic question involved in such a contest and appeal is as to who should administer the estate and thus receive a commission or compensation therefor. Ordinarily, the estate—that is, the creditors and devisees—are not, as such, at all interested. In the case at bar, the contest and appeal was a controversy between the respondent herein on the one side and the appellant on the other, and the estate should not bear the expense, certainly, of the losing party. In re Estate of Simmons, 43 Cal. 543, 548; In re

Estate of Barton, 55 Cal. 87, 88. As was said by the court in Re Estate of Arnold, 121 Cal.App. 247, 250, 8 P.2d 897, 898: "Where such an executor, having offered the will for probate, is met with a contest, he may adopt one of two alternatives: He may assume the burden of resisting the contest, or may cast it upon those who would be benefited by the probate of the will. Dodd v. Anderson, 197 N.Y. 466, 90 N.E. 1137, 27 L.R.A., N.S., 336, 18 Ann. Cas. 738. If he chooses the former, and is unsuccessful, he does so in the light of the absence of statutory authority for the allowance of the attorneys' fees out of the assets of the estate and the rule of [In re] Estate of Olmstead, supra [120 Cal. 447, 52 P. 804]."

In the case now engaging our attention, respondent administratrix in her petition prayed for an award of attorneys' fees in the sum of $900 exclusive of services rendered on the appeal, and the further sum of $500 for services rendered in connection with the appeal. In its order, the court allowed respondent attorneys' fees in the total sum of $800, but did not specify what, if any, part of said sum was in payment for services rendered on the appeal. We mention this situation so that upon further proceedings to be had pursuant to the order we must make in this case, the court will not make an award of any amount as attorneys' fees for services rendered in connection with the appeal. The court properly disallowed respondent's claim for $168.30 expended by her as costs in the contest and appeal and the same ruling should be made as to attorneys' fees for services rendered on the appeal.

[8] From what we have hereinbefore said, it is manifest that the court erroneously charged against the estate the costs incurred by appellant in successfully prosecuting the former appeal from the order appointing respondent as administratrix with the will annexed. As heretofore pointed out, the controversy embodied in the appeal was purely a personal one in which the estate was not interested or benefited. The costs expended by appellant as the prevailing party on that appeal should therefore be taxed against respondent individually and not against the assets of the estate.

From the foregoing it follows that the orders appealed from must be reversed and the cause remanded with directions to the court below to determine what fees respondent is entitled to for services rendered by her to the estate as administratrix with the will annexed during the interim of 59 days following her purported appointment and the date when notice of appeal from the order appointing her was filed, and to award such sum to her; to determine what fees respondent's attorneys are entitled to for services rendered to the estate during the aforesaid 59 days and make an award thereof to them; to disallow payment to respondent of the sum of $525 as the community property allegedly belonging to her; to tax appellant's costs incurred in prosecuting the former appeal against respondent individually and not against the estate; and to take such further appropriate proceedings as are not in conflict with the views herein expressed. It is so ordered.

YORK, P. J., and DORAN, J., concur.

32 Cal.2d 584

KING et al. v. STANLEY.

L. A. 20148.

Supreme Court of California, in Bank.
Sept. 21, 1948.

1. Frauds, statute of 🔑103(2), 118(4)
Specific performance 🔑25

An agreement for purchase or sale of realty need not be evidenced by formal contract drawn with technical exactness to be specifically enforced, and memorandum of agreement may be found in one paper or in several documents, including exchange of letters or telegrams or both, or in letter from vendor to purchaser which is accepted and acted upon by purchaser. Civ.Code, § 1624, subd. 4.

2. Specific performance 🔑31

Where there was an interchange of communications in which purchaser stated that he and his father would purchase lots at certain price and in which vendor, after stating that expenses of escrow and commission must be met by purchaser, requested "kindly inform me if this meets with your approval", and purchaser thereafter without delay opened the escrow, contract was complete when escrow was opened and letter of escrow company was placed in course of transmission to vendor, as respects right of specific performance. Civ.Code, §§ 1582, 1583.

3. Specific performance 🔑31

Equity does not require that all terms and conditions of proposed land contract be set forth in the contract in order to authorize specific performance, but usual and reasonable conditions of such a contract are, in contemplation of the parties, a part of their agreement. Civ.Code § 3390, subd. 6.

4. Customs and usages 🔑16

In absence of express conditions in land contract, custom determines incidental matters relating to opening of escrow, furnishing deeds, title insurance policies, prorating of taxes, and the like when agreement is sought to be specifically enforced. Civ.Code, § 3390, subd. 6.

5. Specific performance 🔑31

In determining whether there is a written land contract which can be specifically enforced, material factors to be ascertained from writings allegedly constituting the agreement are the vendor, the purchaser, price to be paid, time and manner of payment, and property to be transferred, describing it so that it may be identified. Civ.Code, § 3390, subd. 6.

6. Escrows 🔑5

Escrow instructions, which are merely customary and expected directions to escrow company to carry into effect executory land contract, do not take place of the agreement of sale, but merely carry it into effect, and such instructions are subject to modification without affecting finality of the agreement already reached.

7. Vendor and purchaser 🔑130(1)

A vendor must furnish a good and marketable title. Civ.Code, § 3394.

8. Vendor and purchaser 🔑130(1)

The right of vendee to receive a good and marketable title is not dependent upon terms of land contract but is given by the law itself. Civ.Code, § 3394.

9. Specific performance 🔑97(2)

Escrow instruction requiring vendor to furnish a certificate of title did not impose any onerous or uncontemplated condition upon vendor, though there is no express agreement to furnish certificate of title, as respects specific performance of the land contract.

10. Insurance 🔑124

"Title insurance" is a contract to indemnify against loss through defects in title or against liens or encumbrances that may affect title at time when policy is issued.

See Words and Phrases, Permanent Edition, for all other definitions of "Title Insurance".

11. Vendor and purchaser 🔑142

A vendor may not refuse to perform land contract on ground that his title is not as complete as the one agreed to be conveyed.

12. Vendor and purchaser ⟹58, 76

In contract for sale of realty the delivery of deed and payment of purchase price are dependent and concurrent conditions. Civ.Code, § 1657.

13. Specific performance ⟹97(2)

Escrow instruction, fixing 30 days as reasonable time during which money should remain in escrow to enable purchaser to determine matter of merchantable title, did not preclude specific performance of land contract on ground that it included different terms which had not been accepted by vendor, since it was within contemplation of parties that money should remain in escrow for such time as would be necessary to determine matter of merchantable title and 30 days was a reasonable time for that purpose. Civ.Code, § 1657.

14. Specific performance ⟹97(2)

Escrow instruction, which sought to give vendors permission for payment of bonds, assessments, encumbrances of record to show title as called for, did not preclude specific performance of land contract on ground that it included terms which had not been accepted by vendor, in view of vendor's representation that only encumbrance of record was lien for second half of 1945–46 taxes and of obligation to furnish merchantable title.

15. Specific performance ⟹97(2)

Fact that form on which escrow instructions were submitted by purchaser contained blank provision regarding payment of commission, while land contract specifically provided that vendor would not be liable for any commission, did not preclude specific performance of contract on ground that escrow instruction included terms which had not been accepted by vendor.

16. Vendor and purchaser ⟹21

Existence of an intent to reduce informal writings to a formal written contract for sale of land would not necessarily prevent a binding obligation from arising, notwithstanding contemplated written or formal contract was not executed, unless it also appeared that parties agreed or intended not to be bound until formal written contract was executed. Civ.Code, § 1624, subd. 4.

17. Specific performance ⟹25

Where none of essential terms of land contract evidenced by informal writing was left for future determination, proof that parties intended to reduce informal writings to a formal written contract, if established, would not prevent an obligation subject to specific performance from arising, where there was no showing that parties had intended not to be bound until formal contract was executed. Civ.Code, § 1624, subd. 4.

18. Specific performance ⟹28(2), 37

Where there was an interchange of communications in which purchaser stated that he and his father would purchase lots at certain price and in which vendor, after stating that expenses of escrow and commissions must be met by purchaser, requested "kindly inform me if this meets with your approval", and purchaser without delay opened the escrow, there was mutual assent to a contract which was sufficiently certain, so that specific performance thereof could be had upon suit by purchaser and wife.

19. Specific performance ⟹6

Where there was no lack of mutuality of remedy at time of suit by purchaser and wife for specific performance of land contract, there was no impediment to performance by vendor, and purchaser and wife were entitled to the equitable relief sought.

◆

Appeal from Superior Court, Los Angeles County; Robert H. Scott, Judge.

Action by John W. King and another against Madeline M. Stanley for specific performance of agreement to convey real property. From judgment for plaintiffs, the defendant appeals.

Affirmed.

Prior opinion, App., 189 P.2d 46.

Abraham Glicksberg, of San Francisco, and Marshall M. Malter, of Los Angeles, for appellant.

M. Lewis Lehman, of Los Angeles, for respondents.

SHENK, Justice.

This is an appeal from a judgment directing specific performance of an agreement for the purchase and sale of real property.

The plaintiffs, as buyers, sought performance by the defendant of an alleged contract of sale of two lots in Los Angeles County, for the purchase price of $4,000. There is no question of the ability of the parties to perform or of the adequacy of the consideration. The principal issue raised by the answer was the existence of a written contract executed by the defendant. The only evidence consisted of correspondence between the parties which the trial court found constituted an enforcible contract.

John W. King, designated herein as the plaintiff, wrote to the defendant: "In looking through the records I find that you are the owner of two lots on 4th Ave. in the 9100 block in Inglewood, Calif. If you are interested in disposing of one I would be willing to pay $1500.00 cash. Please reply to:-1st Lt. John W. King * * *." On November 27, 1945, by letter the defendant thanked the plaintiff for the offer saying she would like to sell both lots at $2,000 each and that she thought the price would go even higher than $2,000 in a short time. The plaintiff then sent a telegram, dated November 29, 1945, to the defendant which read: "My father and I will purchase your lots at $2000 cash each will open escrow here and forward papers for signature if arrangements are satisfactory wire collect." December 2, 1945, the defendant wrote to the plaintiff as follows: "In reply to your telegram stating you would purchase both lots for $2,000 cash each. If you will take care of all necessary expenses of Escrow & any commission, if any, to be paid so I will net $4,000 in the deal you may start Escrow & send the papers to me for signature. The first half of the taxes for the year has been paid & there are no assessments due. Kindly inform me if this meets with your approval." On December 7, 1945, the defendant received from an escrow company a letter dated December 3, 1945, reading: "We enclose escrow instructions covering proposed purchase by J. W. King and wife of property you now own. Also enclosed is the deed * * *. Your prompt return of the enclosures will assist us in proceedings with this transaction. * * *" Escrow instructions enclosed and signed by the plaintiffs directed the company to deliver the consideration of $4,000 provided a policy of title insurance with the usual exceptions showed title in plaintiffs as joint tenants free of encumbrances except the second half of 1945–46 taxes which were to be pro-rated. In their instructions the plaintiffs agreed to pay the buyer's customary charges, also the seller's title and escrow charges. These instructions also specified thirty days for completion of the escrow. The defendant was requested to sign instructions containing the following pertinent provisions: "All the conditions and demands above are hereby approved and I will hand you the necessary documents called for on my part to cause title to be shown as above, which you are authorized to deliver upon payment to you for my account the sum of $4,000.00 and within the time provided * * * and you are hereby authorized to pay any bonds, assessments, and/or taxes and any encumbrances of record to show title as called for/or necessary to comply with same * * * Pay to ——— a licensed real estate broker * * * as a commission the sum of $——— * * *"

The defendant was requested to sign the instructions and execute the deed and return both. On December 12, 1945, instead of complying she wrote the following to the escrow company: "In reply to your letter * * * I wish to refer to a letter of Dec. 2nd, 1945, to Lt. J. W. King in which I requested he inform me if contents of the letter met with his approval. Having failed to receive a reply to that letter I assumed he had changed his mind about purchasing said lots. The papers you mailed me which arrived here Dec. 7th came as quite a surprise. I therefore decided not to sell the property at this time. Will you kindly cancel all papers regarding these lots & notify Lt. King. Thank you for your courtesy."

[1, 2] An agreement for the purchase or sale of real property does not have to be evidenced by a formal contract drawn with technical exactness in order to be binding. A memorandum of the agreement (sec. 1624 (4), Civil Code) is sufficient, and this may be found in one paper or in several documents, including an exchange of letters or telegrams or both (Breckinridge v. Crocker, 78 Cal. 529, 21 P. 179; Niles v. Hancock, 140 Cal. 157, 73 P. 840; Twisselmann v. Cohn, 57 Cal.App.2d 987, 136 P.2d 33), or in a letter from the vendor to the purchaser which is accepted and acted upon by the latter. De Rutte v. Muldrow, 16 Cal. 505. The offer must be unequivocally accepted in order to be binding. In plaintiff's letter of November 23 there was an offer to purchase one lot which was rejected by the defendant who, at the same time, made a counter-offer to sell both lots at a price of $2,000 each. The plaintiff accepted the counter-offer and indicated his intent to open escrow to consummate the transfer. In her letter of acknowledgment the defendant added the qualification that the price stated should be net to her, with the possible exception of 1945–46 taxes and authorized the plaintiff, if satisfied, to open the escrow and send the papers for her signature, and indicate his approval. The plaintiff without delay opened the escrow which was the designated act of acceptance, and thereby and through the letter of the escrow company indicated his approval of the specified terms. The contract was complete when the escrow was opened and the letter of the escrow company was placed in the course of transmission to the defendant. Secs. 1582, 1583, Civil Code.

[3–5] There is no merit in the contention that the court could not ascertain with reasonable certainty from the writings of the parties the duty of each and the conditions of performance. Civil Code, sec. 3390 (6); Rest.Contr. 370; 23 Cal.Jur. 429, et seq. Equity does not require that all the terms and conditions of the proposed agreement be set forth in the contract. The usual and reasonable conditions of such a contract are, in the contemplation of the parties, a part of their agreement. In the absence of express conditions, custom determines incidental matters relating to the opening of an escrow, furnishing deeds, title insurance policies, prorating of taxes, and the like. Janssen v. Davis, 219 Cal. 783, 788, 29 P.2d 196; Wagner v. Eustathiw, 169 Cal. 663, 666, 147 P. 561; Bisno v. Herzberg, 75 Cal.App.2d 235, 241, 170 P. 2d 973; O'Donnell v. Lutter, 68 Cal.App.2d 376, 383, 156 P.2d 958. The material factors to be ascertained from the written contract are the seller, the buyer, the price to be paid, the time and manner of payment, and the property to be transferred, describing it so it may be identified. Breckinridge v. Crocker, supra, 78 Cal. 529, 21 P. 179; Grafton v. Cummings, 99 U.S. 100, 25 L.Ed. 366; O'Donnell v. Lutter, supra, 68 Cal. App.2d 376, 156 P.2d 958. There is no question that these essential items were clearly determinable here. The defendant was the seller. The plaintiff was the person with whom she had negotiated as buyer and the fact that he sought to take title in the name of himself and his wife as joint tenants as a matter of convenience would not materially affect the agreement. As the transaction was to be cash it was immaterial to the seller whether the buyer took title in his own name, or with his wife, or with his father. The price to be paid was clearly $4,000 net; terms, cash on delivery of merchantable title. The property itself was sufficiently described in the parties' writings.

[6-13] The defendant contends that the escrow instructions did not follow the alleged contract obligations but included different terms which had not been accepted by her. Reliance is placed on the inclusion of an agreement to furnish certificate of title and of a direction for payment of commission by the plaintiffs. The escrow instructions were merely customary and expected directions to the escrow company to carry into effect the executory agreement. Such instructions do not take the place of the agreement of sale but merely carry it into effect. Keelan v. Belmont Co., 73 Cal.App.2d 6, 12, 165 P.2d 930. They are subject to modification (Zlozower v. Lindenbaum, 100 Cal.App. 766, 773, 281 P. 102) without affecting the finality of the agreement already reached.

It is true there was no express agreement to furnish a certificate of title. However, it was the duty of defendant to furnish a good and marketable title (Crim v. Umbsen, 155 Cal. 697, 103 P. 178, 132 Am. St.Rep. 127; Easton v. Montgomery, 90 Cal. 307, 27 P. 280, 25 Am.St.Rep. 123; Turner v. McDonald, 76 Cal. 177, 18 P. 262, 9 Am.St.Rep. 189; Whittier v. Gormley, 3 Cal.App. 489, 86 P. 726) and the right of the vendee to receive such marketable title is not dependent upon the terms of the contract but is given by the law itself. Sec. 3394, Civil Code; Annotation 57 A.L.R. 1253, 1261. Therefore the securing of title insurance by the plaintiff did not impose any onerous or uncontemplated condition upon defendant. Smith v. Schrader, 80 Cal.App. 478, 487, 251 P. 967. Plaintiff by his instructions did not require a title "satisfactory to [purchaser]" (Parkside Realty Co. v. MacDonald, 166 Cal. 426, 434, 137 P. 21, 25; Van Demark v. California Home Extension Ass'n, 43 Cal. App. 685, 185 P. 866), which might be deemed a new condition, but was merely attempting to satisfy himself as to the merchantability of the defendant's title. Title insurance is a contract to indemnify against loss through defects in the title or against liens or encumbrances that may affect the title at the time when the policy is issued. Rice v. Taylor, 220 Cal. 629, 636, 32 P.2d 381; Title Insurance & Trust Co. v. Los Angeles, 61 Cal.App. 232, 235, 214 P. 667; Foehrenbach v. German American Title & Trust Co., 217 Pa. 331, 66 A. 561, 563, 12 L.R.A.,N.S., 465, 118 Am.St.Rep. 916, quoting definition from 1 Cooley on Insurance, 12. It is a reasonable method by which a vendee may determine the merchantability of the vendor's title; and a seller may not refuse to perform on the ground that his title is not as complete as the one agreed to be conveyed. Miller v. Dyer, 20 Cal.2d 526, 529, 127 P.2d 901, 141 A.L.R. 1428. The vendee could elect to take such title as the vendor could convey. In any event there was here no showing that the defendant could not convey good title or that there would be any obstacle to the obtaining of the certificate of title insurance. The escrow instruction signed by the plaintiff that he was to pay the seller's title and escrow charges constituted compliance with the defendant's condition, which was unaffected by the addition of the thirty-day time limitation. In a contract for the sale of real estate the delivery of the deed and the payment of the purchase price are dependent and concurrent conditions. Sec. 1657, Civil Code; Cates v. McNeil, 169 Cal. 697, 706, 147 P. 944; Whittier v. Gormley, supra, 3 Cal.App. 489, 86 P. 726. But it was well within the contemplation of the parties that the money should remain in the escrow for such time as would be necessary to determine the matter of merchantable title, and thirty days is a reasonable time for that purpose. Inasmuch as the instructions were merely supplementary to the executory contract and not the contract itself, the parties could have arranged for a different period, since it also appeared by stipulation that the plaintiffs were ready, willing and able at all times from December 2, 1945, to perform.

[14] The instruction which sought to give the defendant's permission for the payment of bonds, assessments, taxes and encumbrances of record to show title as called for, added to the contract no condition not agreed upon by the defendant in view of her representation that the only encumbrance of record was the lien for the second half of the 1945–46 taxes and of her obligation to furnish merchantable title.

[15] It is true there was no direction in the instructions that the plaintiff would pay any sale commission, but neither was there a showing that the defendant was obligated to pay a commission. The blank provision in the instruction regarding payment of commission was that usually included in the forms for instructions. The mere absence of a specific instruction that the plaintiff would pay a non-existent commission does not indicate a departure from the conditions which were accepted by him. If the defendant was so obligated, she should have furnished evidence thereof. No such showing was made.

[16-18] There is no merit in the defendant's contention that all of the writ-

ings offered in evidence by the plaintiffs were merely part of the preliminary negotiations. There was no determinable intent to reduce these informal writings to a formal written contract. The existence of such intent would not necessarily prevent a binding obligation from arising, notwithstanding the contemplated written or formal contract was never executed (Gavina v. Smith, 25 Cal.2d 501, 504, 154 P.2d 681; Levin v. Saroff, 54 Cal.App. 285, 289, 201 P. 961), unless it also appeared that the parties agreed or intended not to be bound until a formal written contract was executed. Patch v. Anderson, 66 Cal.App.2d 63, 151 P.2d 644. Here the converse may justifiably be found, and the informal writings became a binding contract notwithstanding the agreement was not reduced to a more formal writing. None of the essential terms was left for future determination. The mere state of mind of the parties is not the object of inquiry. The terms of the contract are determinable by an external, not by an internal standard—or by what has been termed the objective rather than the subjective test. Zurich General Accident & Liability Assur. Co. v. Industrial Acc. Comm., 132 Cal.App. 101, 104, 22 P.2d 572. Measured by any reasonable standard there is here mutual assent to a contract which is sufficiently certain so that the court was within its power in decreeing specific performance. Remmers v. Ciciliot, 59 Cal.App.2d 113, 138 P.2d 306; Fleishman v. Woods, 135 Cal. 256, 67 P. 276; Rest.Contr. 360.

[19] Since there was no lack of mutuality of the remedy at the time of suit (Jones v. Clark, 19 Cal.2d 156, 161, 119 P.2d 731; Sayward v. Houghton, 119 Cal. 545, 549, 51 P. 853, 52 P. 44; Van Fossen v. Yager, 65 Cal.App.2d 591, 151 P.2d 14), there is no impediment to performance by the defendant in this action, and the plaintiffs were entitled to the equitable relief as determined by the trial court.

The judgment is affirmed.

GIBSON, C. J., and EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

---

32 Cal.2d 592

TOWNSEND v. STATE BAR OF CALIFORNIA.

L. A. 20539.

Supreme Court of California, in Bank.

Sept. 22, 1948.

1. Attorney and client ⚷53(2)

Evidence justified State Bar's local administrative committee's conclusion, adopted by Board of Governors, that attorney advised client to convey her realty for purpose of defrauding her judgment creditor, so as to support Board's recommendation that attorney be suspended from practice of law. Business and Professions Code, §§ 6067, 6068, 6103, 6106; Pen.Code, § 531.

2. Evidence ⚷314(1)

In disciplinary proceedings against attorney, statements of trust company's officer to State Bar reporter over telephone as to client's purchase of land, alleged to have been conveyed by her on attorney's advice to defraud client's judgment creditor, with proceeds from client's sale of other property through escrows at such company, were inadmissible as hearsay.

3. Attorney and client ⚷46

An attorney's argument that his client held bare legal title to realty conveyed by her, but that beneficial interest therein was in grantee because of resulting trust, constituted no defense to charge that attorney advised such conveyance for purpose of defrauding client's judgment creditor. Business and Professions Code, §§ 6067, 6068, 6103, 6106; Pen.Code, § 531.

4. Attorney and client ⚷54

The State Bar Board of Governors' correction of local administrative committee's findings, in disciplinary proceedings against attorney, merely to conform to stipulations and with respect to finding relevant only to charge determined in respondent's favor, did not invalidate board's recommendation of attorney's suspension for three years, instead of three months as recommended by committee.

5. Attorney and client ⚷58

The State Bar Board of Governors' suspension of attorney for three years on finding that he advised client to convey her realty for purpose of defrauding her judgment creditor was not excessive discipline, in view of attorney's previous suspensions. Business and Professions Code, §§ 6067, 6068, 6103, 6106; Pen.Code, § 531.

◆

Proceeding by Corwin A. Townsend against the State Bar of California to review a proceeding wherein respondent's Board of Governors recommended petitioner's suspension from the practice of law for three years.

Order that petitioner be suspended from practice for three years.

Corwin Townsend, in pro. per.

Arthur E. Schifferman and Jerold E. Weil, both of Los Angeles, for respondent.

PER CURIAM.

Corwin A. Townsend has brought before this court for review the proceeding in which the Board of Governors of the State Bar recommended that he be suspended from practice for a period of three years.

The order to show cause alleged that, in two particulars, Townsend violated the requirements of the Business and Professions Code relating to his oath and duties as an attorney. The first specification of misconduct was that he knowingly advised his client to make a conveyance of certain real property owned by her for the purpose of delaying and defrauding her creditors. A second charge, relating to inconsistent allegations in pleadings prepared by him in connection with the litigation which followed this conveyance, in effect, was dismissed by the Local Administrative Committee to which the matter was referred for hearing.

The evidence upon which the recommendation of suspension is based shows that a claim and delivery action was commenced by J. Cabibbo in which he sought the recovery of personal property and damages for its detention. Townsend represented Bernice Von der Senden, also known as B. A. Chipman, who was one of the defendants. On March 2, 1942, following a trial, the case was submitted for decision.

Two weeks later Bonhomme M. Cahn, the attorney for the plaintiff, was told that the court had reached a conclusion and would render judgment for the plaintiff. Cahn testified that he then gave Townsend this information. "I stated to him over the telephone", Cahn told the committee, "that I had had a great deal of trouble in trying to get this automobile and personal effects which were subject to a chattel mortgage and that I did not want my client to bear any more expenses in this matter * * * He told me to give him about a week and I would hear from him * * *." The judgment entered on March 23, 1942, was for possession of the property and $560 damages for its wrongful retention.

It appears that, for several years prior to 1942, Townsend had represented Mrs. Von der Senden in various transactions and, in particular, had advised and assisted in the making of a prior conveyance by her and reconveyance to her of the property here involved. He told the committee that he also advised her to make the deed which is the basis of the present proceeding. The record does not disclose with certainty the time when he gave Mrs. Von der Senden this advice nor when he prepared the deed. A certificate signed by him as a notary public recites that the grantor acknowledged her signature to it before him on February 2, 1942. When Townsend was asked if Mrs. Von der Senden executed the deed on that date he replied: "If that is the date on there, that is when she appeared."

There is no evidence that the deed was ever delivered to the grantee. Townsend testified on this point that, "* * * I think I told her to send it to her mother, that it should be delivered to the grantee; and later on when the matter came up I asked Mrs. Von der Senden if she had sent it to her mother and she said no, that she still had it, and I told her that it should be delivered to her mother right away on account of the judgment." He "presumed" that it was recorded by Mrs. Von der Senden, because "she was the person vitally interested".

In connection with the recordation, it appears that Townsend placed on the deed instructions to the recorder to send it, when recorded, to "A. Castellanos, attorney". Castellanos, said Townsend, was "a Mexican attorney", an "associate" but not a member of the California bar. "I had mail addressed to him that I didn't care to have addressed to myself. I didn't want the recorder's record to show that it was sent back to me and I said 'We can send it to Mr. Castellanos and he can bring it over to me.'"

The deed was recorded on March 21, 1942, two days before judgment was entered in the Cabibbo case. When Castellanos received the deed from the recorder, he gave it to Townsend, who in turn delivered it to Mrs. Von der Senden. "I think she mailed it to her mother", Townsend testified.

Kate Adair is described in the record as the mother of Mrs. Von der Senden. At the time this proceeding was heard, she was said to be out of the State, and her testimony was not obtained.

Upon this evidence, the committee found that at the time of the trial of the Cabibbo action, Bernice Von der Senden was the record owner of the real estate conveyed by her. Upon learning of the decision of the court and before the judgment was entered, Townsend prepared for Mrs. Von der Senden the deed to Kate Adair, a nonresident of California, "which he caused to be dated February 4, 1942". After Mrs. Von der Senden executed these deeds, they were acknowledged by her before him as a notary public and, on March 21, 1942, placed of record. The conveyance was made for the purpose of hindering, delaying, and defrauding Cabibbo, as a creditor of Mrs. Von der Senden and preventing him from recovering upon his judgment.

From these facts, the committee decided that, as charged in the order to show cause, Townsend violated his oath and duties as an attorney at law within the meaning of section 6103 of Article 6 of the Business and Professions Code of the State of California, as the same are prescribed by sections 6067 and 6068 of Article 4 of that code. It also concluded that he had committed acts involving moral turpitude and dishonesty within the meaning of section 6106 of the Business and Professions Code. A comment of the committee accompanying the findings states "that the alleged inconsistent allegations were either justifiable in a technical sense or such as might have been made through negligence or oversight [but that] the acts of the respondent in procuring conveyances of the property in question were knowingly made with an intent to defraud creditors of respondent's client". In reaching these conclusions, the committee added, it "was particularly impressed with the fact that a purported defense which respondent described in his own testimony was entirely unsubstantiated in spite of [his] * * * representations that evidence to support his good faith in the matter would be forthcoming."

The findings and conclusion of the committee were adopted by the Board of Governors with the correction of one minor typographical error. But it changed the recommendation that Townsend be suspended from the practice of law for a period of three months to a recommendation of suspension for three years because of prior suspensions for violation of the Business and Professions Code.

Townsend challenges the determination of the Board of Governors in three particulars: (1) that the order increasing the suspension was improper; (2) that under the law stated in Davis v. Perry, 120 Cal. App. 670, 8 P.2d 514, his actions were fully justified; and (3) that the Board of Governors was not warranted in correcting the findings of the committee. The State Bar answers these contentions by pointing out that: (1) the Board of Governors is not bound by the recommendations of the committee and Townsend's prior record justified the increased term of suspension; (2) that the finding of the committee and Board of Governors on the main issue is fully supported by evidence and (3) that the Board of Governors corrected the findings of the committee to make them conform to a stipulation in the record.

[1] Although Townsend does not directly present the question as to the sufficiency of the evidence to support the finding and recommendation of the Board of Governors, that is the basic issue. The testimony

as to his knowledge of the judgment which was about to be rendered stands uncontradicted. He then advised his client, the defendant in the action, that a deed to the property "should be delivered to her mother right away on account of the judgment". The recordation of this deed was accomplished by a method designed to hide Townsend's participation in the transaction and, considering all of the circumstances, the committee was fully justified in its conclusion that Townsend advised a conveyance of property for the purpose of defrauding the creditor of his client.

[2] In defense of the charge against him, Townsend argued to the committee that Mrs. Von der Senden held the bare legal title to the property which she conveyed, the beneficial interest in it being in the grantee because of a resulting trust. He stated that he would produce evidence showing the purchase of the land with the proceeds from the sale of other property which Mrs. Adair sold through two escrows at California Trust Company. To support his assertions in this regard, he called an officer of the corporation as a witness, but excused him without questioning. Townsend then attempted to introduce into evidence the statements of this person made to the reporter for the State Bar in a telephone conversation initiated by him after having received a subpoena. The committee properly sustained objections to this evidence as being hearsay.

[3] Townsend places much reliance upon the statement made in Davis v. Perry, 120 Cal.App. 670, 8 P.2d 514, 517, that "the lien of a judgment does not attach to a naked title". But if he believed that this rule was applicable to the title held by Mrs. Von der Senden, there was no occasion for the conveyance which he advised her to make "on account of the judgment". And of some significance in this connection is the testimony of attorney Cahn. He told the committee that when he discovered the record of this conveyance he called Townsend and said: "What is the idea of transfer by Von der Senden to her mother?" To this, Townsend answered, "My client [Mrs. Von der Senden] has a right to protect her property".

The defense that the deed made by Mrs. Von der Senden was executed and delivered in satisfaction of a resulting trust was also made in a prior action in which Mrs. Adair and Townsend were named as defendants. The trial court found that the conveyance was made to delay and defraud creditors, and this was affirmed on appeal. Michal v. Adair, 66 Cal.App.2d 382, 152 P.2d 490.

[4] The correction in findings made by the Board of Governors was, as the State Bar contends, merely to conform to stipulations. Moreover, it was a finding relevant only to the second charge of the order to show cause which was changed and this charge was determined in Townsend's favor.

[5] In 1931, Townsend was suspended for one year for allowing his name to be used by an "ambulance chasing" adjustment agency. Townsend v. State Bar, 210 Cal. 362, 291 P. 837. In 1935 he was again suspended, this time for six months, for making false statements in a sworn declaration of his candidacy for the office of Judge of the Superior Court. Townsend v. State Bar, 4 Cal.2d 619, 51 P.2d 879.

Every person who is a party to any conveyance made to defeat, hinder, or delay creditors or others, is guilty of a misdemeanor (Pen.Code, sec. 531), and in view of Townsend's prior record, suspension for a period of three years is not excessive discipline to be imposed in the present proceeding.

It is, therefore, ordered that Corwin A. Townsend be suspended from the practice of law for a period of three years commencing thirty days after the date of the filing of this opinion.

32 Cal.2d 502

PEOPLE v. SHORTS.

Cr. 4803, 4900.

Supreme Court of California, in Bank.

Aug. 31, 1948.

1. Criminal law ⚷1084, 1131(4)

On appeal from order denying motion in nature of coram nobis to vacate judgment imposing death penalty, where judgment has previously been affirmed on appeal, defendant has burden to apply for stay of execution and to support application by prima facie showing of substantial merit in appeal and probable cause for reversal, and in absence of prima facie showing, application for stay will be denied, and appeal deemed taken for improper objective and, hence, to be frivolous and subject to dismissal forthwith.

2. Criminal law ⚷997
Habeas corpus ⚷1

The availability of motion in nature of application for writ coram nobis, or availability of other corrective judicial process, such as habeas corpus, to enable a convicted person, even after appeal and affirmance of conviction, to establish that conviction was procured under circumstances which offend fundamental conceptions of justice constitutes a part of protection afforded by due process of law clause. U.S.C.A.Const. Amend. 14.

3. Criminal law ⚷997, 1084, 1023(12)

The constitutional necessity for a corrective process, available to a defendant after trial and after affirmance of conviction on appeal, does not require that procedure provided shall encompass, as an absolute right in every case, a further trial on issues of fact, or a right, independent of a prima facie showing of merit, to a stay of execution or to consideration on appeal. U.S.C.A.Const.Amend. 14; Pen.Code, § 1237.

4. Criminal law ⚷1023(12), 1024(1)

Either the people or the defendant may appeal from an order on motion in nature of coram nobis to vacate judgment of conviction after affirmance on appeal. Pen.Code, §§ 1237, 1238.

5. Criminal law ⚷997

Each state may decide for itself whether, after guilt has been determined by ordinary processes of trial and affirmed on appeal, a later challenge to its essential justice must come before a bench of judges rather than before a jury. U.S.C.A.Const. Amend. § 14.

6. Criminal law ⚷308

Before a defendant can be adjudged guilty, the state has burden of proof to overcome the presumption of innocence.

7. Criminal law ⚷308, 997

The presumption of innocence of defendant ends with verdict of guilty, and the final affirmed judgment of conviction is conclusive unless set aside upon a ground amounting to, akin to, or in the nature of extrinsic fraud or some other lack of due process, or upon proof that a fact existed which could not in the exercise of due diligence by defendant have been proved at the trial, and which, if known then, would have precluded the judgment from being entered.

8. Criminal law ⚷997

An affirmed conviction is presumed to be valid in all respects, and defendant in order to set aside an affirmed conviction must proceed as one who is at least prima facie guilty, and defendant has burden of producing convincing proof of a fact which constitutes a legal ground for setting aside judgment.

9. Constitutional law ⚷270

The procedure which permits convicted defendant, after affirmance on appeal, to apply directly to trial court for vacation of judgment and for stay of execution, but which reserves to Supreme Court, on appeal from order denying motion, discretion to grant or deny a stay of execution and to dismiss appeal as irregular and frivolous when motion is not supported by a prima facie showing of merit and probable cause, meets constitutional requirements as due process. U.S.C.A.Const.Amend. 14; Pen. Code, § 1237. Rule on Appeal, rule 32.

10. Criminal law ⚷1084

The constitutional power of Supreme Court to issue writs necessary or proper to the complete exercise of its appellate jurisdiction, includes the power to stay execution of death sentence until final determination of a pending appeal from an order made after the final judgment imposing such sentence. Const.Cal. art. 6, § 4.

11. Criminal law ⚷997

One who applies for a writ of coram nobis to vacate an affirmed judgment of conviction must show that the facts upon which he relies were not known to him and could not in the exercise of due diligence have been discovered by him at any time substantially earlier than the time of his motion for the writ.

12. Criminal law ⚷1084

One who seeks a stay of execution in order that he may perfect an appeal from an order denying motion for writ of coram nobis to vacate an affirmed judgment of conviction, where the only point involved appears on the face of the application and on records already before Supreme Court to be a question as to the age of defendant, which question of substantially conflicting evidence has been resolved adversely to defendant by trial court, must make some further prima facie showing of merit and diligence.

13. Criminal law ⚷997

Where a defendant seeks to vacate a judgment of conviction, particularly where judgment has been affirmed on appeal, the showing of diligence essential to the granting of relief by way of coram nobis should be no less than the similar showing required in civil cases where relief is sought against lately discovered fraud.

14. Limitation of actions ⚷179(2)

Where relief is sought against lately discovered fraud, not only the probative facts upon which the basic claim rests must be alleged, but also the time and circumstances under which the facts were discovered, in order that court can determine as a matter of law whether litigant proceeded with due diligence, and a mere allegation of the ultimate facts, or of the legal conclusion of diligence, is insufficient.

15. Criminal law ⚷997

It is essential to availability of the remedy of coram nobis or coram vobis that the mistake of fact relied upon for relief was unknown to the applicant at the time of the trial, and could not by reasonable diligence have been discovered by him in time to have been presented to the court.

16. Criminal law ⚷997, 1084

Oral statement of defendant's attorney on argument of motion in nature of coram nobis to vacate affirmed judgment of conviction of first degree murder, on ground that defendant was under 18 years of age when murder was committed, that attorney had hoped to introduce witnesses from a sister state, was no excuse for delaying presentation of motion for five months following the affirmance of conviction and did not entitle defendant to a stay of execution to enable defendant to perfect his appeal from dennal of motion. Pen.Code, §§ 190, 1237.

17. Criminal law ⚷1084

A defendant who knows a fact but does not disclose it until after final judgment of conviction, and who does not attempt to explain his nondisclosure, has not made the requisite showing of diligence and good faith to entitle defendant to a stay of execution of judgment to enable defendant to perfect his appeal from order denying motion in nature of coram nobis to vacate affirmed judgment of conviction. Pen.Code, § 1237.

18. Criminal law ⚷1084

Where upon a previous prosecution for first degree murder, which ended when jury could not agree upon a verdict, defendant testified he did not know his age, failure to properly initiate an inquiry showed a want of diligence precluding defendant from obtaining a stay of execution of affirmed judgment of conviction in order to enable defendant to perfect appeal from order denying motion in nature of coram nobis to vacate conviction on ground that defendant was under age of 18 years when murder was committed. Pen.Code, §§ 190, 1237.

19. Criminal law ⚷1084, 1131(4)

Evidence established a lack of good faith on part of defendant in instituting proceeding to vacate judgment of conviction of first degree murder on ground that when murder was committed defendant was under 18 years old, and in seeking to prosecute appeal from order denying motion, and stay of execution would therefore be denied and appeal dismissed. Pen.Code, §§ 190, 1237.

20. Criminal law ⇨1084

Where application for stay of execution of affirmed judgment of first degree murder to permit perfection of appeal from order denying motion in nature of coram nobis to vacate judgment does not purport to show that appeal has merit, Supreme Court need not examine record to determine whether application was inadvertently defective. Pen.Code, § 1237.

EDMONDS and TRAYNOR, JJ., dissenting in part.

Appeal from Superior Court, Alameda County; O. D. Hamlin, Jr., Judge.

Robert Shorts was convicted of first degree murder and he appeals from order denying motion to vacate in the nature of coram nobis.

Appeal dismissed.

Stephen Casalina and George W. Norris, both of Oakland, for appellant.

Fred N. Howser, Atty. Gen., and Clarence A. Linn, Deputy Atty. Gen., for respondent.

SCHAUER, Justice.

This case presents initially the following question: In a death penalty case, after the judgment of conviction has been reviewed and affirmed on appeal and has been thereafter attacked in the trial court by motion to vacate (in the nature of coram nobis), which motion has been denied, does the right of the defendant to appeal from the order of denial carry with it as of course a right to stay of execution?

[1] We conclude that the right is not absolute; that the final judgment which has been affirmed after review on appeal is possessed of strong presumptions of regularity and validity in every respect; that this court may, on proper showing, order execution of the judgment stayed on appeal from the order of denial of the motion to vacate but that in such appeals the burden is upon the defendant to make application for a stay and to accompany and support such application by a prima facie showing of substantial merit in the appeal and probable cause for reversal of the order; that wanting such prima facie showing the appeal must be deemed to have as its only objective a delay in execution of the sentence under a valid final judgment, hence to be frivolous and irregular and subject to dismissal forthwith. In other words, on appeal from an order denying a motion to vacate a judgment imposing the death penalty, where such judgment has previously been reviewed on appeal and affirmed, the burden is on the defendant to apply for a stay of execution of such final judgment and to support such application by a prima facie showing of substantial merit in his appeal and probable cause for reversal of the order denying the motion; in the absence of such prima facie showing not only will the application for the stay be denied but the appeal itself will be deemed taken for an improper objective—delay of execution of a final and valid judgment, not the correction of any legal wrong or the enforcement of any legal right—and, hence, to be frivolous and irregular and as such subject to dismissal forthwith.

[2–5] It is to be remembered that a motion in the nature of an application for the writ coram nobis is an extraordinary remedy. Its availability—or the availability of other corrective judicial process, such as habeas corpus—to enable a convicted person, even after appeal and affirmance of a judgment of conviction, to establish that in truth the judgment was procured under circumstances which offend "the fundamental conceptions of justice which lie at the base of our civil and political institutions" has been recognized as constituting a part of the protection afforded by the Due Process Clause of the Fourteenth Amendment. (See Mooney v. Holohan (1935), 294 U.S. 103, 110, 55 S.Ct. 340, 79 L.Ed. 791, 98 A.L.R. 406; Taylor v. Alabama (1948), 335 U.S. 252, 68 S.Ct. 1415.) But it approaches triteness to point out that the fact that the state must furnish a corrective process, available after trial and after a judgment of conviction has been affirmed on appeal, does not mean that in any particular case the defendant shall be entitled to relief. Furthermore, we are satisfied, the necessity for such process does not require that the procedure provided shall encompass, as an absolute right in every case, a further trial on issues of fact, or a right, independent of a prima facie showing of merit, to a stay of execution or to consideration on appeal. Our laws permit an appeal in coram nobis proceedings, either by the People (Penal Code, § 1238; People v. Gilbert (1944), 25 Cal.2d 422, 444, 154 P.2d 657; People v. Lumbley (1937), 8 Cal.2d 752, 761, 68 P.2d 354) or by the defendant (Penal Code, § 1237; People v. Perez (1908), 9 Cal.App. 265, 266, 98 P. 870; People v. Reid (1924), 195 Cal. 249, 232 P. 457, 36 A.L.R. 1435; People v. Schwarz (1927), 201 Cal. 309, 312, 257 P. 71; People v. Campos (1935), 3 Cal.2d 15, 19, 43 P.2d 274; People v. Paiva (1948), 31 Cal.2d 503, 190 P.2d 604), but such right of appeal by a defendant, we have concluded, in a case such as this, need go no further than to afford him a reasonable opportunity to make a prima facie showing of merit in the appeal as a basis for a stay of execution; and lacking a prima facie showing of merit and probable cause for reversal sufficient to warrant a stay of execution, the appeal itself may be dismissed. "Each State may decide for itself whether, after guilt has been determined by the ordinary processes of trial and affirmed on appeal, a later challenge to its essential justice must come in the first instance, or even in the last instance, before a bench of judges rather than before a jury." (Hysler v. Florida (1942), 315 U.S. 411, 417, 316 U.S. 642, 62 S.Ct. 688. 691, 86 L.Ed. 932.) If the process is available and adequate to furnish relief in all meritorious cases it meets the requirements of both law and justice; that a particular defendant be promptly denied relief where he makes no prima facie showing of meritorious ground for relief is not an objectionable, but is, rather, a desirable, attribute of the process. (See Penal Code, § 681a.) A court of last resort is properly zealous in requiring that a person charged with crime, particularly where the judgment of guilt spells death, shall be accorded as of right the last full measure of constitutional protection; but we are bound also to recognize that laws exist and are to be enforced for the protection of society as well as the protection of the accused and that expeditious enforcement of law is an important element of justice.

[6–8] When a defendant has been informed against or indicted, has been afforded the right of counsel, has been regularly brought to trial, confronted with the witnesses, tried, convicted, had the benefit of appeal and suffered affirmance of the judgment of conviction, he stands in a position which is different from that which he occupied before he was found guilty of the offense. Before he was adjudged guilty the state was the attacker and bore the burden of proof to overcome the strongest presumption known to the law; but after verdict, and particularly after the judgment of conviction has been affirmed on appeal, the procedural burdens of the parties are transposed. The care and solicitude of the state for justice continue unabated, always; but the presumption of innocence of the defendant ended with the verdict, and the final, affirmed judgment of conviction is conclusive unless set aside upon a ground amounting to, akin to, or in the nature of extrinsic fraud or some other lack of due process, or, as has often been said in substance, upon proof that a fact existed which could not in the exercise of due diligence by the defendant have been proved at the trial, and which, if known then, would have precluded the judgment from being entered. (See People v. Gilbert (1944), supra, 25 Cal.2d 422, 442, 154 P.2d 657, and authorities there cited.) The defendant then, if he would set aside such judgment, must proceed as one who is at least prima facie guilty; he, now, is the attacker and has the burden of producing convincing proof of a fact which constitutes a legal ground for setting aside the judgment. The presumption that the judgment is valid in all respects is strong; the interests of justice and of humanity require that its terms be executed promptly if it be not set aside.

From what has been said it appears that any right to the coram nobis corrective process is subject to reasonable judicial control in the application thereof. In certain states a procedure different in form from that of this state safeguards the People from the use of meritless and tardy petitions for the writ of coram nobis to secure unwarranted delays in the execution of valid judgments of conviction. After a judgment of conviction has been affirmed, Alabama and Florida require that a defendant who seeks to have it set aside by the writ coram nobis shall secure from the appellate court which affirmed the judgment permission to file in the trial court his petition for writ of error coram nobis. The showing required in California on application for a stay such as the one before us is similar to that required by Alabama and Florida of one who seeks leave to petition for the writ. "Such application should make an adequate showing of the substantiality of the petitioner's claim to the satisfaction of this Court. A mere naked allegation that a constitutional right has been invaded will not suffice. The application should make a full disclosure of the specific facts relied upon, and not merely conclusions as to the nature and effect of such facts. The proof must enable this Court to 'ascertain whether under settled principles pertaining to such writ the facts alleged would afford at least prima facie just ground for an application to the lower court for a writ of error coram nobis.' And in the exercise of our discretion in matters of this character, this Court should look to the reasonableness of the allegations of the petition and to the existence of the probability of the truth thereof." Johnson v. Williams (1943), 244 Ala. 391, 394 [13 So.2d 683, 686], as quoted in Taylor v. Alabama (1948), supra, 335 U.S. 252, 68 S.Ct. 1415; Hysler v. Florida (1942), supra, 315 U.S. 411, 416, 316 U.S. 642, 62 S.Ct. 688, 86 L.Ed. 932.

In the Taylor case, supra [68 S.Ct. 1416], the United States Supreme Court said: "The question in this case is whether the State of Alabama deprived the petitioner of due process of law under the Fourteenth Amendment to the Constitution of the United States when the Supreme Court of that State denied him permission to file a petition for writ of error coram nobis in the Circuit Court of Mobile County, Alabama. We hold that it did not. We hold also that the Alabama procedure, whereby one of its trial courts, by writ of error coram nobis, may set aside its own judgment in a criminal case because of an error of fact not apparent on the common law record, is a procedure long recognized by the common law and constitutes due process of law under the Fourteenth Amendment. We hold further that the procedure of that State is in accordance with long-established common law practice and constitutes due process of law under the Fourteenth Amendment in requiring that the permission of the Supreme Court of Alabama be secured by a petitioner before filing such a petition for writ of error coram nobis, in a trial court of Alabama, if it appears that the trial court's judgment already has been affirmed by such Supreme Court. * * * The first question is whether this Alabama procedure to secure a review of a judgment in a criminal case by writ of error coram nobis constitutes due process of law under the Fourteenth Amendment. It is clear that it does. * * * As distinguished from the traditional writ of error enabling a superior court to review an error of law committed by a trial court, the writ of error coram nobis brings the error of fact directly before the trial court. However, when the judgment of the trial court already has been affirmed by the judgment of a superior court, then the trial court is bound by the mandate of that superior court. Under those circumstances, it is appropriate to require a petitioner to secure, from that superior court, permission to file his petition for writ of error coram nobis in the trial court where he seeks an order setting aside the judgment already affirmed by the superior court. This additional step was included in the Florida procedure which was favorably considered by this Court in Hysler v. Florida, supra [315 U.S. 411, 316 U.S. 642, 62 S.Ct. 688, 86 L.Ed. 932] * * * In passing upon this request that court was not bound to accept at face value the allegations of the petition. The issue was not submitted to it as though on a demurrer. That court was called upon to decide not only whether this new petition, if true, presented a meritorious ground for setting aside its previous judgment, but that court, in its supervisory capacity over the enforcement of the law, was called upon to determine also the reasonableness of the allegations made in the petition and the probability or improbability of their truth."

[9] Certainly the California procedure, which permits the convicted defendant, after affirmance of the judgment on appeal, to apply directly to the trial court for vacation of the judgment (and for stay of execution [1]) but which, we have concluded, reserves to this court, on appeal from an order denying the motion, the right in the exercise of judicial discretion to grant or to deny a stay of execution and to dismiss the appeal as irregular and frivolous when there is a failure to accompany and support the application for the stay by a prima facie showing of merit and probable cause, fully meets the constitutional requirements.

The salient facts of the case before us are as follows: Robert Shorts is confined in the state prison at San Quentin under sentence of death. The judgment of conviction was affirmed on November 17, 1947. (People v. Isby, 30 Cal.2d 879, 883, 186 P.2d 405.) On April 13, 1948, Shorts applied to this court for stay of execution. His petition for stay alleges that April 16, 1948, was set as the day for execution of sentence; that the superior court heard and denied his petition for a writ of error coram nobis; that he has filed notice of appeal from the order of denial; and he seeks a stay "in order to give the attorneys for Robert Shorts an opportunity to obtain the reporter's transcript of said hearing and to prepare said appeal." It appears that the petition for coram nobis was not filed with the superior court until April 5, 1948, nearly five *months* after the judgment of conviction was affirmed and only eleven *days* before the date set for execution. Although the application for the stay is clearly insufficient in the particulars hereinafter specified, we granted a temporary stay for two reasons: 1. In order that we might assure ourselves that the failure of Shorts to make a prima facie showing of merit was not due to any inadvertence on his part. 2. To enable us to fully review and declare the law covering this subject, to the end that future applicants for stays in similar proceedings shall have no basis for misapprehension as to the character and extent of the showing which they must make if they are to secure a stay and avoid dismissal of their appeal as irregular.

[10] It is to be recognized that this court has appellate jurisdiction in criminal cases where judgment of death has been rendered (including proceedings which attack such a judgment by motion to vacate or petition for the writ of error coram nobis) and it also has power "to issue writs * * * necessary or proper to the complete exercise of its appellate jurisdiction" (Cal.Const., Art. VI, § 4). This power to issue writs, inherent and expressly recognized by the Constitution, includes the power to stay execution of sentence of death (substantially equivalent to issuance of the writ of supersedeas) until final determination of a pending appeal from an order made after the final judgment imposing such sentence. The right to such an appeal would be worthless and the appellate jurisdiction of this court could not be exercised if the questions raised on a death penalty appeal were rendered moot by execution of the death sentence. See People v. Durrant (1897), 119 Cal. 54, 50 P. 1070; People v. Durrant, (1897) 119 Cal. 201, 209, 210, 51 P. 185; In re Albori (1928), 95 Cal.App. 42, 48–50, 272 P. 321; People v. Biescar (1928), 95 Cal.App. 70, 272 P. 328; In re Braham (1929), 98 Cal. App. 731, 277 P. 895; People v. Santos (1933), 134 Cal.App. 227, 25 P.2d 235; Martin v. Rosen (1934), 2 Cal.App.2d 450, 454, 38 P.2d 855; People v. Burnette (1939), 34 Cal.App.2d 663, 94 P.2d 399; People x. Rodgers (1940), 38 Cal.App.2d 360, 363, 101 P.2d 157; People v. Simpson (1944), 65 Cal. App.2d 15, 149 P.2d 738; People v. Cox (1944), 65 Cal.App.2d 712, 151 P.2d 269.

Rule 32 of the Rules on Appeal recognizes the power of a reviewing court to grant such a stay of execution and the incidental power to grant a temporary stay pending a ruling on the application for a stay. This rule requires that "An application to the reviewing court for a stay of execution of a judgment of conviction on an appeal pending therein shall include a showing that proper application for such stay was made to the superior court, and that such court unjustifiably refused to grant the stay." The application before us fails to show compliance with this rule.[2]

---

[1] See Rule 32, Rules on Appeal.

A more serious defect in the application for stay is Shorts' failure to show, prima facie, that the motion for coram nobis and the appeal from the order of denial have any substance or probability of merit. When he applied for a stay he did not furnish this court with a copy of his motion or petition for coram nobis. He alleged merely that he "is prepared to show in said writ of error coram nobis that * * * Shorts is under the age of eighteen (18) at the present time." Section 190 of the Penal Code provides that "the death penalty shall not be imposed or inflicted upon any person for murder committed before such person shall have reached the age of eighteen years; provided, further, that the burden of proof as to the age of said person shall be upon the defendant." The evidence available to support such asserted ground of the motion was not set forth by affidavit or otherwise. Shorts did not even attempt to sustain his essential burden of showing that he was prompt and diligent in seeking relief by way of coram nobis and that the controlling fact upon which he relies in that proceeding was not known to him at the time he was tried and convicted. It ordinarily is to be presumed that a person knows his own age; if a defendant claims that he was under eighteen at the time he committed a murder the law, as above noted places on him the burden of proving his age. (Penal Code, § 190.) In the absence of any showing of diligence and merit an appellant is not entitled to a stay to enable him to perfect his appeal. One who applies for such a stay should make a prima facie showing that his appeal is taken in good faith, that some substantial and justiciable point is in actual controversy and that there is probable cause for reversal of the trial court's order. (See People v. Rodgers (1940), supra, 38 Cal.App.2d 360, 363, 101 P.2d 157.)

[11, 12] It is well settled that a showing of diligence is prerequisite to the availability of relief by motion for coram nobis. (People v. Cabrera (1936), 7 Cal.2d 11, 12, 59 P.2d 804; People v. Lumbley (1937), supra, 8 Cal.2d 752, 761, 68 P.2d 354; People v. Gilbert (1944), supra, 25 Cal.2d 422, 441, 154 P.2d 657; In re De La Roi (1946), 28 Cal.2d 264, 275, 169 P.2d 363; People v. Black (1931), 114 Cal.App. 468, 473, 300 P. 43; People v. Vernon (1935), 9 Cal.App.2d 138, 142, 143, 49 P.2d 326; People v. Hammond (1937), 22 Cal.App.2d 505, 506, 71 P.2d 334; People v. Kelly (1939), 35 Cal.App.2d 571, 575, 96 P.2d 372; People v. Lewis (1945), 72 Cal.App.2d 318, 320, 164 P.2d 295; People v. Egan (1946), 73 Cal.App.2d 894, 900, 167 P.2d 766; People v. Darcy (1947), 79 Cal.App.2d 683, 692, 180 P.2d 752; see also 27 Cal.Law Rev. 228, 232.) One who applies for a writ of coram nobis upon a ground such as the one here presented must show that the facts upon which he relies were not known to him and could not in the exercise of due diligence have been discovered by him at any time substantially earlier than the time of his motion for the writ; otherwise he has stated no ground for relief. And one who seeks a stay of execution in order that he may perfect an appeal from an order denying the writ, where the only point involved appears on the face of the application and on the records already before this court to be a question as to the age of the defendant, which question on substantially con-

---

[2] Whether the power of the superior court (prior to an appeal from its order) to stay execution of a death penalty upon motion to vacate an affirmed judgment is affected by section 3700 of the Penal Code, we do not consider. That section provides: "No judge, court, or officer, other than the Governor, can suspend the execution of a judgment of death, except the warden of the State prison to whom he is delivered for execution, as provided in the six succeeding sections, unless an appeal is taken." Regardless of its meaning and validity otherwise, it has no application here as an appeal has been taken.

flicting evidence has been resolved adversely to the defendant by the trial court, must make some further prima facie showing of merit and diligence; otherwise he has failed to show that his appeal is taken in good faith.

[13–15] We are of the view that where a defendant seeks to vacate a solemn judgment of conviction, particularly where such judgment has been affirmed on appeal, the showing of diligence essential to the granting of relief by way of coram nobis should be no less than the similar showing required in civil cases where relief is sought against lately discovered fraud. In such cases it is necessary to aver not only the probative facts upon which the basic claim rests, but also the time and circumstances under which the facts were discovered, in order that the court can determine as a matter of law whether the litigant proceeded with due diligence; a mere allegation of the ultimate facts or of the legal conclusion of diligence, is insufficient. (See Lady Washington Consol. Co. v. Wood (1896), 113 Cal. 482, 486-487, 45 P. 809; Burke v. Maguire (1908), 154 Cal. 456, 465, 98 P. 21; Del Campo v. Camarillo (1908), 154 Cal. 647, 657-658, 98 P. 1049; Nichols v. Moore (1919), 181 Cal. 131, 132-138, 183 P. 531; Consolidated R. & P. Co. v. Scarborough (1932), 216 Cal. 698, 702, 16 P.2d 268; Hobart v. Hobart Estate Co. (1945), 26 Cal.2d 412, 441, 442, 159 P.2d 958.) Furthermore, it must appear that the new matter averred is truly newly *discovered* by the defendant, not merely newly *disclosed.* See Taylor v. Alabama, 1948, supra, 335 U.S. 252, 68 S.Ct. 1415; In re De La Roi (1946), supra, 28 Cal.2d 264, 271, 275, 169 P.2d 363.) As is said in 31 American Jurisprudence, at page 325, section 806: "It is essential to the availability of the rĕmedy of coram nobis or coram vobis that the mistake of fact relied upon for relief was unknown to the applicant at the time of the trial, and could not by the exercise of reasonable diligence have been discovered by him in time to have been presented to the court * * * A reason assigned for the rule is that if the applicant for the writ has knowledge of the fact, and such fact if divulged would be for his benefit, he should not be permitted to conceal it, gamble upon the issue, and, being disappointed therewith, ask the court to relieve him from the consequences of his own intentional or negligent act."

[16] Since the temporary stay of execution was granted herein, the record on appeal from the denial of Shorts' motion for coram nobis has been filed with us. From this record it is apparent that the application for stay of execution to permit the appeal to take the full course and time of a regular appeal was not inadvertently defective in its omission of the essential showing of diligence and of merit. The petition for coram nobis was accompanied by an affidavit of Shorts' attorney, who avers that "at the time of * * * trial said attorney was under the impression that Robert D. Shorts was over the age of eighteen (18) years of age; that since that appeal [from the judgment of conviction] was filed said affiant has discovered that Robert D. Shorts was, at the time of the commission of the act of murder, under the age of eighteen (18) years * * *" It further appears from such affidavit that in or about August, 1947, the attorney was in possession of the evidence (affidavits) upon which he relies to show the age of Shorts. As stated above, the judgment of conviction was affirmed on November 17, 1947, and the petition for coram nobis was not filed until April 5, 1948. The papers in support of the motion for coram nobis contain no explanation whatsoever for the delay in moving for the writ. The only explanation offered at any time for such delay was the oral statement of the attorney to the trial court on argument of the motion that he had hoped to produce witnesses from Mississippi. This is not an excuse for delaying presentation of the motion until a few days before the date set for execution of sentence.

[17, 18] Furthermore, neither the petition for the writ, the accompanying affidavit of Shorts' attorney, nor any other of the affidavits filed in support of the motion contains any averment that Shorts himself did not at all times know his age. Clearly a defendant who has knowledge of a fact but does not disclose it until after final judgment of conviction, and who does not

attempt to explain his nondisclosure, has not made the requisite showing of diligence and good faith. See People v. Cabrera (1936), supra, 7 Cal.2d 11, 12, 59 P.2d 804; People v. Vernon (1935), supra, 9 Cal.App. 2d 138, 142, 145, 49 P.2d 326; see also Taylor v. Alabama (1948), supra, 335 U.S. 252, 68 S.Ct. 1415; In re De La Roi (1946), supra, 28 Cal.2d 264, 169 P.2d 363. The only attempt to establish the essential fact of want of knowledge on the part of defendant himself is the unsupported statement of defendant's counsel, made orally to the trial court on argument of the motion and in his brief before this court, that at a previous trial (which ended when the jury could not agree upon a verdict) defendant testified that he did not know his age. If this be so, it shows want of diligence in that an inquiry was not thereupon promptly initiated.

It is to be observed also that the transcript filed with this court on the appeal from the judgment of conviction (which transcript was also in evidence in the coram nobis trial) shows that Shorts gave his age as twenty-seven years when he was arrested in November, 1946. In testifying upon direct examination at the trial of the cause on April 7, 1947, at which time he was represented by able counsel of his own choosing, he stated that he was "nineteen years old." He then explained his previous claim of the age of twenty-seven years by stating that he had "raised [his] age" because he was "trying to [get] work." Throughout cross-examination he adhered to his claim that his "true age" was "nineteen" as of the time of trial, despite the fact that he admitted that he "first registered for the draft in '42," which was five years prior to that time. He also admitted upon the trial that he had suffered a prior conviction in May, 1944, for a violation of section 4532 of the Penal Code (escape from jail), for which he served a term in the state prison at San Quentin. To give any semblance of validity to petitioner's claim that he is now—in 1948—under the age of eighteen years, petitioner must necessarily contend that he was but eleven years of age when he registered for the draft in 1942, and that he was but thirteen years of age when he was sentenced to San Quentin on his prior felony conviction involving an escape from jail. Coupled with the weakness of the showing here, such earlier testimony of the defendant indicates an utter lack of good faith on his part in instituting the proceeding for a writ of error coram nobis and in seeking to prosecute this appeal from the trial court's order.

The grounds upon which a writ of error coram nobis may be granted are strictly limited. The function of the writ and the types of situation to which it may apply are discussed at length in People v. Reid (1924), 195 Cal. 249, 232 P. 457, 36 A.L.R. 1435; and in People v. Gilbert (1944), supra, 25 Cal.2d 422, 440-444, 154 P.2d 657. Suffice it to say here that research discloses no case in which this remedy has been held available to obtain relief where the sole alleged fact upon which the petitioner relies in the coram nobis proceeding is wholly inconsistent with the facts developed and asserted by petitioner in his own testimony upon the trial of the cause, while declarations directly to the contrary appear in the previously noted cases of In re De La Roi (1946), supra, 28 Cal.2d 264, 275, 169 P.2d 363, and People v. Black (1928), 89 Cal. App. 219, 224, 264 P. 343.

[19] We can only conclude that the appeal from the order denying the motion for coram nobis has been taken solely for the purpose of delaying execution of sentence on a final and valid judgment. We deem it incontrovertible that in a death penalty case such as this wherein, on an appeal from an order denying the writ coram nobis, there is an utter lack of showing of merit and diligence sufficient to warrant a stay of execution, the appeal itself may properly be held to have been taken solely for delay, therefore to be irregular as having no proper appellate objective and, hence, to be sham and frivolous and subject to dismissal. In such circumstances not only will the stay be denied but the appeal will be dismissed. (See People v. Smith (1933), 218 Cal. 484, 487, 489, 24 P.2d 166; Penal Code, § 1248 ["If the appeal is irregular in any substantial particular, but not otherwise, the appellate court may order it to be dismissed"].)

In People v. McNulty (1892), 95 Cal. 594, 30 P. 963, this court expressed the view that an appeal could not be dismissed on the ground that it is *frivolous;* its *irregularity* as having no proper appellate objective was not specifically discussed. It was said (p. 595 of 95 cal., p. 961 of 30 P.), "To dismiss an appeal is to refuse to consider its merits, and therefore there can be no dismissal of an appeal on the ground that it is without merit; for to reach this conclusion the merits must be considered, and the record must be examined," and that (p. 596 of 95 Cal., P. 964 of 30 P.) where there is 'an appealable order and notice of appeal therefrom substantially and formally sufficient" the appeal is not "irregular in some substantial particular" within the meaning of section 1248 of the Penal Code, no matter how obvious its lack of merit. With this view we cannot agree; where it appears without any serious contention to the contrary that an appeal from an order after final judgment in a death penalty case is taken solely for purposes of delay, the appeal must be held to be irregular in a most fundamental sense. Its objective is not the correction of error, the enforcement of legal right, or the reversal of the trial court; it seeks only groundless delay, and to that extent defeat of justice, in the execution of a valid final judgment. It is also to be observed that in the McNulty case the court pointed out that an appeal from an order after final judgment does not stay execution as of course; that if execution is to be stayed "the *onus* rests upon the appellant to convince the judge of the superior court or one of the justices of this court that there is some merit in his appeal. If he cannot, — if his appeal is clearly frivolous, — no certificate will be granted, and there will be no stay." (People v. McNulty (1892), supra, 95 Cal. 594, 597, 30 P. 964.) Furthermore, since the McNulty case was decided, the legislature has enacted for the guidance of all the courts of this state in the handling of criminal cases a very positive admonition of policy. "The welfare of the people of the state of California requires that all proceedings in criminal cases shall be heard and determined at the earliest possible time. It shall be the duty of all courts and judicial officers and of all district attorneys to expedite the hearing and determination of all such cases and proceedings to the greatest degree that is consistent with the ends of justice." (Penal Code, § 681a.)

[20] It is true that in the present case we have examined the record on appeal in order to determine whether the application for stay of execution to permit the presentation of such record was inadvertently defective. But we do not consider ourselves obligated to make such examination where, as here, an application for stay of execution to permit perfection of a pending appeal does not purport to show that the appeal has any semblance of merit. Expressions in People v. McNulty (1892), supra, 95 Cal. 594, 30 P. 963.) and People v. Godfrey (1929), 100 Cal.App. 91, 279 P. 1030, which are inconsistent with this opinion are overruled and disapproved.

For the reasons above stated the stay heretofore granted is terminated (Cr. 4803), the appeal from the order denying the petition for coram nobis is dismissed (Cr. 4900), and the trial court is directed to proceed with execution of its sentence in the manner provided by law.

GIBSON, C.J., and SHENK, CARTER, and SPENCE, JJ., concur.

EDMONDS, Justice (concurring and dissenting).

This case, in my opinion, presents no question concerning the right of the defendant, as of course, to a stay of execution in connection with an appeal from an order of denial of his petition for coram nobis. The stay was granted for the express purpose of allowing the appeal to be perfected and heard. That has been accomplished, and whether or not the stay was granted erroneously is a question not now before the court. The only proceeding in which, properly, there may now be a decision is the appeal (Crim. 4900); the order granting the stay has accomplished its purpose (Crim. 4803).

I concur in the conclusion reached after an examination of the record that the appeal should be dismissed as frivolous.

But I disagree with the dicta which purports to declare the procedural law applicable to a petition for a stay of execution and to the determination that an appeal may be dismissed prior to a hearing upon the merits, in the absence of procedural irregularity.

There is no logical basis whatever for placing the dismissal of an appeal upon the basis of deficiencies in the application for a stay of execution. It is said that the court, in denying the application for the stay, can conclude that "the appeal itself will be deemed taken for an improper objective—delay of execution of a final and valid judgment, not the correction of any legal wrong or the enforcement of any legal right—and, hence, to be frivolous and irregular and as such subject to dismissal forthwith." But in the present case the stay was not denied; it was granted and at the time the order was made the record was not before the court. For each of these reasons, therefore, the statement is entirely beyond the scope of the issues proper for consideration.

An application for a stay of execution may be made when an appeal is pending (Penal Code, secs. 1243, 3700; Rules on Appeal, Rule 32[a]) and the petition on behalf of Shorts requested delay for the purpose of giving his attorneys "an opportunity to obtain the reporter's transcript of said hearing and to prepare said appeal." But a decision on the application for a stay can have no direct effect upon, nor decide, an appeal in which the record is not before the court, and may not be filed for an additional 30 to 90 days. (Rule 35[c] and [d], Rules on Appeal.) At least by analogy, the decision in the case of In re Paiva, 31 Cal.2d 503, 190 P.2d 604, requires the court to grant a stay of execution in every case where the defendant has filed a notice of appeal from an order denying a writ of error coram nobis.

"[A]n order made in a proceeding in the nature of a writ coram nobis is an order in the original case, after final judgment therein, which 'affects the substantial rights' of the party (either the plaintiff or the defendant, as the case may be) and gives him a right of appeal as provided for by sections 1237 and 1238 of the Penal Code." (In re Paiva, supra, 31 Cal.2d 510, 190 P.2d 609.) An appeal is a matter of right (see Penal Code, sec. 1237) and may only be dismissed by an appellate court after consideration of the record upon its merits, unless the appeal itself is irregular in some substantial procedure. (Penal Code, sec. 1248.) "The right of appeal is conferred by the Constitution, and statutes and rules of procedure for its exercise are to be liberally construed; and no appeal will be dismissed on technical grounds, where there has been no violation or disregard of any express rule of procedure." (People v. Preciado, 31 Cal.App. 519, 522, 160 P. 1090, 1091, quoting from Estate of Nelson, 128 Cal. 242, 60 P. 772.

To deny an application for a stay of execution during the pendency of an appeal from an order denying a writ of error coram nobis would allow the execution of the defendant before the hearing of that appeal, which the court has said is from an order "in the original case" and accorded "as a matter of right". As the court has now characterized such an order in a capital case it stands in substantially the same position as the judgment and sentence and the law has gone to great lengths in guaranteeing to every defendant an appellate review of the decision which imposes the penalty of death.

Furthermore, the appeal of Shorts now has been considered on its merits and the decision dismissing it is not inconsistent with the rule of People v. McNulty, 95 Cal. 594, 30 P. 963, and People v. Godfrey, 100 Cal.App. 91, 279 P. 1030. Section 1248 of the Penal Code provides, "If the appeal is irregular in any substantial particular, but not otherwise, the appellate court may order it to be dismissed". The McNulty case merely reiterates this rule and points out that on a motion to dismiss an appeal for reasons other than irregularity in taking it, the merits of the case are in issue and the motion cannot be granted when the record is not before the court. Otherwise stated, the record must be the basis for a decision upon the merits. This is a fundamental rule of appellate procedure of long standing; to overrule it means judicial repeal of section 1248 of the Penal Code. Certainly an appellate court should not determine an appeal prior to the time the record is before it upon the assertion of the respondent that no substantial question of law is presented.

TRAYNOR, J., concurs.

32 Cal.2d 578

WILLIAMS v. DUFFY et al.

S. F. 17792.

Supreme Court of California, in Bank.

Sept. 15, 1948.

Writ of Certiorari Denied Oct. 13, 1948.

See 69 S.Ct. 57.

1. Criminal law 🔑981(1)

Under statute requiring prison warden to call existence of good reason to believe defendant under sentence of death has become insane to attention of District Attorney for a judicial inquiry into sanity, warden has discretion in determining when "good reason to believe that a defendant has become insane" exists, and is not bound to accept a prima facie showing of insanity. Pen.Code, §§ 1367, 3701 et seq.

2. Appeal and error 🔑801(4)

Usually if the disposition of a motion to dismiss an appeal requires a consideration of appeal upon its merits, the motion must be denied.

3. Appeal and error 🔑786

An appellate court has inherent power to dismiss an appeal where an examination of the judgment roll demonstrates that the appeal is frivolous.

4. Mandamus 🔑187(9)

In order to prevail on appeal from judgment denying petition for writ of mandate to compel warden of state prison to institute judicial inquiry into the sanity of a prisoner confined under death sentence, petitioner was required to show that no evidence supported trial court's findings that prisoner was sane and that no good reason existed to believe that prisoner had become insane, and that evidence compelled a finding that good reason existed to believe that prisoner had become insane. Pen.Code, §§ 1367, 3701 et seq.

5. Mandamus 🔑168(4)

Evidence sustained determination upon petition for writ of mandate that prisoner under death sentence was sane and that no good reason to believe that prisoner had become insane existed which would require judicial inquiry into sanity. Pen.Code, §§ 1367, 3701 et seq.

6. Mandamus 🔑187(9)

Where trial court's determination on petition for writ of mandate for judicial inquiry into sanity, that prisoner confined under death sentence was sane and that no good reason to believe prisoner to have become insane existed, was supported by the evidence determination could not be disturbed on appeal. Pen.Code, §§ 1367, 3701 et seq.

7. Criminal law 🔑997

Where a defendant after final judgment of conviction seeks relief in the nature of "coram nobis", the relief if granted would be to vacate the judgment for a fact which existed but was unknown at time of trial and which, if known, would have precluded conviction.

See Words and Phrases, Permanent Edition, for all other definitions of "Coram Nobis".

8. Judgment 🔑476

A judgment of conviction is presumably valid and enforceable.

9. Criminal law 🔑997, 1219

A defendant who would vacate a conviction through coram nobis proceedings, or who would delay execution of death sentence for judicial review of sanity after delivery to prison warden, bears burden of procedure and proof. Pen.Code, §§ 1367, 3701 et seq.

10. Mandamus 🔑61

Mandamus is available to obtain a judicial inquiry into sanity of prisoner confined under sentence of death. Pen.Code, §§ 1367, 3701 et seq.

11. Mandamus ⚿187(8)

Where appeal from trial court's determination upon petition for writ of mandate that prisoner confined under death sentence was sane and that no good reason to believe prisoner to have become insane existed which would require a judicial inquiry into sanity sought only groundless delay, appeal would be dismissed. Pen. Code, §§ 1248, 1367, 3701 et seq.

◆

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Proceeding by Etta Williams against Clinton T. Duffy, Warden of the State Prison at San Quentin, and H. O. Teets, Acting Warden of the State Prison at San Quentin, for writ of mandate to compel respondents to institute a judicial inquiry into the sanity of Arthur R. Eggers, who is confined in prison under judgment imposing sentence of death. From an adverse judgment petitioner appeals. The Attorney General moves to dismiss appeal.

Petitioner's motion for stay of execution denied. Motion to dismiss appeal granted.

James A. Starritt, of Los Angeles, for petitioner.

Fred N. Howser, Atty. Gen., and Clarence A. Linn, Deputy Atty. Gen., for respondents.

SCHAUER, Justice.

The Attorney General moves to dismiss as irregular, in that it is assertedly taken solely for the purpose of delaying execution of a valid death sentence, this appeal from a judgment of the Superior Court of Marin County which denies a petition for writ of mandate. The writ is sought to compel respondents, the warden and acting warden of San Quentin State Prison, to institute a judicial inquiry into the sanity of Arthur R. Eggers, who is confined in the prison under judgment imposing the sentence of death, which judgment has been affirmed on appeal (People v. Eggers (1947), 30 Cal.2d 676, 185 P.2d 1). The procedure for such an inquiry is set out in sections 3701 through 3704 of the Penal Code. Section 3701 provides, in material part, "If, after his delivery to the warden for execution, *there is good reason to believe* that a defendant, under judgment of death, has become insane, the warden must call such fact to the attention of the district attorney of the county in which the prison is situated, whose duty it is to immediately file in the superior court of such county a petition, stating the conviction and judgment, and the fact that the defendant is believed to be insane, and asking that the question of his sanity be inquired into. * * *" (Italics added.)

[1] It is to be noted that it is unlawful to execute an insane person (Pen.Code, § 1367) and that the warden's duty, as prescribed by the above quoted section, depends not on the fact of insanity but on the fact as to whether "there is good reason to believe that a defendant * * * has become insane." It is the position of petitioner that the warden has no discretion in the premises; i. e., that when there has been called to the attention of the warden evidence which is competent to establish prima facie that a defendant is insane it becomes the immediate and absolute duty of the warden to initiate the judicial proceedings provided for in sections 3701 et sequitur. In other words, urges petitioner, it is beyond the jurisdiction of the warden to himself make any inquiry either as to the fact of insanity or as to the *weight of reasons for believing* that the defendant is sane or insane; if a single competent witness suggests to the warden that a condemned defendant is insane the warden may not consider the opinions of qualified experts or other witnesses to the contrary and determine that in his view there is *not* "good reason to believe that" the defendant "has become insane"; on the contrary he is bound, absolutely, to accept any competent prima facie showing of insanity as being legally "good reason to believe that" the defendant "has become insane," and the ultimate fact as to sanity must then be determined upon trial before a jury. Such position, for the reasons hereinafter stated, cannot be sustained.

If petitioner's contention were tenable it would lie within the power of any defendant under death sentence to procure, without regard to fact or justice, delay—and perhaps an unlimited number of delays—in execution of the sentence if he, his relatives or friends, could find any competent witness, either psychiatrist or intimate lay acquaintance (who might be a fellow convict), who would express the opinion that such defendant "has become insane." It is not remarkable at all that persons under sentence of death, and, subject to some qualifications, their relatives and friends, shall seek by every resource at their command to avoid or delay execution of the sentence. It is easy, and under the circumstances would be relatively safe, for an unscrupulous person to corruptly express an opinion that a sane defendant has become insane; it is likewise true that relatives and friends of a condemned person may honestly and conscientiously but mistakenly form an opinion that he has become insane. The law must recognize all these facts and cope with them; and to cope with them effectually there must be some range of discretion for the initial ascertainment and determination by a disinterested agency of the fact as to whether there is in truth "good reason to believe" that the defendant "has become insane." We are satisfied that the bounds of reasonable discretion have not been transcended here either by the warden (or the acting warden) or the trial judge and that the defendant has been accorded a full measure of every legal right to which he is entitled.

The history of Eggers' campaign to avoid or delay execution of sentence is as follows: After his conviction of first degree murder was affirmed by this court (People v. Eggers (1947), supra, 30 Cal.2d 676, 185 P.2d 1), February 6, 1948, was fixed as the date for execution. On January 30, 1948, Eggers petitioned this court for stay of execution and for the writ of habeas corpus. These petitions were denied without opinion on February 3, 1948 (Cr. 4873). On February 5, 1948, the United States Supreme Court granted a stay of execution pending consideration of Eggers' petition for the writ of certiorari. On March 15, 1948, the United States Supreme Court denied certiorari. On April 5, 1948, that court denied Eggers' petition for a rehearing and vacated the stay. June 25, 1948, had been fixed as the date for execution of sentence when, on June 22, 1948, Etta Williams, elder sister of Eggers, adopting the procedure suggested by the Attorney General of California in Phyle v. Duffy (1948), 68 S.Ct. 1131, 92 L.Ed. 1494, instituted this mandamus proceeding, alleging that Eggers is "so far mentally deranged as to be incapable of acting in his own behalf, and for that reason your Petitioner brings this action for and on behalf of * * * Eggers." The trial court granted the alternative writ of mandate and stayed execution. It heard evidence and argument as to whether "there is good reason to believe that [Eggers] * * * has become insane" (Pen.Code, § 3701). After such hearing it found "That said Arthur R. Eggers is presently sane and capable of acting in his own behalf. That respondents do not have, nor is there any good reason to believe that Arthur R. Eggers has become insane or is presently insane," and rendered the judgment from which petitioner has appealed.

A new date—September 24, 1948—has been set for execution. Petitioner asks that execution again be stayed and "That the Court set this matter on the calendar in the regular manner, allowing statutory time for filing of briefs and oral argument." She asserts baldly that "The appeal has merit" but, as hereinafter shown in some detail, she does not, nor can she, make any showing of substance in support of such assertion.

[2, 3] The Attorney General recognizes the usual rule that "if the disposition of a motion to dismiss requires a consideration of the appeal upon its merits, the motion must be denied," and relies upon the exception thereto that "An appellate court has inherent power to dismiss an appeal where an examination of the judgment roll demonstrates that the appeal is frivolous" (In re Estate of Wunderle (1947), 30 Cal.2d 274, 279, 181 P.2d 874, 877) or where "a mere inspection of the record discloses that no relief can be given to the appellant" (Hibernia Sav. & Loan Soc. v. Doran (1911), 161 Cal. 118, 120, 118 P. 526; see also People v. Smith (1933), 218 Cal. 484, 489, 24 P.2d 166; People v. Shorts (Cal. Sup.1948), 197 P.2d 330).

[4-6] In order to prevail in this appeal petitioner would have to show that there is no evidence to support the trial court's findings that Eggers is sane and that there exists no good reason to believe that he has become insane; she would have to show that the evidence impels a finding that there is good reason to believe that he has become insane and, therefore, that it is the duty of the warden to institute a full judicial inquiry into the question, as provided in section 3701. Examination of the reporter's transcript discloses that there exists no basis for sincerely advancing such contentions. The evidence in this connection is as follows: On June 3, 1948, in accord with prison routine, three psychiatrists examined Eggers; they concluded that he was sane and so reported to the warden. There is no evidence that Eggers behaved in such a manner that the warden should have questioned his sanity. The first notice to the warden that anyone believed that Eggers was not sane was given by service of this petition. Thereafter, on June 25, the warden caused Eggers to be examined by three psychiatrists other than those who had examined him on June 3. They too concluded and reported to the warden that Eggers was sane. The only expert opinion to the contrary is that of a psychiatrist who examined Eggers on June 26, at the request of counsel then representing petitioner, and reported to the warden that in his opinion Eggers was insane. Obviously, the trial court's determination is amply supported by the evidence and, therefore, cannot be disturbed. (See Mitchell & Johnson v. Smith (1936), 16 Cal.App.2d 119, 60 P.2d 509; Heaton v. Justice's Court, etc. (1937), 19 Cal.App.2d 118, 122, 64 P.2d 1004; Thompson v. Brown (1946), 75 Cal.App.2d 344, 348, 170 P.2d 1010.)

[7-10] The trial court appears to have made careful inquiry as to whether Eggers is within the prohibition of section 1367 of the Penal Code that "A person cannot be * * * punished for a public offense, while he is insane." There is an analogy between the case here and that presented by a defendant who, after final judgment of conviction, seeks relief in the nature of coram nobis. It is at once apparent that the cases are different in that the coram nobis procedure would vacate the judgment for a fact which existed but was unknown at the time of trial and which, if known, would have precluded the judgment which was entered, whereas proceedings based on sections 1367 and 3701 et sequitur of the Penal Code do not attack the judgment insofar as it constitutes an adjudication of guilt nor do they challenge any previously litigated fact or rely on any earlier existing fact; rather do they seek solely, as their ultimate object, to prevent or delay execution of an admittedly valid judgment on the ground that since the judgment was entered a fact (insanity of the defendant) has come to exist which fact, so long as it exists, precludes execution of the judgment. (Pen.Code, § 1367.) It is true, however, in relation to both proceedings, that the defendants have suffered final judgments of conviction; that such judgments are presumptively valid and enforceable; and that the defendant (or another acting for him) who would vacate the judgment, or would prevent or delay its execution, bears the burden of procedure and of proof. (See People v. Shorts (1948), supra, 197 P.2d 330.) And as stated in Phyle v. Duffy (1948), supra, 68 S.Ct. 1131, 1136, 92 L.Ed. 1501, "Applications for inquiries into sanity made by a defendant sentenced to death, unsupported by facts, and buttressed by no good reasons for believing that the defendant has lost his sanity, cannot, with any appropriate regard for society and for the judicial process, call for the delays in execution incident to full judicial inquiry. And a court can just as satisfactorily determine by mandamus as by direct application whether there are good reasons to have a full-fledged judicial inquiry into a defendant's sanity."

[11] Since there is shown to exist no tenable ground whatsoever for attack on the judgment denying issuance of the writ of mandate, it is apparent that petitioner's appeal from such judgment fails to constitute any justifiable basis for a stay of execution; it is further apparent that this appeal has no proper appellate objective and, therefore, is in that respect irregular in a substantial particular and can be dismissed. (Pen.Code, § 1248; People v. Smith (1933),

supra, 218 Cal. 484, 487, 489, 24 P.2d 166; People v. Shorts (1948) supra, 197 P.2d 330.) As in the Shorts case (page 339 of 197 P.2d), "Its objective is not the correction of error, the enforcement of legal right, or the reversal of the trial court; it seeks only groundless delay, and to that extent defeat of justice, in the execution of a valid final judgment."

For the reasons above stated petitioner's motion for stay of execution is denied; respondent's motion to dismiss petitioner's appeal is granted; the appeal is, accordingly dismissed. Let the remittitur issue forthwith.

GIBSON, C. J., and SHENK, CARTER and SPENCE, JJ., concur.

EDMONDS and TRAYNOR, JJ., concur in the judgment.

---

87 Cal.App.2d 660

CAMP v. MATICH.

Civ. 13679.

District Court of Appeal, First District, Division 1, California.
Sept. 21, 1948.

1. Landlord and tenant 🔑117

"Periodic tenancies", though not expressly mentioned in the Code, are recognized as a form of tenancy at will, being created by the parties to continue for successive periods of the same length, unless sooner terminated by notice at the end of one such period.

See Words and Phrases, Permanent Edition, for all other definitions of "Periodic Tenancy".

2. Landlord and tenant 🔑114(1, 2), 115(1)

An original tenancy at will under an invalid lease, or a lease with an indefinite term, may be construed as a tenancy from year to year or month to month upon payment of rent at such periods.

3. Landlord and tenant 🔑117

"Periodic tenancies" include all tenancies which are in their nature such as will endure for a certain period and will continue for subsequent periods of the same length, unless terminated by notice at the end of one such period.

4. Landlord and tenant 🔑117

The reservation and payment of rent at stated periods, in absence of express agreement, is the principal criterion to determine the duration of the successive terms of a periodic tenancy.

5. Landlord and tenant 🔑117

Where no time is mentioned and no annual rent reserved in a letting, the character of the letting as to time will be controlled by the intervals between the rent payments.

6. Landlord and tenant 🔑94(2), 116(2), 120(2)

A "periodic tenancy" differs from a "tenancy for a fixed term" in that the latter terminates at the end of such term without any requirement of notice as in the case of a periodic tenancy.

See Words and Phrases, Permanent Edition, for all other definitions of "Tenancy for a Fixed Term".

7. Estates 🔑1

To create an estate for a definite period, the duration must be capable of exact computation when it becomes necessary, otherwise no such estate is created.

8. Landlord and tenant 🔑18(3)

In action of wrongful detainer, evidence justified inference that defendant held the premises by virtue of a six months' oral lease and that his right of possession terminated at end of six months.

9. Fixtures 🔑4

The intention of the parties is controlling in determining whether an affixed article is to be considered as realty, or personalty which may be removed without injury to the premises. Civ.Code, § 1019.

10. Appeal and error 🔑1008(1)

Where court in action of unlawful detainer viewed the premises, its findings that corrugated iron building erected on premises and redwood siding installed in original building on premises had become integral parts of the realty by reason of the manner of construction and could not be removed without substantial injury to premises were conclusive on appeal, in absence of agreement by the parties to the contrary. Civ.Code, § 1019.

11. **Fixtures** ⚿27(2)

A tenant may agree with his landlord that the tenant may remove fixtures at any time.

12. **Landlord and tenant** ⚿157(4)

Former owner's inability to recall alleged understanding that defendant might at any time remove improvements placed on leased premises by defendant sustained finding, in action of unlawful detainer, that there was no such understanding or agreement as to removal of improvements, notwithstanding defendant's testimony as to such understanding. Code Civ.Proc. § 1847.

13. **Vendor and purchaser** ⚿232(9)

Mere possession of realty by tenant did not constitute notice to bona fide purchaser for value that shed attached to leased property, so as to make one continuous structure, and siding installed in original structure on premises, were in fact personal property under agreement with former owner that tenant might remove such improvements at any time.

14. **Appeal and error** ⚿989

Because of the presumptions in favor of verdict, findings, and judgment, appellate court, when reviewing the evidence in support of a verdict, finding, or judgment, must consider all the evidence rather than certain disconnected portions thereof, must accept as true all evidence tending to establish correctness of finding or verdict, and must consider evidence in aspect most favorable to prevailing party and give him benefit of every inference that can reasonably be drawn in support of his claim, and a mere doubt as to whether finding is justified by evidence will not authorize appellate court to set aside finding.

15. **Appeal and error** ⚿110

Order denying a motion for new trial was not appealable.

Appeal from Superior Court, Santa Clara County; M. G. Del Mutolo, Judge.

Action of unlawful detainer by Thomas H. Camp, as trustee of John Cownie trust, against Peter Matich. From an adverse judgment and order denying a new trial, defendant appeals.

Appeal from order dismissed and judgment affirmed.

Bohnett, Hill, Cottrell & Bohnett and Eugene K. Kennedy, all of San Jose, for appellant.

Harvey C. Miller and Richard W. Morton, both of San Jose, for respondent.

WARD, Justice.

This is an appeal by defendant from the judgment and from an order denying a new trial in an action for unlawful detainer, in which plaintiff was awarded possession of the premises in dispute and defendant was ordered to pay damages amounting to $1,351.36, plus costs, and permanently enjoined from removing or altering certain buildings and premises. The notice of appeal specifies that it is taken from "the whole thereof" but appellant's opening brief specifies: "The appeal is taken to a portion of this amount, namely, Six Hundred Fifty-One and 36/100 Dollars ($651.36), which amount was ordered as damages for the removal of certain property from the premises of the respondent, and also that portion of the judgment which permanently restrained the defendant from entering, removing and tearing down any of the buildings on the premises of the plaintiff."

Appellant does not call attention to any claimed error in ruling on evidence; rather, it is the sufficiency of the evidence to sustain the findings and the legal conclusions drawn therefrom that is presented upon appeal.

The court found that defendant "is in possession" under the terms of an oral lease which commenced January 1, 1946; that the tenancy expired on June 30, 1946; that the right to remove fixtures terminated on the last mentioned date, but that defendant held over contrary to demands to surrender possession "and is now holding the same"; that the value of the premises since June 30, 1946 is the sum of $100 per month; that defendant erected a corrugated iron building at the eastern end of the original building and installed redwood walls or siding in the original building; that the erected and affixed portions by reason of the manner of construction had become an integral part of the real property and could not be removed without doing substantial injury to plaintiff's premises; that after the tenancy of the premises had terminated defendant tore down and removed the building erected by him and has threatened to remove and carry away the redwood siding or walls installed in the original building; that the damage by reason of such removal would not be compensable in money; that the additional installations and attached rooms were not built or installed with any understanding or agreement that they might be removed. Conclusions of law follow that plaintiff is entitled to a judgment of unlawful detainer, and that a writ of restitution should be issued thereon; that he is entitled to an injunction permanently restraining and enjoining defendant from tearing down or removing the "redwood walls or siding" now in the building, and to a judgment for damages.

In substantiation of the findings, the evidence shows that the John Cownie Trust is the owner of the designated real property situated in the City of San Jose, California, and that it has been such since the latter part of March, 1946. L. D. Bohnett, defendant's counsel, testified that the property "was formerly owned by the Thermotite Construction Company, in which I was somewhat interested, and my brother was running it. They wanted to borrow money. I had a client who was willing to lend them the money on this property if I would sign the note. I signed the note, and when the Corporation went flat, I had to take the property over to protect myself." In 1936, defendant, doing business as the San Jose Concrete Company, went into possession of the property "on a month-to-month basis." Defendant continued in possession when Bohnett sold the property to E. J. Rimple. The exact date of the transfer does not appear in the record. It apparently took place early in 1945 since Rimple testified that "After I owned the property several months," defendant stated that he would pay six months' rent at once. The date of this statement was fixed as around July of 1945. John Cownie of the Cownie Trust, subsequent purchaser of the property, testified that the first time he talked with defendant was a month or six weeks after its purchase, at which time "I told Mr. Matich that I had purchased the property for this trust company, and it would be for rent, and asked him if he would be interested in renting the property. * * * He said that his lease was out on July 1st, and that promptly after Mr. Rimple had sold the property, that he had advised him, Mr. Matich, that the property had been sold and he would be not in position to release it to him. * * * I then asked him if he would be interested, and he said that as soon as he had received this notice from Mr. Rimple, he had gone, and I'm not positive whether he said he had rented or purchased the lot next to me, but that he could for the present, for some time, use the two of them, and I again asked him if he would be interested in keeping my lot, and he said he wouldn't, so I told him I'd take it under consideration and advise him, which I did a little later, as to what the rental would be * * * a week or ten days after our conversation * * * I told him that I had given the matter consideration, and I named him a price, that I would rent it to him for one or two years at $150.00 a month, and he replied that at that price it was more than he was paying for the other lot, and he wouldn't be interested, and that's all the conversation I had with him about the rental."

A witness who subsequently leased the property from plaintiff at $150 a month testified that he had visited the property around May 10, 1946, and also during the trial of the case. He further testified that "starting from the rear of the property, the northeast side, there was one wooden shed back there, and in front of that there was a frame construction with half of it roofed, and the rest of it open; and to the southeast of the property there was an open corrugated iron shed. I don't know what the dimensions were, they're 23 x 18, something like that, approximately. * * * then there was a main shed, I think 40 x 60, in the front, corrugated iron. Then there was these small sheds that were adjoining, and they were wooden frame, corrugated top, and the next section was corrugated iron building 28 x 28, I believe, and it was about 18 feet high. It had sliding doors." He also testified that this 28 x 28 building was removed in its entirety, and he described the interior of the corrugated iron building 40 x 60 and the shed remaining on the property as having "tongue and groove lining." His testimony was that the removed 28 x 28 building "was fastened to the building which now remains, and it was in two heights * * * a square frame building covered with corrugated iron." This corresponds in substance with defendant's testimony. Another witness, a licensed contractor, estimated the cost of the removed frame building covered with corrugated sheet iron to be $651.36.

Defendant was called under section 2055, Code of Civil Procedure, and testified that on two occasions he paid Mr. Rimple $600 for six months' rent. He testified that in May or July of 1945 he asked Rimple if it would be of help to him if he paid rental for six months in advance. "Mr. Rimple, he gave me answer, he says, 'This is going from month to month.' I said, 'I understand that.' Like he say, 'If I want to order you out, I could order you out and give you thirty days' notice,' which was the understanding between us." However, in December of 1945 he again paid Rimple $600 in payment of rental through June 30, 1946.

Defendant's testimony is to the effect that he went to his original landlord, Mr. Bohnett, and received his "OK" on the installations and it was understood that if the place should be sold defendant could move his "material out," but Bohnett testified: "Well, there was some discussion about lease, and I did prepare a lease for one year, but it was never signed, and we went, just went on a month-to-month basis at the beginning.

"Q. Do you recall a conversation with Mr. Matich concerning the installation of the redwood tongue and grooving? A. I recall a conversation, my memory is that it was over the telephone, I may be wrong, but I recall that Mr. Matich asked me if I had any objection to his building a steam room in that shed. I told him that I had no objection, and dismissed it from my mind. Now, whether there was more to the conversation or not, I can't recall. There may very well have been, but my attitude, I know this, that if he had asked me, if he did ask me—

"Q. Well, I'll object to what you would have done if he would have asked you, Mr. Bohnett. You don't now recall any conversation whereby you told him he could remove that building and things when he moved? A. No, I've told you all that I recall.

"Q. All that you recall? A. The reason, as I've stated, I paid little attention to what happened there, as long as I got enough rent to carry it."

The only witness called by defendant was Mr. Rimple who testified that defendant was his tenant on a month-to-month basis during all the time that he owned the property, and that after he "owned the property several months, he asked me if I would care to accept more than one month's payment, that he'd be glad to help me out. He knew that I was under expense building other buildings on other property, and he volunteered to pay me more than the month's rent. * * * there was no conversation as to changing the terms."

[1-5] A consideration of the elements present in a leasehold for six months and of those found in a periodic tenancy is appropriate in determining the problem presented on this appeal. "Though not expressly mentioned in the Code, *periodic tenancies* are recognized by our cases as a form of tenancy at will. They are created by the parties to continue for successive periods of the same length, unless sooner terminated by notice at the end of one such period. Examples are tenancies from year to year and month to month. An original tenancy at will under an invalid lease, or a lease with an indefinite term, may be construed as a tenancy from year to year or month to month upon payment of rent

at such periods. Witkin, Summary of California Law, Vol. 1, 573. Tiffany points out that this expression covers all tenancies "which are in their nature such as will endure for a certain period, and will continue for subsequent successive periods of the same length, unless terminated by due notice, at the end either of the first period or of one of the successive periods." 1 Tiffany, Landlord and Tenant, p. 119. The authorities agree that in the absence of express agreement, the reservation and payment of rent at stated periods is "the principal criterion to determine the duration of the successive terms of a periodic tenancy." Jones, Landlord and Tenant, p. 253, sec. 215. Jones adds (p. 254) that "Where no time is mentioned, and no annual rent reserved in a letting, the character of the letting as to time will be controlled by the intervals between the rent payment; monthly or weekly payments implying monthly or weekly tenancies."

[6, 7] The most important difference between a periodic tenancy and a tenancy for a fixed term—such as six months—is that the latter terminates at the end of such term, without any requirement of notice as in the former. Ryland v. Appelbaum, 70 Cal.App. 268, 233 P. 356; Black v. Black, 77 Cal.App. 82, 46 P. 90. In order to create an estate for a definite period, the duration must be capable of exact computation when it becomes possessory, otherwise no such estate is created. Restatement of the Law, Property, sec. 19, comments a and b.

[8] In the present appeal, when all of the evidence is considered, particularly defendant's conversation with Rimple, and the fact that six months' rental had twice been paid in advance to cover the last year of the occupancy, a reasonable inference may be drawn that defendant held the premises by virtue of a six months' oral lease, and that his right to possession terminated on June 30, 1946. This conclusion to be sound in law and in fact must be based upon the assumption that the additions and improvements to the property did not consist merely of trade fixtures, and that a notice was not necessary to terminate an oral lease. These points will be given further consideration.

[9-11] The intention of the parties is controlling in determining whether an affixed article is to be considered as realty, or personalty which may be removed without injury to the premises. Section 1019, Civil Code, provides: "A tenant may remove from the demised premises, any time during the continuance of his term, anything affixed thereto for purposes of trade, manufacture, ornament, or domestic use, if the removal can be effected without injury to the premises, unless the thing has, by the manner in which it is affixed, become an integral part of the premises." In this case in addition to the evidence introduced the court viewed the premises. Under these circumstances the findings on the issue pertaining to fixtures may not be disturbed by an appellate court unless there was an agreement by the parties to the contrary. A tenant may agree with his landlord that the former may remove fixtures at any time. 12 Cal.Jur. 580.

[12] Defendant calls attention to his own testimony that there was an understanding reached with Bohnett that the improvements could be removed when he ceased to be in possession of the property. Mr. Bohnett testified that he had no independent recollection of the conversation. That testimony did not assist defendant. The court had a right to consider the importance of such a question, and the fact that if such an agreement had been made with the original landlord he probably would have remembered it. The defendant as a witness must be judged upon the theory that the court weighed the probability of the making of such an agreement and that the manner in which defendant testified turned the scales against him on this question. Code of Civil Procedure, sec. 1847.

Defendant contends that his possession and occupation of the property constitutes notice of his agreement with Bohnett that he might remove the fixtures at any time, so that plaintiff—admittedly a bona fide purchaser for value—is bound by said agreement.

Plaintiff successfully distinguishes the cases cited by defendant. Follette v. Pacific Light & Power Corp., 189 Cal. 193, 208 P. 295, 23 A.L.R. 965, involves the claim of one asserting the right to an easement as against a subsequent purchaser. Hunter v. Watson, 12 Cal. 363, 73 Am.Dec. 543; Pell v. McElroy, 36 Cal. 268 and J. R. Garrett Co. v. States, 3 Cal. 2d 379, 44 P.2d 538, involve disputes between an "owner" in possession and a subsequent purchaser. Scheerer v. Cuddy, 85 Cal. 270, 24 P. 713 and Beverly Hills Nat. Bank & Trust v. Seres, 76 Cal.App.2d 255, 172 P.2d 894, involve the claim of a tenant as against a subsequent purchaser.

Both parties cite Oroville-Wyandotte Irr. Dist. v. Ford, 47 Cal.App.2d 531, 118 P.2d 340, holding that an agreement concerning fixtures is only binding on one having notice, but that such notice is provided by the recordation of the contract to convey in which the agreement was set forth. In the present case the lease was oral. Plaintiff also cites Nead v. Specimen Hill Mining Co., 52 Cal.App.2d 475, 126 P.2d 450, dealing with the effect of the knowledge of a purchaser of a mining claim regarding a conditional sales agreement under which the seller retained title to the mining machinery, and Trabue Pittman Corporation v. County of L. A., 29 Cal.2d 385, at page 397, 175 P.2d 512, at page 520, wherein the court stated: "It is well settled, however, that such contract * * * (as here discussed), is not effective against those not bound by the agreement; for example, innocent third persons."

[13] If the mere possession by a tenant of real property is notice to a purchaser that certain articles, as a shed or house attached to leased property so as to make one continuous structure, are in fact personal property without any further circumstances of a nature reasonably calculated to put the purchaser on notice of an agreement to that effect between the tenant and a former landlord, there would be no way to protect the purchaser. In the present case there was evidence that the attached and additional property had become an integral part of the premises as they existed when the first oral lease was made, and evidence from which a reasonable inference may be drawn that there was no agreement between defendant and his previous landlord as to the removal of the fixtures.

[14] The vital question on this appeal is whether there is substantial evidence to support the findings. In his discussion of the evidence dealing with the nature of the lease, defendant overlooks the fact that, "Because of the presumptions in favor of the verdict and findings and judgment, the appellate court when reviewing the evidence in support of a verdict or finding, or, in the absence thereof, in support of the judgment, must take into consideration all the evidence rather than certain disconnected portions thereof. It must accept as true all evidence tending to establish the correctness of the finding or verdict, and it must consider it in the most favorable aspect toward the prevailing party, and give to him the benefit of every inference that can reasonably be drawn in support of his claim. A mere doubt as to whether a finding is justified by the evidence will not authorize the appellate court to set aside the finding." 2 Cal.Jur., 879–880; see, also, English v. Olympic Auditorium, Inc., 217 Cal. 631, 20 P.2d 946, 87 A.L.R. 1281; Kenney v. Los Feliz Investment Co., 2 Cal.2d 647, 43 P.2d 255; Givens v. Johnson, 73 Cal.App.2d 139, 166 P.2d 67; Peterson v. Peterson, 74 Cal. App.2d 312, 168 P.2d 474.

[15] The appeal from the order denying defendant's motion for a new trial is not appealable and hence is dismissed. The judgment as appealed from is affirmed.

PETERS, P. J., and BRAY, J., concur.

87 Cal.App.2d 591

In re SPENCER'S ESTATE.

Civ. 13692.

District Court of Appeal, First District,
Division 2, California.
Sept. 17, 1948.

1. Wills ⚷130

No particular words are necessary to show a testamentary intent, but it must satisfactorily appear, from document offered as a holographic will, that deceased intended, by document itself, to make a disposition of his property after his death in favor of party claiming thereunder.

2. Wills ⚷130

Fact that unrelated matters were discussed in letter which was claimed to be a holographic will did not render the letter inoperative as a will, but was a factor to be considered in determining writer's intent, if language used in letter did not clearly show that it was writer's purpose to dispose of her property on her death.

3. Wills ⚷130

Letter written by woman about five years before her death and while a valid formal will was in effect, to a friend who at his own expense had made extensive repairs and improvements to woman's property, thanking friend for check and stating that building and lot "will be turned over to you one day" and that she was moving to a smaller flat where there were elevators, was not a valid holographic will because it did not clearly show a testamentary intent.

4. Wills ⚷130

The existence or nonexistence of apprehensiveness of imminent death by one who executed alleged holographic will is an important factor in determining whether there is testamentary intent.

5. Wills ⚷130

Where there exists a previously made and unrevoked will, an alleged holographic will, thereafter executed, should be so phrased that there can be no doubt from its language that testator's intention was thus to make further testamentary provisions regarding the disposal of his estate.

6. Wills ⚷334

Finding that letter, which was claimed to be a holographic will, was not a last will and that deceased did not express in letter any testamentary intent or intend thereby to make any testamentary disposition of her property, was sufficient as a finding of ultimate fact.

7. Wills ⚷337

Where, from proponent's testimony, it clearly appeared that there was nothing newly discovered about evidence on which proponent based motion for new trial on ground of newly discovered evidence, and there was no showing that evidence was not available at time of trial, and evidence at best would be but corroborative and cumulative and could not have brought about a different result, motion for new trial was properly denied.

8. Wills ⚷384

On appeal from order revoking an order admitting alleged holographic will to probate, appellant could not contend that order admitting to probate a formal will was invalid because alleged holographic will had been already admitted, and because petition for revocation of order admitting alleged holographic will to probate had not been disposed of, where there was no appeal from order until long after time to appeal had expired.

◆

Appeal from Superior Court, Contra Costa County; Harold Jacoby, Judge.

Proceeding in the matter of the estate of Carrie Belle Spencer, also known as Carrie Bell Spencer, deceased, wherein an order was made admitting to probate as the deceased's last will a certain letter written, dated, and signed by the deceased. From an order revoking the order admitting the letter to probate, Raymond B. Johnson, Public Administrator of Contra Costa County, and Thomas Milan, opposed by Mortimer B. Veale, appeal.

Order affirmed.

Yates F. Hamm and Matthew Ward, both of Antioch, and Marcel E. Cerf, Robinson & Leland, of San Francisco, for appellant.

Carlson, Collins & Gordon, Robert Collins, and Frederick Bold, Jr., all of Richmond, for respondents.

GOODELL, Justice.

This appeal was taken from an order which revoked an order admitting to probate as decedent's last will a letter written, dated and signed by her reading as follows:

"May 19th, 1936
"121 Cromwell Road,
"S.W. 7.

"Dear Mr. Thomas Milan:

"Thank you for your kind letter and the cheque. I do not think it is quite fair to you.

"However the building & lot will be turned over to you one day—for I haven't any relations that would be bothered with them—as they have all they want or need so please accept them.

"We are moving to a smaller flat this week & it is very much better for me for there are no elevators here, & there are 4 here in the new one.

"I have had to be carried up & down the stairs when I was obliged to go out on business—ever since before Xmas.

"Two men, with a carrying chair—so I have been out very little & I am delighted to move."

The sole question presented for decision is whether this letter constitutes a valid holographic will.

[1] It is well settled that "No particular words are necessary to show a testamentary intent but it must satisfactorily appear from the document offered * * * that the decedent intended, by the very paper itself, to make a disposition of his property after his death in favor of the party claiming thereunder." In re Estate of Wunderle, 30 Cal.2d 274, 280, 281, 181 P.2d 874, 878.

[2] The letter in question discusses matters in no way connected with the testamentary disposition of property, namely, the receipt of a remittance and the moving by decedent from one home to another. It does not contain any farewell messages or directions such as are frequently found in letters offered for probate. E. g. In re Estate of Button, 209 Cal. 325, 287 P. 964; In re Estate of Cook, 173 Cal. 465, 160 P. 553. The fact that unrelated matters are discussed "would not make the letter inoperative as a will, but it is a factor which may be considered in determining the intent of the writer if the language used does not clearly show that it was his purpose thereby to dispose of his property on his death." In re Estate of Golder, 31 Cal.2d 848, 850, 193 P.2d 465, 466.

[3] The part of the letter which appellant claims is testamentary reads: "However the building & lot will be turned over to you one day—for I haven't any relations that would be bothered with them—as they have all they want or need so please accept them." In our opinion this language does not clearly show a testamentary intent or purpose. The words are susceptible of three meanings other than the one for which appellant contends, namely (1st) that "the building & lot will be turned over to you one day" *when I make a deed to you, or a will naming you as devisee;* (2nd) that *I have already made a deed which I will turn over to you one day in the future,* and, (3rd) that *I have already made a will in your favor and one day, when I die, the property will be turned over to you.*

In Re Estate of Richardson, 94 Cal. 63, 29 P. 484, 485, 15 L.R.A. 635, the language of the letter was "You and your children get everything." The court said, 94 Cal. at page 65, 29 P. at page 485: "The last expression might be used in a letter like this, by one who had already made a formal will, which may have been lost or destroyed, or might be with reference to making a formal will,—that is, 'You and your children get everything by a formal will,' or 'will get everything by a will I shall make.' This construction of the language is as consistent with a proper interpretation of it as is that contended for by the appellant. It is not for courts to declare that to be a testamentary disposition of his estate, when it does not clearly appear that such was the intention of the individual executing it." Other cases where the language did not clearly or definitely show a testamentary intent and purpose, are In re Estate of Meade, 118 Cal. 428, 431, 50 P. 541, 62 Am.St.Rep. 244; In re Estate of Branick, 172 Cal. 482, 484, 157 P. 238; In re Estate of Kelleher, 202 Cal. 124, 129, 259 P. 437, 54 A.L.R. 913; In re Estate of Anthony, 21 Cal.App. 157, 131 P. 96.

The last four words of the paragraph here in question, "so please accept them," simply take their color and meaning from the earlier language.

In the Golder case, 31 Cal.2d 848, 193 P.2d 465, supra (decided since the briefs were filed herein), a letter dated December 13, 1941, from the decedent, a sailor in the navy, to his mother, contained the following post-script: "P. S. I have a surprise coming for you and hope it works out. This is all I can tell you. *My insurance is made out to Alyse so should I get in this war and not come back I want my savings & stocks to go to you.* * * *"

The court held that this language was not testamentary and in the course of the opinion said: "Language similar to that used here has been held to be dispositive where the character of the instrument and the surrounding circumstances have indicated a testamentary intent. In re Estate of Cook, 173 Cal. 465, 160 P. 553." And later: "When words which may be construed as testamentary are used in an informal document such as a letter, and it is not entirely clear that the writer intends thereby to control the disposition of his property at his death, the courts have been very liberal in admitting extrinsic evidence to show intent." In re Estate of Cook, [173 Cal. 465, 160 P. 554] which the court cites, is illustrative of this rule for there the three letters held to be testamentary were written the day before the testatrix entered a hospital for an operation after suffering for 15 or 20 years from a malignant disease and "she had reason to believe she might not live through it." She died about a month later.

In Mrs. Spencer's letter she expressed pleasure at the prospect of getting away from an up-and-down-stairs problem but there is no evidence to show how such problem arose. Nor is there anything in the letter, or extrinsic to it, to show that she was at all apprehensive as to her health. Moreover she did not die until nearly five years later.

In each of the letters admitted as wills in the cases relied on by appellant an entirely different picture was presented.

In Clarke v. Ransom, 50 Cal. 595, the letter was written by the testatrix "under the belief that her death was near at hand, as in fact it was," for she died nine days later. The language she used was: "Dear Old Nance: I wish to give you my watch, two shawls, and also five thousand dollars."

In Mitchell v. Donohue, 100 Cal. 202, 34 P. 614, 38 Am.St.Rep. 279, the testator, who was suffering from an abscess in his back, wrote the following letter: "this is to serifey that ie levet to mey wife Real and persnal and she to dispose for them as she wis" and handed it to his wife, saying: "That's for you, for fear anything should happen * * *." He died 16 days later.

In Re Estate of Dexter, 179 Cal. 247, 176 P. 168, 169, the letter read: "I have stated to you before that I wish you to administer on my estate, when it has to be. So will put it in writing. Distributed equally among my nieces and nephews. You receive your pay besides out of the estate." This paper was an addendum to a note written the day before in which the testatrix said, inter alia, "if anything happens to me while I am away." The court said: "That she understood the importance and character of the writing is apparent from the fact that in the letter of transmittal she impressed upon Wright the importance of keeping it in some safe depository."

In Re Estate of Spitzer, 196 Cal. 301, 237 P. 739, 742, the letter was written when the testator was in extremis (see In re Estate of Kelleher, 202 Cal. 124, 128, 259 P. 437, 54 A.L.R. 913) and he died about seven weeks later. After describing certain dispositions which he had already made, the testator said "Bal of Estate to go to Lulu M. Plane".

In Re Estate of Button, 209 Cal. 325, 287 P. 964, 965, the letter showed that the testatrix intended to take her own life. She did so on the same day. The testamentary language was: "You can have the house on 26th ave. and all the things of value so you won't be out any money on burying me."

In Re Estate of Beffa, 54 Cal.App. 186, 187, 201 P. 616, 617, the letter likewise was written on the day of the testator's suicide. The testamentary language was: "I sign and trasfer * * *."

In Re Estate of Miller, 128 Cal.App. 176, 17 P.2d 181, 184, the letter was written "with a consciousness of approaching dissolution," about five weeks before death. The testamentary language was "All bank accts or any and all property real and person belonging to me will be given to Minnie I. Miller."

In Re Estate of Beaty, 27 Cal.App.2d 745, 81 P.2d 1002, 1003, the document read: "I was sick all night. * * * If I should pass out * * * Keep the Home and all of you live here do not give away my things that I have had so long." It also contained directions as to burial.

In Milam v. Stanley, Ky., 111 S.W. 296, 297, 17 L.R.A.,N.S., 1126, the testator three days before he was to be hanged wrote his daughters: "I guess my last hope is gone. * * * I want to make you and Lulu a deed to that house and lot". The court said that the testator "knew when he wrote this paper that he was to die on February 15th. * * * He did not have in mind that he was thereafter to make his daughters a deed to the house and lot. * * * These words show that he had in mind, not something that he was going to do, but something he was then doing." The court cited Clarke v. Ransom, 50 Cal. 595, supra, on the point that the letter was "written in expectation of death".

In Buffington v. Thomas, 84 Miss. 157, 36 So. 1039, 1040, 105 Am.St.Rep. 423, the letter, written by an invalid, said: "This leaves me in bed with high fever. I do not know whether I shall live to see morning. * * * Eliza has did what she could for me and I want her to have our home in Yazoo City. * * *" In the Spitzer case, 196 Cal. 301, 307, 237 P. 739, supra, the court cites the Buffington case, on the proposition that the testator's "anticipation of death would be a sufficient reason to prompt him to make his will."

In each of the foregoing cases cited by appellant the language of the writing is much stronger than that employed by Mrs. Spencer. In each of them (with the possible exception of In re Dexter's Estate) the evidence showed, also, the testator's consciousness or apprehensiveness of imminent death. For these reasons none of them has persuasive value in this case.

In re Spratt, 75 L.T.N.S. 518, the court conceded that the document was a will, and then added that the only question was whether it was conditional.

[4] That the existence or non-existence of apprehensiveness of imminent death is an important factor in determining whether there is testamentary intent, is accentuated in the Richardson case, 94 Cal. 63, 65, 29 P. 484, 485, 15 L.R.A. 635, where the court said: "He was not in extremis, nor is there anything to show that he contemplated immediate or very proximate dissolution, which might necessitate a final disposition of his estate"; likewise in the Henning case, In re Henning's Estate, 186 Cal. 307, 199 P. 39, 40, where the court said that "From the whole letter * * * it is evident that the deceased was contemplating matrimony rather than death."

The court was liberal in admitting extrinsic evidence in this case, but such evidence did not embrace the circumstances attending the writing of the letter of May 19, 1936. The testamentary intent, or lack thereof, must therefore be judged by the language of the letter itself, and, as we have said, it does not clearly show such intent or purpose. Appellant's case is not aided to any appreciable extent by the extrinsic evidence which was admitted. The utmost it shows is that he had been a tenant of the property in question since 1914, and for almost 10 years before decedent's death in 1941 he had been her agent in the handling of her interests. Also, that he had made extensive repairs and improvements to the property at his own expense. It shows that decedent was deeply grateful to appellant and that he and she were close friends. It shows that in 1932 on one of decedent's visits she told appellant "This building is going to be yours," and that on August 19, 1937, she wrote him from London "I am glad you have done something for the old building for I couldn't do it, and you will have to take it out in waiting for the real ownership to you," a statement entirely consistent with what she wrote on May 19, 1936, that "the building & lot will be turned over to you one day." All in all, the extrinsic evidence does not go any further than to show the decedent's reasons and motives for either deeding or devising the property to appellant "one day." It in no way aids in the inquiry into what was in her mind when she wrote the letter.

[5] Both sides agree that Mrs. Spencer was an educated woman and a good business woman. On August 19, 1927, she executed a formal will, with her solicitor and one of his clerks as witnesses. It may safely be said, then, as was said in Re Estate of Branick, 172 Cal. 482, 484, 157 P. 238, 239, "It is quite clear that the testator understood the nature and requirements of a will." Moreover the existence of the formal will of 1927 would seem to bring the case within the rule of White v. Deering, 38 Cal. App. 433, 437, 177 P. 516, 517, that "where there exists a previously made and unrevoked will of the testator, such instrument [the informal writing] should be so phrased that there can be no doubt from its language that the intention of the testator was thus to make further testamentary provisions regarding the disposal of his estate * * *." See, also, In re Estate of Logan, 29 Cal.App.2d 60, 64, 84 P.2d 245. This might well have weighed with the trial judge in holding that the letter was not testamentary in character.

[6] The court found that the letter of May 19, 1936, "is not a last will or testament * * * that the decedent did not express in said letter any testamentary intent or intend thereby to make any testamentary disposition of her property * * *." Appellant claims that the court failed to find on material issues. It is difficult to understand this attack, for the finding is upon the ultimate fact in issue (In re Estate of Janes, 18 Cal.2d 512, 514, 116 P.2d 438) and is therefore sufficient.

[7] The motion for a new trial was properly denied. Appellant testified that in 1932 on one of decedent's visits to Antioch she said to him "*in the presence of her husband and another man by the name of Chris Bogan who was working there * * * I don't know if he heard it or not,* * * * as long as that I have been good tenant to her and been taking good care of her property and she is not going to forget me when she died. She said that much, and she says, 'This building is going to be yours' and words to that effect * * * I don't remember the exact words." (Emphasis added.) In attempting to make a showing of newly discovered evidence affidavits were filed to the effect that the man referred to did overhear the conversation. From appellant's own testimony just quoted it clearly appears that there was nothing newly discovered about it. Moreover, there was no showing that the testimony of the Bogdans was not available at the time of the trial (see 20 Cal. Jur. pp. 78, 79) and at best it would be but corroborative and cumulative and could not have brought about a different result See 20 Cal.Jur. pp. 94, 95.

Our conclusion that the letter of May 19, 1936, does not constitute a valid holograph will disposes of appellant's contention that that letter "acted as a revocation of the former or attested will."

[8] The formal, witnessed document dated August 19, 1927, was offered for probate on June 12, 1946, at the same time that the petition for revocation of the order admitting the letter of May 19, 1936, was filed. On August 26, 1946, an order was made admitting to probate the 1927 document, notwithstanding the letter of May 19, 1936, had been already admitted and the petition for revocation had not been disposed of. Appellant now attempts to raise this point, but he is not in a position to successfully do so since no appeal was taken from the order of August 26, 1946, until September 22, 1947, long after the time to appeal had expired. Furthermore, when the issues raised by the petition to revoke and the answer thereto came to trial on December 9, 1946, both sides went to trial on these issues without presenting the point now raised. It is from the order entered on the findings made on that trial that this appeal was taken.

The order appealed from is affirmed.

NOURSE, P. J., concurs.

87 Cal.App.2d 668

HENSGEN et al. v. SILBERMAN et al.

Civ. 16321.

District Court of Appeal, Second District, Division 1, California.

Sept. 21, 1948.

Hearing Denied Nov. 18, 1948.

1. Divorce ⚷172

Generally validity of a divorce decree cannot be questioned in a proceeding concerning any right or other interest arising out of marital relation, either by a spouse who has obtained such decree of divorce from a court which had no jurisdiction, or by a spouse who takes advantage of such decree by remarrying.

2. Estoppel ⚷63

Though ignorance of the truth is a primary essential on the part of one pleading an estoppel in pais, California courts recognize another species of estoppel called "quasi estoppel" which is based upon principle that one with full knowledge of the facts shall not be permitted to act in a manner inconsistent with his former position or conduct to the injury of another. Code Civ.Proc. § 1962, subd. 3.

See Words and Phrases, Permanent Edition, for all other definitions of "Quasi Estoppel".

3. Courts ⚷37(3)

One who has invoked exercise of a jurisdiction within general powers of court cannot seek to reverse its orders upon ground of lack of jurisdiction. Code Civ.Proc. § 1962, subd. 3.

4. Divorce ⚷330

Where first wife never questioned validity of Mexican mail order divorce prior to husband's death but permitted husband's second wife to incur benefits and obligations incident to valid marriage and first wife herself remarried twice, first wife was estopped to question validity of Mexican divorce decree for sole purpose of sharing in property accumulated by husband and second wife during years they lived together as husband and wife. Code Civ.Proc. § 1962, subd. 3.

Appeal from Superior Court, Los Angeles County; Wilbur C. Curtis, Judge.

Action by Esther Hensgen, as special administratrix with general powers of the estate of Nicholas Carl Hensgen, deceased, and others, against Rose Silberman, sued as Rose Silverman, also known as Rose Hensgen, and another, to recover community property purportedly transferred by deceased without consideration and without consent of his wife. From the judgment, plaintiffs appeal.

Affirmed.

A. W. Brunton, of Los Angeles, for appellants.

Newton E. Anderson and Eldon V. McPharlin, both of Los Angeles, for respondents.

YORK, Presiding Justice.

The instant action was instituted by Esther Hensgen, as special administratrix of the estate of Nicholas Carl Hensgen, deceased; Thelma Hensgen Neal, widow of decedent, and the two minor daughters of decedent and said widow, against Rose Silberman, the alleged second wife of decedent, to recover the proceeds of a life insurance policy, certain cash, bonds and other personal property acquired during the marriage of decedent and said Rose Silberman.

This appeal has been perfected by plaintiffs from a judgment in favor of defendant Rose Silberman, based upon findings of fact of the trial court to the following effect:

That Nicholas Carl Hensgen and plaintiff Thelma Hensgen Neal were married in 1928 in the state of Texas and separated in August, 1940, while residing in this state; that on December 12, 1940, said parties went to Tijuana, Mexico, where they conferred with an attorney and made the necessary arrangements to obtain a Mexican mail order divorce; that "thereafter the said Thelma Hensgen Neal was granted a purported final decree of divorce from Nicholas C. Hensgen, on December 17, 1940, by the Civil Court of First Instance, Bravos District, Chihuahua, Mexico." That on December 25, 1940, Nicholas

C. Hensgen and Rose Silberman Hensgen were married in the State of Nevada and at all times thereafter until the death of Nicholas on December 24, 1945, they lived together as husband and wife. "That said Rose Hensgen entered into said marriage and thereafter lived with Nicholas C. Hensgen as husband and wife in good faith and under the bona fide belief that said marriage was valid."

That on April 11, 1941, said Thelma Hensgen Neal married Walter A. Smith in the State of Nevada, "with whom she thereafter continued to live as husband and wife for not less than two years and four months; that on February 1, 1946, she obtained a decree of divorce in Nevada from said Walter A. Smith; that on the same date, February 1, 1946, said Thelma Hensgen Neal married a Mr. Neal to whom she is now married. * * *

"That the said Thelma Hensgen Neal had full knowledge of the marriage of Nicholas C. Hensgen and Rose Hensgen and that they were living togethr as husband and wife and were generally reputed to have been legally married; that the said Thelma Hensgen Neal, together with Walter A. Smith, visited the home of Nicholas C. Hensgen and Rose Hensgen on several occasions and that at no time prior to the death of Nicholas C. Hensgen did Thelma Hensgen Neal claim or inform Rose Hensgen of any alleged invalidity of said marriage; that the said Thelma Hensgen Neal at no time prior to the death of Nicholas C. Hensgen took any steps to have her own remarriage to Walter A. Smith set aside as unlawful; that the said Thelma Hensgen Neal at no time protested against the said marriage of Nicholas C. Hensgen and Rose Hensgen or their relationship as husband and wife; that over five years have elapsed since the granting of the Mexican decree of divorce and the remarriage of the parties until the commencement of this action. All of which was to the prejudice of defendant Rose Hensgen."

In accordance with such findings, the court decreed that Rose Silberman, also known as Rose Hensgen, is entitled to the proceeds of a certain life insurance policy in the sum of $6,993.50, now on deposit in the registry of the court; and that the following described personal property is the sole and separate property of defendant Rose Silberman, and that none of the plaintiffs has any right, title or interest therein:

(a) Joint savings account in name of Nicholas C. Hensgen or Rose Hensgen, at Bank of America, 7th & Spring Sts., Los Angeles, in the sum of $451.21;

(b) Joint savings account in name of Nicholas C. Hensgen at Metropolitan Federal Savings and Loan Association, Los Angeles, in the sum of $1462.12;

(c) War bonds in name of Nicholas C. Hensgen or Rose Hensgen of the value of $1668.75;

(d) Household furniture and furnishings, execept for one Crosley Shelvador electric refrigerator, located at 2445 Corinth Avenue, West Los Angeles, California.

It was also decreed that plaintiff Esther Hensgen, as special administratrix with general powers of the Estate of Nicholas Carl Hensgen, deceased, is entitled (1) to possession of that certain Crosley Shelvador electric refrigerator now in custody of Rose Hensgen; (2) to judgment against Rose Hensgen for the sum of $100 in lieu of the mechanics' tools disposed of by the latter, delivery of possession thereof being impossible; further, that plaintiff Esther Hensgen, as special administratrix, and defendant Rose Hensgen are each entitled to an undivided one-half interest as tenants in common in and to a 1939 Lincoln Zephyr automobile.

It is here asserted by appellants that, since the Mexican decree of divorce is illegal and ineffective, no estoppel arises against the first wife by reason of her subsequent remarriage under the circumstances here presented, and that estoppel as a defense to an action to recover community property is not available to the purported second wife, who had knowledge of the Mexican divorce.

In Re Estate of Hensgen, 80 Cal.App.2d 78, 181 P.2d 69, the same parties, Rose Silberman Hensgen and Thelma Hensgen Neal, each asserting to be the widow of Nicholas Carl Hensgen, claimed the right to administer his estate. In that case, this court held that the Mexican decree of divorce was a nullity; therefore, no rights could accrue to Rose Hensgen as widow, and that Thelma Hensgen Neal was not estopped to attack such void decree by reason of her acquiescence therein.

It was there stated 80 Cal.App.2d at page 80, 181 P.2d at page 71: "Appellant, however, contends that respondent Thelma Hensgen is estopped from attacking the validity of the former's marriage to decedent. We are not unmindful of the cases holding that a party may be estopped to assert the invalidity of a divorce decree secured by or acquiesced in by him (at least when he seeks by such assertion to secure property rights, as distinguished from a determination of marital status), even though such decree be void for want of jurisdiction. Harlan v. Harlan, supra (70 Cal.App.2d 657, 660, 661; 161 P.2d 490); In re Estate of Davis', 38 Cal.App.2d 579, 585, 101 P.2d 761, 102 P.2d 545; Starbuck v. Starbuck, 173 N.Y. 503, 66 N.E. 193, 194, 93 Am.St.Rep. 631; Brown v. Brown, 266 N.Y. 532, 195 N.E. 186; Chapman v. Chapman, 224 Mass. 427, 113 N.E. 359, L.R.A.1916F, 528; Querze v. Querze, 290 N.Y. 13, 47 N.E.2d 423; note 122 A.L.R. 1321; 153 A.L.R. 941 (note); 17 Am.Jur. 575. Neither are we unmindful of the rule that where the question in controversy relates to the property rights or pecuniary interest of the parties as distinguished from their marital status, the doctrine of estoppel is applicable under circumstances properly calling for its application. But the instant proceeding is not of the character first above mentioned. This is not a proceeding to determine heirship. It involves the appointment of an administratrix. The filing of a contest squarely presented to the court the question of determining the marital status of the parties claiming the right of appointment as administratrix, viz., who was the legal wife of decedent at the time of his death? Any estoppel imposed upon respondent Thelma Hensgen would not make valid appellant's marriage to the decedent, and it was the validity of that marriage that was before the court for determination. * * * Furthermore, it might here be pointed out that respondent Thelma Hensgen is not seeking through this proceeding to gain any pecuniary benefit, as is evidenced by the fact that she has nominated respondent Esther Hensgen for appointment as administratrix, and Esther Hensgen had pending in the probate court her petition for appointment as guardian of the estates of the minor children of the decedent and respondent Thelma Hensgen."

[1-3] In Re Estate of Davis', 38 Cal.App.2d 579, 584, 101 P.2d 761, 763, 102 P.2d 545, the decedent urged respondent to go to Nevada, establish a residence for the sole purpose of securing a divorce, and then to marry him. He paid the costs and expenses of the divorce and went to Reno and took an active part in the preparation of the case, and married respondent on the day the divorce was granted. Upon the death of Mr. Davis his heir attacked the validity of respondent's divorce and subsequent marriage to Mr. Davis. The court held that because of Mr. Davis' part in procuring the Nevada divorce decree for respondent he would have been foreclosed from denying the validity thereof or the subsequent marriage under the doctrine of quasi estoppel, and that his heir was in no better position. In the cited case, the court stated:

"The accepted rule, free from emotionalism, is found in 'Restatement of the Law of Conflict of Laws', Sec. 112, as follows: 'The validity of a divorce decree cannot be questioned in a proceeding concerning any right or other interest arising out of the marital relation, either by a spouse who has obtained such decree of divorce from a court which had no jurisdiction, or by a spouse who takes advantage of such decree by remarrying.'

"The California doctrine is based upon subdivision 3 of section 1962 of the Code of Civil Procedure, which prohibits a party from denying an act which he has deliberately led another to believe and act upon as true. Though ignorance of the truth is a primary essential on the part of the one pleading an estoppel in pais, our courts have recognized another species of estoppel, called 'quasi-estoppel,' which is based upon the principle that one cannot blow both hot and cold, or that one 'with full knowledge of the facts shall not be permitted to act in a manner inconsistent with his former position or conduct to the injury of another'. 10 Cal.Jur., p. 645. McDanels v. General Ins. Co., 1 Cal.App.2d 454, 459, 36 P.2d 829. Another way of stating the same general principle (applicable directly to the instant case) is that one who has invoked the exercise of a jurisdiction within the general powers of the court cannot seek to reverse its orders upon the ground of lack of jurisdiction. 'The principle opposing such action is one of estoppel in the interest of a sound administration of the laws whereby the regularity or even validity of an act procured by one himself cannot be raised—not that the act is valid, for it may not be, and estoppel does not make valid the thing complained of but merely closes the mouth of the complainant. Spence v. State Nat. Bank, Tex.Com.App., 5 S.W.2d 754. The principle is known as the doctrine of acquiescence, often referred to as quasi estoppel.' Spohn Co. v. Bender, 18 Cal.App.2d 447, 451, 64 P.2d 152, 154."

[4] While much of the testimony of the two wives is contradictory in many respects, nevertheless, it clearly establishes, as the trial court found, that at no time subsequent to the date of the Mexican decree, i.e., December, 1940, and prior to decedent's death on December 24, 1945, did appellant Thelma Hensgen Neal question or take any action to assert the invalidity of the Mexican divorce. She permitted respondent Rose Silberman to hold herself out as the lawful wife of decedent and to incur the benefits and obligations incident to a valid marriage. If, as testified by said appellant, decedent told her in 1943 that she was not legally married to Walter A. Smith because of the invalidity of the Mexican divorce, it was incumbent upon her to disclose such fact to Rose Silberman so that the latter could have taken steps to legalize her marriage to decedent. Instead, said appellant Thelma Hensgen Neal failed to act and respondent Rose Silberman continued to live with her purported husband, caring for him as a dutiful spouse under the belief that she was validly married to him, working and pooling her earnings with his in order to contribute to their joint savings and to enhance what she was led to believe was their community property.

In view of the foregoing, upon the simplest principles of equitable estoppel, appellants cannot now be heard to question the validity of the Mexican divorce decree for the sole purpose of sharing in the property accumulated by decedent and respondent Rose Silberman during the years they lived together as husband and wife.

For the reasons stated, the judgment appealed from is affirmed.

DORAN and WHITE, JJ., concur.

---

87 Cal.App.2d 643

DE SYLVA et al. v. BALLENTINE et al.
DE SYLVA et al. v. DE SYLVA.

Civ. 16237.

District Court of Appeal, Second District,
Division 3, California.

Sept. 20, 1948.

Hearing Denied Nov. 18, 1948.

Bastards 🔑75

In action to determine amount payable by plaintiff for his illegitimate infant son's support, Superior Court had jurisdiction to modify its order, requiring plaintiff to pay specified sum monthly and counsel fees pending appeal from order to pay support money, counsel fees and costs pendente lite, by reducing amount of attorneys' fees for services on appeal. Civ.Code, §§ 137, 196a.

◆

Appeal from Superior Court, Los Angeles County; Fred Miller, Judge.

Action by George G. DeSylva and another against Marie Ballentine, also known as Marie Ballentine Moskovita, and named plaintiff's illegitimate son, Stephen William DeSylva, sued as Stephen William Ballentine, an infant, by his guardian ad litem, to determine the amount which such plaintiff should pay for defendant infant's support, in which defendants filed a cross-complaint against named plaintiff. From an order modifying an order awarding cross-complainants counsel fees pending determination of an appeal from an order awarding support money and counsel fees pendente lite, cross-complainants appeal.

Affirmed

Fink, Rolston, Levinthal & Kent, of Los Angeles, for appellants

Tacht, Warne, Ross, & Bernhard and Isaac Pacht and Bernard Reich, all of Beverly Hills, for respondent

VALLEE, Justice

Appeal from an order modifying a prior order awarding counsel fees to appellants with which to respond to an appeal from an order which awarded support and counsel fees pendente lite. The action was brought by respondent to have the court determine the amount he, as father of an infant born out of wedlock, should pay the infant's mother for his support and maintenance

On May 7, 1947, an order was made requiring respondent to pay $750 per month for the support of the infant and to pay $5,000 counsel fees, and $750 costs, pendente lite. On May 8, 1947, respondent filed a notice of appeal from the order made the previous day On May 12, 1947, appellants filed an application for support money, counsel fees and costs pending determination of the appeal On May 13, 1947, an order was made requiring respondent to pay $750 per month for the support of the infant pending the appeal, $1,500 counsel fees for services on the appeal, and the actual costs of the appeal

On May 20, 1947, respondent filed an abandonment of his appeal pursuant to Rule 38 of the Rules on Appeal. 22 Cal.2d 1, 27. On June 9, 1947, pursuant to a notice of motion, an order was made modifying the order of May 13, 1947, by reducing the amount of attorneys' fees for services upon the appeal from $1,500 to $250. From this latter order the infant and his mother appealed.

Appellants contend that the trial court did not have jurisdiction to modify the order of May 13, 1947, with respect to counsel fees already accrued and that the order reducing the counsel fees from $1,500 to $250 was void. The contention is without semblance of merit. That the court had jurisdiction to make the order in question was determined in Glesby v. Glesby, 73 Cal.App. 2d 301, 166 P.2d 347, which was an appeal from an order reducing an award of counsel fees. In the Glesby case this court said, 73 Cal.App.2d at page 306, 166 P.2d at page 350: "The third and last contention of the appellant,—that a modification of an order for attorney's fees cannot be validily based upon a change of circumstances, seems to be adequately disposed of by the short opinion in Nightingale v. Superior Court, 1920, 184 Cal. 583, 194 P. 1002, where an application for a writ of certiorari to review an order modifying an order concerning counsel fees in a divorce action was denied. There the court said: 'We entertain no doubt of the power of the court in divorce actions to modify its orders for the payment to the wife of money necessary to enable her to support herself during the pendency of the action, or to enable her to prosecute or defend the action, as the circumstances with regard to necessity change. As to orders for the payment of money for support there has never been any question in this behalf, and there is no difference in principle with relation to money to be paid to her for the purpose of enabling her to pay attorneys.' It is clear to us that the trial court had power to make the modifying order, and that due to the change of circumstances it was appropriate and reasonable." See also Chester v. Chester, 76 Cal.App.2d 265, 272, 172 P.2d 924. The power of the court in an action to determine the amount to be paid for the support of an infant born out of wedlock is the same as in a divorce action. (Civ.Code, sec. 196a.) Civil Code sections 196a and 137 expressly authorize the court to vary, alter or revoke an order, such as that of May 13, 1947, at its discretion.

The equities of the case argued by appellants do not concern us. It is not contended that the court abused its discretion. Upon the abandonment of the appeal, filed twelve days after the appeal was taken, all that the attorneys for the respondents on that appeal (appellants here) had to do was "to gather up their briefs and retire." Reynolds v. Reynolds, 67 Cal. 176, 177, 7 P. 480, 481.

Order affirmed.

SHINN, P. J., and WOOD, J., concur.

---

87 Cal.App.2d 690

WHELAN v. WHELAN.

Civ. 3933.

District Court of Appeal, Fourth District, California.

Sept. 22, 1948.

1. Divorce 🔑211, 286

Granting or refusing of alimony in actions for divorce is largely in trial court's discretion, and before appellate courts will interfere, it must be made clearly and affirmatively to appear on face of entire record that discretion has been abused. Civ. Code, § 137.

2. Divorce 🔑209, 221

The purpose of allowances to a wife for alimony pendente lite, counsel fees, and court costs are to enable wife to live in her accustomed manner pending disposition of divorce action and to provide her with necessary funds for attorney's fees and costs in order to present her case properly. Civ. Code, § 137.

3. Divorce 🔑209, 221

A wife who has brought an action for divorce, is not required first to impair capital of her separate estate before she is entitled to alimony pendente lite, counsel fees, and court costs, but if she possess independent means sufficient for such purposes, allowances should not be granted and there must be sufficient showing of her need for them. Civ. Code, § 137.

4. Divorce 🔑214(3), 226

A wife seeking alimony pendente lite, counsel fees, and court costs in a divorce action, must show her needs and the husband's ability to pay. Civ. Code, § 137.

5. Divorce 🔑209, 215

The circumstances of parties to divorce action, including the property which each possesses, and their respective incomes and earning abilities, as well as their needs are to be considered in determining the amount and necessity of temporary alimony. Civ. Code, § 137.

6. Divorce 🔑211

Where pregnant wife alleged in her complaint in divorce action that she was without funds to support herself or to prosecute action and that husband earned $2,000 a month, but admitted that she had separate funds amounting to $1,400 and bonds worth about $3,000, and community funds amounting to $1,640, and husband alleged in his answer that during ten months when parties lived together he gave wife in excess of $6,400 in cash in addition to $100 a week for personal spending money, an allowance of temporary alimony of $30 a week, without requiring wife to exhaust funds held by her was not an abuse of discretion. Civ. Code, § 137.

Appeal from Superior Court, San Diego County; Joe L. Shell, Judge.

Action for divorce by Margaret L. Whelan against Thomas Whelan, wherein defendant filed a cross-complaint. From an order directing defendant to pay plaintiff $30 a week for alimony pendente lite, $250 for counsel fees, and $20 for costs, the defendant appeals.

Order affirmed.

Sweet, Ault & Warner, of San Diego, for appellant.

Luce, Forward, Kunzel & Scripps, of San Diego, for respondent.

MUSSELL, Justice.

In this action for divorce the defendant appeals from an order of the Superior Court directing him to pay plaintiff the sum of $30 per week as and for alimony pendente lite for the support of herself, and the further sum of $250 for counsel fees, and for $20 costs. It was further ordered that defendant pay to plaintiff all reasonable fees, expenses and charges in relation to the birth of the unborn child of plaintiff and defendant. An order to show cause was issued on the verified complaint and the hearing had on affidavits of the parties.

In the amended complaint plaintiff alleges that she is without money or funds with which to support herself or prosecute this action; that defendant is an able-bodied man, an attorney at law, with a lucrative practice, and derives an income therefrom, the exact amount of which is unknown to plaintiff; that plaintiff is informed and believes, and on that ground alleges that defendant earns and is capable of earning approximately $2,000 per month, and is able to pay a reasonable monthly sum for the support and maintenance of plaintiff and her attorney fees.

Defendant filed an answer to the amended complaint, together with a cross-complaint for divorce. He denied that plaintiff was without money or funds with which to support herself or prosecute the action. In his affidavit, filed in opposition to the order to show cause, defendant stated that plaintiff had ample funds of her own from which to support and maintain herself and pay her counsel fees and costs; that during the marriage of the parties he gave plaintiff a weekly allowance of $100 for her own use; that in addition to this allowance he paid all of the household and living expenses; that during the marriage defendant gave plaintiff in excess of $5,500 in cash, and gave her a check for $900 on the day the complaint was filed. He further stated that he gave plaintiff 200 shares of stock in the San Diego Gas & Electric Company of the approximate value of $3,000; that plaintiff had four separate bank accounts in her own name in which there was deposited a considerable amount of cash.

Plaintiff in her counter affidavit stated that the total amount of the payments to her during the marriage was the sum of $3,000 out of which she paid the household expenses; that she received and cashed the check for $900 and has used the money for living expenses since the separation of the parties. Plaintiff admitted that she had property in her possession as follows: 200 shares of stock in the San Diego Gas & Electric Company of the approximate value of $2,800; one account of $200 in the Bank of America, La Mesa Branch, containing the remainder of the $3,000 expense money; another in the Bank of America of $1,640, which she alleged was community funds of the parties; the further sum of $1,400 in two other banks, which money she alleged was her separate property and owned by her before her marriage; also six shares of the common stock of Dresser Industries of the approximate value of $130. The total property, both community and separate, admitted to be in her possession amounted to approximately $6,170.

It is the sole contention of defendant that under the facts the court abused its discretion in ordering him to pay alimony pendente lite, medical expenses, costs and counsel fees.

Section 137 of the Civil Code provides in part as follows: "When an action for divorce is pending, the court may, in its discretion, require the husband * * * to pay as alimony any money necessary to enable the wife * * * to support herself and her children, * * * or to prosecute or defend the action."

[1] In Baldwin v. Baldwin, 28 Cal.2d 406, at page 413, 170 P.2d 670, at page 674, the court said: "The rule has also been declared that 'The granting and refusing of alimony in actions for divorce is a matter which lies largely in the discretion of the trial court. * * * Before the appellate courts will interfere, it must be made clearly and affirmatively to appear upon the face of the entire record in the case that the discretion has been abused.' (1 Cal.Jur. 1012, § 64.)"

[2, 3] The purpose of allowances to a wife for alimony pendente lite, counsel fees and court costs are to enable her to live in her accustomed manner pending the disposition of the action and to provide her with necessary funds for attorney's fees and costs to properly present her case. Loeb v. Loeb, 84 Cal.App.2d 141, 190 P.2d 246. She is not required to first impair the

capital of her separate estate. If she possesses independent means sufficient for these purposes the allowances should not be granted and there must be sufficient showing of her need for them. Loeb v. Loeb, supra.

[4, 5] The plaintiff must show her needs and the ability of defendant to pay. The circumstances of the parties, including the property which each possesses, their respective incomes and earning abilities, as well as their needs, are to be considered in determining the amount and the necessity of temporary alimony. Sweeley v. Sweeley, 28 Cal.2d 389, 391, 170 P.2d 469.

[6] Plaintiff alleges in her complaint that she "is without money or funds with which to support herself or to prosecute this action;" that of the weekly allowance of $100 which she received during the marriage she saved $200; that in addition thereto she has separate funds amounting to $1,400 and community funds amounting to $1,640. Defendant in his answer alleges that during the time the parties lived together, approximately ten months, he gave her in excess of $6,400 in cash, in addition to $100 per week for her personal spending money. It is apparent that to enable plaintiff to live in her accustomed manner, a sum considerably in excess of the amount allowed by the trial court would be necessary, especially in view of plaintiff's pregnancy. While it is true that there must be a showing of necessity (Patton v. Patton, 32 Cal.2d 520, 196 P.2d 909) the allowance of $30 per week to plaintiff, considering present living costs, would not be sufficient to provide her with more than the bare necessities.

Defendant does not deny the allegation that he earns and is capable of earning approximately $2,000 per month from the practice of his profession. Nor does he allege that he is unable to comply with the order of the court. He argues that plaintiff is required to use the funds in her possession before she is entitled to an order for support pendente lite.

Under the facts presented, we conclude that plaintiff is not required to exhaust the funds presently held by her before seeking support from her husband.

In Buehler v. Buehler, 73 Cal.App.2d 472, at page 475, 166 P.2d 608, at page 610, the court said: "The law is settled in California that when a wife is the owner of nonincome producing property she is not required to have recourse to such property for her support before seeking support from her husband. (Farrar v. Farrar, 45 Cal.App. 584, 586, 188 P. 289; Busch v. Busch, 99 Cal.App. 198, 200, 278 P. 456.)"

The award made was not disproportionate to the needs and assets of the respective parties and therefore not an abuse of discretion.

The order is affirmed.

GRIFFIN, Acting P. J., concurs.

87 Cal.App.2d 524

UNION PAC. R. CO. v. ZIMMER.

Civ. 16150.

District Court of Appeal, Second District, Division 3, California.

Sept. 13, 1948.

Hearing Denied Nov. 8, 1948.

1. Courts 🔑361, 365(3)

Validity and legal effect of a release from liability under the Federal Employers' Liability Act are governed by federal rather than by state law as to which decisions the federal courts are controlling. Federal Employers' Liability Act, §§ 1–10, 45 U.S.C.A. §§ 51–60, 55.

2. Release 🔑1

A release by an employee of an employer for injuries for a substantial consideration including those injuries if any which are unknown and which may thereafter appear is not violative of the Federal Employers' Liability Act providing that a contract to enable carrier to exempt itself from liability created by the act shall be void. Federal Employers' Liability Act, § 5, 45 U.S.C.A. § 55.

3. Release ⚷16, 58(5)

A release of a claim for personal injuries may be avoided on the ground of mutual mistake as to the nature or seriousness of the injury and the question is normally one for the trier of facts.

4. Release ⚷23

Mere fact that a release is extremely comprehensive and purports to be a complete discharge from all claims arising out of the accident and is understood as such by the releasor will not prevent its avoidance where proper grounds therefor exist.

5. Release ⚷17(2)

Where an employee was told that his injured arm would be all right, would not be stiff and that he would have a good arm, which statements were made by examining physician, declarations were not opinions as to future developments but were expressions of fact as to the seriousness of the injury and present condition of the patient authorizing release to be set aside where the statements were erroneous.

6. Release ⚷57(2)

Evidence justified the setting aside of employee's release of employer for injuries to his arm where both parties shared a mistaken understanding that condition of the arm was not serious and that disability resulting therefrom might be of a reasonably short duration and where in view of subsequent developments the payment made equalled only a few months of lost wages. Federal Employers' Liability Act, § 5, 45 U.S.C.A. § 55.

7. Release ⚷21

Fundamental test of "ratification" by conduct is whether releasor with full knowledge of material facts entitling him to rescind has engaged in some unequivocal conduct giving rise to an inference that he intended his conduct to amount to a ratification.

See Words and Phrases, Permanent Edition, for all other definitions of "Ratification".

8. Release ⚷21

The use or retention of the settlement proceeds by one sui juris executing a release for personal injuries who has knowledge of the material facts ratifies an otherwise voidable release if the retention is for an unreasonable time under the circumstances.

9. Release ⚷58(1)

Whether releasor has knowledge of material facts amounting to the ratification of an otherwise voidable release and whether retention of the proceeds thereof has been for an unreasonable length of time so as to amount to ratification of the release are normally questions for the trier of fact.

10. Release ⚷21

Injured railroad employee did not ratify release for injuries which subsequently turned out to be permanent by spending the proceeds of the settlement, where there was uncertainty in employee's mind as to his ultimate recovery due to statements of examining physicians that his arm would be all right and employer's superintendent had indicated a further substantial payment to the employee would be recommended. Federal Employers' Liability Act, § 5, 45 U.S.C.A. § 55.

11. Release ⚷21

Injured railroad employee's execution of an affidavit respecting the execution of a release of the employer negating the existence of fraud in reaching settlement did not constitute an express "ratification" of the release so as to preclude a seasonable rescission on the ground of a mutual mistake of fact as to the seriousness of the employee's injuries. Federal Employers' Liability Act, § 5, 45 U.S.C.A. § 55.

12. Appeal and error ⚷1008(1)

Where appellate court could not say as a matter of law that injured employee retained proceeds of settlement for such an unreasonably long period of time after becoming fully cognizant of the seriousness of his injury entitling him to rescind as to amount of the ratification of the release, trial court's findings on that issue could not be disturbed.

◆

Appeal from Superior Court, Los Angeles County; William D. Dehy, Judge Assigned.

Action by the Union Pacific Railroad Company against Lawrence Zimmer for declaration of rights under a release. From the judgment, the plaintiff appeals.

Affirmed.

E. E. Bennett, Edward C. Renwick and Malcolm Davis, all of Los Angeles, for appellant.

Hildebrand, Bills & McLeod and Sheridan Downey, Jr., all of Oakland, for respondent.

SHINN, Presiding Justice.

In March, 1941, while working as a switchman in the Union Pacific Railroad yards at Cheyenne, Wyoming, respondent Lawrence Zimmer sustained a fractured left elbow under circumstances concededly giving rise to a cause of action in his favor against his employer, Union Pacific Railroad Company, under the Federal Employers' Liability Act, 45 U.S.C.A. §§ 51–60. On the second day after the accident, respondent's arm was operated on by Dr. Fox, a surgeon in the employ of the railroad, and was placed in a cast. About May 6, Dr. Fox removed the cast, and told respondent, "Your arm isn't going to be stiff. Your arm is all right. You go down to Omaha, they want to see you; get it settled up and get back to work." Respondent proceeded to Omaha, where, on May 12, he met Harry I. Benon, who on a prior occasion had represented that he was associated with attorneys for the Brotherhood of Railway Trainmen, and had offered to help respondent reach a settlement with the railroad. Benon took respondent to the office of Dr. Fouts, a private physician, for an examination which included the taking of X-rays. Dr. Fouts told respondent that it would take some time, but that he "would have a good arm." A written report of this examination, which respondent read, disclosed that he had an ununited fracture of the olecranon process of the left ulna, and that bony union had not yet occurred. The report concluded with these words: "This man has not reached the maximum improvement. It is less than 8 weeks since his operation, and the arm is still sore. He has a fairly good range of motion and good flexion strength. The extension is somewhat weak. This will improve as time goes on and the soreness gets out of the elbow. In my opinion he will not have reached his maximum improvement until 3 or 4 months from this date."

Respondent and Benon next went to the railroad's claim department, and claim agent Oberlander took them to the office of two company surgeons, Drs. Nilsson and Langdon, for an examination of respondent's arm. These doctors took further X-rays and viewed the arm through a fluoroscope, but refused to discuss the injury. Dr. Nilsson, however, told respondent, "Your arm will come out all right," and Dr. Langdon said, "I can't say anything; but you will have a good arm anyway." The latter also stated that he agreed with Dr. Fouts' report. On the following day, May 13, 1941, respondent and Benon engaged in an all-day bargaining session with Oberlander, which resulted in a settlement of $965, and a release was then executed. By its terms, this instrument purported to release Union Pacific Railroad Company "from all claims and causes of action that now exist or may hereafter accrue, for damages for any and all personal injuries, including those injuries, if any, which are unknown to me at the present time and which may hereafter appear, and for complications arising from all injuries or treatment thereof, whether such injuries are known or unknown * * * and I do hereby release all claims for all my injuries, though such injuries are other and greater than I now believe them to be and though Union Pacific Railroad Company may be absolutely liable therefor." Near the bottom of the instrument, in the handwriting of respondent, appear the words, "I have read the foregoing receipt, release, and contract and fully understand the same," followed by his signature.

In July, 1941, respondent attempted to return to work, but was unable to perform his duties as a switchman because of the impaired condition of his left arm. He was then sent to Denver, where Dr. Grieg, another company surgeon, operated on the elbow and wired it in an attempt to bring about a union of the broken bone. This operation was unsuccessful, for the wires subsequently broke. Another operation in December, 1941, likewise was unsuccessful. At the time of the trial, the fracture was still ununited, resulting in an apparently permanent partial disability of the left arm.

In January, 1942, respondent again called on plaintiff's claim agent in Omaha with a view to obtaining further compensation. The agent prepared an affidavit, to be referred to in greater detail hereafter, which respondent signed. Later, negotiations were continued at Cheyenne, during which Mr. Stoddard, the local superintendent, told respondent that he wanted to see him "get a square deal," and that he thought the company would be willing to approve an additional payment of $2,500 or $2,600 for the additional wages lost by respondent. No such adjustment was ever consummated, however.

Meanwhile, respondent had been gradually spending the original settlement proceeds for living expenses, and these funds were exhausted by June, 1942. On June 20, he contacted his present attorney who, on July 7, by letter, tendered repayment of the consideration and interest thereon, and attempted to rescind the release on the grounds of fraud and mistake. The tender was refused, and Union Pacific Railroad Company subsequently brought this action, pursuant to section 1060 of the Code of Civil Procedure, for a declaration of its rights under the release. The trial court found in favor of appellant on the issue of fraud, but determined that the release was not valid and binding for the reason that it was entered into under a mutual mistake of fact as to the seriousness and duration of respondent's injury, and that it had been effectively rescinded. From the judgment entered upon these findings, Union Pacific Railroad Company brings this appeal.

[1] We are presented at the outset with the question of which law the California court should apply in determining the validity of this release, whether the law of the forum, the law of the place of execution, or federal law. Ever since the Supreme Court, in Garrett v. Moore-McCormack Co., 317 U.S. 239, 63 S.Ct. 246, 87 L.Ed. 239, decided that the federal admiralty rule governed the burden of proof of establishing a release in an action brought in a state court under the Jones Act, 46 U.S.C.A. § 688, it has been uniformly held that the validity and legal effect of a release from liability under the Federal Employers' Liability Act, 45 U.S.C.A. §§ 51–60, are also governed by federal rather than state law. Ricketts v. Pennsylvania R. Co., 2 Cir., 153 F.2d 757, 759, 164 A.L.R. 387; Irish v. Central Vermont Ry., 2 Cir., 164 F.2d 837, 839; Thompson v. Camp, 6 Cir., 163 F.2d 396, 400. This rule is in harmony with the policy of uniform interpretation embodied in the established doctrine that general legal principles governing rights and liabilities under the Federal Employers' Liability Act are matters of federal law as to which the decisions of federal courts are controlling, Chesapeake & O. R. Co. v. Kuhn, 284 U.S. 44, 52 S.Ct. 45, 76 L.Ed. 157; Weiand v. Southern Pac. Co., 34 Cal.App.2d 500, 504, 93 P.2d 1023; King v. Schumacher, 32 Cal.App.2d 172, 177, 89 P.2d 466, and we adopt it as a basis for the present decision.

[2] The United States Supreme Court has recently held, contrary to respondent's contention, that releases such as the one presently being considered are not violative of section 5 of the Federal Employers' Liability Act, 45 U.S.C.A. § 55, which provides that any contract to enable any carrier to "exempt itself from any liability created by this chapter, shall to that extent be void". Callen v. Pennsylvania R. Co., 332 U.S. 625, 68 S.Ct. 296, 92 L.Ed. 242. A majority of the court in the Callen case, which was decided subsequent to the filing of respondent's brief herein, also expressly rejected a contention similar to that made by respondent, that releases under the Act should, by reason of a claimed analogy, be construed by reference to the somewhat more favorable rules of decision which admiralty courts have traditionally applied to invalidate releases executed by seamen, the so-called "wards of admiralty". See Hume v. Moore–McCormack Lines, 2 Cir., 121 F.2d 336. The court held that such a change in the law could be made only by Congress, and until

Congress should so act, "the releases of railroad employees stand on the same basis as the releases of others." [332 U.S. 625, 68 S.Ct. 298]

[3, 4] Many decisions in both federal and state courts have affirmed the principle that a release of a claim for personal injuries may, under proper circumstances, be avoided on the ground of mutual mistake as to the nature or seriousness of the injury. See cases cited in Annotation 117 A.L.R. at p. 1030. Each case, of course, must be considered on its own facts, and the question of mutual mistake is normally one for the trier of fact. 45 Am.Jur., Release, sec. 49, p. 708. It is well settled, however, that the mere fact that the release is extremely comprehensive in terms, and purports to be a complete discharge from all claims arising out of the accident, and is understood as such by the releasor, will not prevent its avoidance where proper grounds therefor exist. Tulsa City Lines v. Mains, 10 Cir., 107 F.2d 377, 381; Atlantic Greyhound Lines v. Metz, 4 Cir., 70 F.2d 166, 168; see also Bonici v. Standard Oil Co., 2 Cir., 103 F.2d 437, 438; Southwest Pump & Machinery Co. v. Jones, 8 Cir., 87 F.2d 879; Great Northern R. Co. v. Reid, 9 Cir., 245 F. 86. Accord: Hudgins v. Standard Oil Co., 136 Cal.App. 44, 28 P.2d 433; Rider v. Kansas City Terminal R. Co., 112 Kan. 765, 212 P. 678.

[5] Appellant's chief contention is that the evidence fails to disclose any mistake as to present or past facts, and on the contrary does show only mistaken opinions as to the future outcome of a known injury. We think the facts presented cannot be classified in such an unequivocal fashion. Initially it may be noted that appellant appears to have overlooked Dr. Fox's flat statement, "Your arm is all right," which, considered with the accompanying direction to "get it settled up and get back to work," would be difficult to construe in any sense other than as an assertion as to the then existing condition of the injured member. Moreover, the statements made by Drs. Fox, Nilsson, and Langdon to the effect that respondent's arm would not be stiff, that it would come out all right, and that he would have a good arm, need not be interpreted solely as declarations of opinion as to future developments, but may also be fairly understood, by way of reasonable implication, as expressions of fact as to the seriousness of the injury sustained and the present condition of the patient. Dr. Fouts' written report was clearly susceptible of a like interpretation, particularly when considered in relation to his oral statement that respondent would have a good arm. Respondent testified that he understood the words, "maximum improvement," as contained in the written report, to mean "will be all right." As was said in Scheer v. Rockne Motors Corporation, 2 Cir., 68 F.2d 942, 945 (holding a release voidable for mutual mistake), "There is indeed no absolute line to be drawn between mistakes as to future, and as to present facts. To tell a layman who has been injured that he will be about again in a short time is to do more than prophesy about his recovery. No doubt it is a forecast, but it is ordinarily more than a forecast; it is an assurance as to his present condition, and so understood." See also, Tulsa City Lines v. Mains, 10 Cir., 107 F.2d 377, 381.

[6] The facts presented strongly repel the suggestion that the railroad intended the single payment of $965 to purchase absolution from an injury as serious and permanent as the present one subsequently turned out to be. The apparent willingness of the company officials to negotiate for a further settlement in the early part of 1942, on the basis of additional time lost, lends weight to this view. On the other hand, it is inconceivable that respondent would have accepted a sum equal to a few months lost wages in full settlement for a permanently disabling injury. We think the evidence as a whole supports the conclusion that both parties shared a mistaken understanding that the condition of respondent's arm was not serious, but was such that any temporary disability resulting therefrom would be of reasonably short duration. On this showing, relief was properly granted. See Steele v. Erie R. Co., D.C.N.Y., 54 F.2d 688, 689; Scheer v. Rockne Motors Corporation, supra; Thompson v. Camp, 6 Cir., 163 F.2d 396, 401; Great Northern R. Co. v. Fowler, 9 Cir., 136 F. 118; Lion Oil

Refining Co. v. Albritton, 8 Cir., 21 F.2d 280.

Appellant relies upon Harmon v. United States, 5 Cir., 59 F.2d 372, Chicago & N. W. Ry. Co. v. Wilcox, 8 Cir., 116 F. 913, and Sitchon v. American Export Lines, 2 Cir., 113 F.2d 830, as requiring a contrary conclusion. We think none of these cases is controlling. The release in the Harmon case was attacked on the ground of incapacity of the releasor, and no issue of mistake was involved. In the Wilcox case, the court held a release to be binding on the ground that the evidence was insufficient to support a finding of mutual mistake, where the plaintiff, who had sustained a badly broken femur, was fully informed of the serious nature of her injury, and was told by her physician that there was no certainty of recovery, and that injuries like hers generally resulted in permanent disability. The facts of that case manifestly go far beyond those presently being considered. In holding a release to be binding, the court in the Sitchon case apparently regarded as controlling the fact that it had been executed solely on the basis of the independent advice of the releasor's own physician and attorney, with no representations whatsoever having been made by company doctors. The opinion on this point is not persuasive, for, on principle, it would seem immaterial what the source of the information giving rise to a mutual mistake might be. Tulsa City Lines v. Mains, supra, 107 F.2d 377, 382. In any event, it is apparent that the court was there confronted with a situation quite different from that in the case at bar, and the decision is not controlling. We hold the finding that the present release was entered into on the basis of a mutual mistake of material fact to be fully supported by the evidence.

Appellant next contends that the release is nevertheless an existing and binding contract on the ground that any right which respondent may have originally had to rescind it was extinguished by an implied ratification thereof by conduct (see 12 Am. Jur. 508, 1030) prior to respondent's letter and tender of repayment in July, 1942, which, it is conceded, would have otherwise constituted a sufficient rescission. As proof of such ratification, reliance is placed chiefly on the continued retention and spending of the proceeds of settlement by respondent long after it is claimed he became fully cognizant of the facts upon which the subsequently attempted rescission was predicated.

[7-9] The fundamental test of ratification by conduct is whether the releasor, with full knowledge of the material facts entitling him to rescind, has engaged in some unequivocal conduct giving rise to a reasonable inference that he intended the conduct to amount to a ratification. 23 R.C.L. 390, quoted in Smallwood v. St. Louis–San Francisco R. Co., 217 Mo.App. 208, 263 S.W. 550, 558; Mensforth v. Chicago Brass Co., 142 Wis. 546, 126 N.W. 41, 42, 43, 512, 135 Am.St.Rep. 1084. In accordance with this rule, it is well-settled that the use or retention of the settlement proceeds by one sui juris who has knowledge of the material facts, will amount to a ratification of an otherwise voidable release if the retention is for an unreasonable time under the circumstances of the case. 45 Am.Jur., Release, sec. 25, p. 690; Annotation 76 A.L.R. 345. Whether the releasor has such knowledge, and whether retention has been for an unreasonable length of time, are normally questions for the trier of fact. See Komer v. Shipley, 5 Cir., 154 F.2d 861, 866; Capital Traction Co. v. Sneed, 58 App.D.C. 141, 26 F.2d 296; Marple v. Minneapolis & St. L. R. Co., 115 Minn. 262, 132 N.W. 333, 334, Ann.Cas. 1912D, 1082; Hannah v. Butts, 222 Mo. App. 1098, 14 S.W.2d 31, 38; Butler v. Gleason, 214 Mass. 248, 101 N.E. 371, 373. Cf. Chicago, St. P. & K. C. R. Co. v. Pierce, 7 Cir., 64 F. 293.

[10] The record fails to indicate exactly when respondent came to a realization that his elbow was not going to fully recover from its injury. The need for two operations subsequent to the execution of the release may have created some uncertainty in his mind as to the ultimate recovery, but mere uncertainty is not knowledge. The record justifies an inference that he did not become fully cognizant that the doctors upon whom he had relied in signing the release had been mistaken

about the seriousness of his injury, until a sufficient period of time had elapsed after the last operation to prove that it, too, had been unsuccessful. Furthermore, the statement made by appellant's superintendent during the discussions of January, 1942, that a further substantial payment to respondent would be recommended and probably approved, could have been properly considered by the court as bearing upon the issue of reasonableness of the retention of consideration thereafter.

[11] Appellant claims that respondent's affidavit, which was executed on January 15, 1942, at the request of appellant's claim agent, constituted an express ratification of the release. This affidavit contained inter alia, an account of the accident and of the circumstances preceding the execution of the release in suit, and stated: "The settlement made by Mr. Oberlander was up and above the board in every way—no settlement was made on time I would lose account the accident—settlement was up and above board and I was satisfied with the settlement, read over the release, fully understood it after I read it, and I knew it was a complete release of all claims for known and unknown injuries." This statement negates the existence of fraud in reaching the settlement, but in the absence of proof of full knowledge by respondent of the facts of the mistake it cannot be understood as an express ratification thereof so as to preclude a seasonable rescission on the latter ground. On the present record, the legal effect of the quoted statement can be at best no different from that of its counterpart in the release itself, which as we have seen, is no bar to a rescission.

[12] The cases cited by appellant do not require a different conclusion. Merwin v. New York, N. H. & H. R. Co., 2 Cir., 62 F.2d 803, clearly has no application to the present case, for there the evidence conclusively showed an express ratification on several different occasions by one with full knowledge of facts entitling him to rescind the release. Other cases cited, such as Colorado Springs & I. R. Co. v. Huntling, '6 Colo. 515, 181 P. 129, and Texas & P. Co. v. Poe, 131 Tex. 337, 115 S.W.2d 591, involved instances of incapacity or fraud in the execution of releases, the true facts of which very shortly thereafter became fully known to the respective releasors; and, on the undisputed evidence as to the length of time during which no offer of rescission or tender of repayment was made, it was held that the question of ratification was one for the court rather than for the jury. On the facts before us, however, we cannot say as a matter of law that respondent retained the proceeds of settlement for such an unreasonably long period of time after becoming fully cognizant of the facts entitling him to rescind, as to amount to a ratification of the release, and the trial court's implied findings on the issue may not be disturbed.

The judgment is affirmed.

WOOD and VALLÉE, JJ., concur.

87 Cal.App.2d 511

MURR v. MURR.

Civ. 16142.

District Court of Appeal, Second District, Division 3, California.

Sept. 13, 1948.

1. Bastards 🔑3

Presumption of legitimacy is conclusive only when birth of child comes within normal period of gestation, or if husband and wife were cohabiting and it was possible under laws of nature for husband to be father of child, though it may be shown that it was not possible by laws of nature for husband to be father, as by showing impotency on his part, or want of intercourse during possible period of conception. Code Civ.Proc. §§ 1962, subd. 5, 1963, subd. 31.

2. Bastards 🔑3

Where mother gave normal birth to mature child 190 days after first possible access to husband who was navy man home on leave, and birth certificate stated that pregnancy was a nine-months' pregnancy, presumption as to legitimacy of child was disputable. Code Civ.Proc. §§ 195, 1962, subd. 5, 1963, subd. 31.

3. Evidence ⚷383(4)

Under statutes providing that certified copy of birth certificate is prima facie evidence of facts stated therein, birth certificate itself was prima facie evidence that pregnancy was of nine months' duration where that fact was stated thereon and certificate was made by attending physician. Health and Safety Code, § 10551.

4. Divorce ⚷146

In husband's divorce action on ground of extreme cruelty specifying that wife bore illegitimate child, where mature child was born after gestation period of six months and ten days, a period one month shorter than shortest known period of gestation for such a birth, and birth certificate stated that birth showed nine months' pregnancy, trial court was required to accord husband fair and full opportunity to present evidence rebutting presumption of legitimacy. Code Civ.Proc. §§ 195, 1962, subd. 5, 1963, subd. 31.

5. Divorce ⚷140

Where husband sought divorce on ground of extreme cruelty, specifying that wife bore illegitimate child, and question of legitimacy included close questions pertaining to laws of nature and medical science, judge's comments that case should be tried in 10 or 20 minutes, unnecessary comments with respect to counsel's wasting time indicating that judge did not consider husband's issues worthy of consideration, remarks indicating that he had prejudged case and comments to effect that it was unimportant whether wife was impeached, indicating that judge refused to consider all evidence, deprived plaintiff of fair trial.

6. Divorce ⚷184(12)

In husband's divorce action on ground of extreme cruelty, trial judge's unjustified adjudging one of husband's witnesses guilty of contempt, sentencing her to jail, and calling her a liar prejudicially affected husband in presentation of case.

7. Divorce ⚷145

In husband's divorce action on ground of extreme cruelty, specifying that wife bore illegitimate child, where proposed evidence was material in that, if true, it would have indicated that wife was pregnant before husband who was in navy arrived home on leave, refusal of motion for continuance to enable husband to produce testimony by attending physician was abuse of discretion.

8. Divorce ⚷151

Where proffered testimony of attending physician based on newly found card record was material in determining whether wife was pregnant before husband returned home from navy on leave and to impeach her testimony that she first consulted doctor after husband had been home, and husband's attorney did not interview doctor prior to trial because he considered relationship between doctor and wife confidential at that time refusal to grant new trial on ground on newly discovered evidence was an abuse of discretion.

◆

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Nick N. Murr against Ida K. Murr for divorce on ground of extreme cruelty, wherein defendant filed a cross-complaint. From the judgment, plaintiff and cross-defendant appeals.

Judgment reversed, and cause remanded for new trial.

William A. Reppy, of Oxnard, for appellant.

Halverson & Halverson, of Los Angeles, for respondent.

WOOD, Justice.

Plaintiff commenced this action for divorce upon the ground of extreme cruelty, specifying that defendant gave birth to an illegitimate child on January 21, 1944 (about two years after the marriage). Defendant answered, denying the allegation of the complaint that there was no issue of the marriage, and alleging that there was born to plaintiff and defendant one child who was born on January 21, 1944. Defendant also filed a cross-complaint for divorce on the ground of extreme cruelty, specifying, among other things, that plaintiff had maliciously denied that he was the father of the child.

The court found that there was one child born to plaintiff and defendant as the issue of the marriage, and that said child was born on January 21, 1944; that defendant did not give birth to an illegitimate child; that defendant had not been guilty of any cruel treatment of plaintiff; that plaintiff had been guilty of cruel treatment of defendant, in that, among other things, he contracted a venereal disease while he was in the navy and that he maliciously denied that he was the father of the child. An interlocutory decree of divorce was granted to defendant upon her cross-complaint, and it was ordered therein that plaintiff pay to defendant for the support of the child the sum of $7.50 per week until the child becomes of age.

Plaintiff appeals from the judgment. He contends (1) that the evidence was insufficient to support the judgment; (2) that this court should hold as a matter of law that the period of gestation, which could have been attributed to coition with plaintiff, was so short that plaintiff could not be the father of the child; (3) that the trial judge abused his discretion in denying plaintiff's motion for a continuance, and in denying plaintiff's motion for a new trial; and (4) that plaintiff did not get a fair trial by reason of the bias and antagonistic attitude of the trial judge.

Plaintiff and defendant were married on December 28, 1941. Plaintiff enlisted in the navy on February 10, 1942, and thereafter the parties were absent from each other until the wife visited him in New Jersey for approximately two weeks in January, 1943. Thereafter they were absent from each other until he visited the wife in Los Angeles from the 15th or 17th of July, 1943, to the 22nd of July, 1943. Thereafter they were absent from each other until November, 1944. The wife gave normal birth to a mature child, weighing 6¼ pounds, on January 21, 1944, which date was 190 days after July 15, 1943, or 188 days after July 17, 1943. The birth certificate, made by the attending physician, Dr. Rue, stated that the pregnancy was a nine-months' pregnancy. The wife testified that she had never had sexual intercourse with anyone other than her husband.

[1-4] Section 1962 of the Code of Civil Procedure provides in part that: "The following presumptions, and no others, are deemed conclusive: * * * 5. The issue of a wife cohabiting with her husband, who is not impotent, is indisputably presumed to be legitimate." Section 1963 of the Code of Civil Procedure provides in part that: "All other presumptions are satisfactory, if uncontradicted. They are denominated disputable presumptions, and may be controverted by other evidence. The following are of that kind: * * * 31. That a child born in lawful wedlock, there being no divorce from bed and board, is legitimate." In Re Estate of McNamara, 181 Cal. 82, 183 P. 552, 7 A.L.R. 313, the court was considering whether the presumption of legitimacy was conclusive or disputable, under circumstances where the period of gestation was 304 days and the birth of the child was not within the normal or usual operation of the laws of nature. The court therein held 181 Cal. at page 95, 183 P. at page 552, 7 A.L.R. 313, that the presumption was not conclusive, and that the presumption was conclusive only when the birth of the child came within the normal period of gestation. In Estate of Walker, 180 Cal. 478, at page 491, 181 P. 792, the court held that the presumption of legitimacy should be considered conclusive if the husband and wife were cohabiting and it was possible under the laws of nature for the husband to be the father of the child. It was also said therein, 180 Cal. at page 491, 181 P. at page 797, that "[I]t is always permitted to show that it was not possible by the laws of nature for the husband to be the father, as by showing impotency on his part, want of intercourse during the possible period of conception * * *." As above stated, in the present case the period of gestation was 188 or 190 days. In Dazey v. Dazey, 50 Cal.App.2d 15, at page 20, 122 P.2d 308, 310, it was said in referring to a medical textbook, that "'It is customary to reckon the length of pregnancy as nine calendar

months, or ten lunary months, two hundred and eighty days' duration, dating from the first day of the last menstruation.'" It was also said therein, 50 Cal.App.2d at page 20, 122 P.2d at page 310, that: "This author also plainly states that if we compute the period from fruitful coition to birth, it [period of gestation] varies from 220 days to 330 days." The attending physician, called as a witness by defendant, testified that, in determining the date when a child will be born, the members of the medical profession count 280 days from the last menstrual period, but if they could actually know the date of fruitful coition they would count the time of delivery from that date; that there is no recognized rule in the medical profession that the periods of pregnancy range from 220 days to 330 days; that there is no hard and fast rule limiting the periods of pregnancy; that he would not consider it an average case if a child were born 190 days after fruitful coition, but he would not say that it was an abnormal case. Under the circumstances here, the presumption as to legitimacy should be regarded as disputable. Section 195 of the Civil Code provides as follows: "The presumption of legitimacy can be disputed only by the husband or wife, or the descendant of one or both of them. Illegitimacy, in such case, may be proved like any other fact." There was no evidence that the child was born prematurely. A certified copy of the birth certificate is prima facie evidence of the facts stated in it, Health and Safety Code, sec. 10551, and therefore the certificate herein is prima facie evidence that the pregnancy was of nine months' duration. A mature child having been born after an alleged gestation period of six months and ten days, which period according to authoritative medical opinion was about one month shorter than the shortest period of gestation for such a birth, and the birth certificate being prima facie evidence that it was a nine-months' pregnancy, the trial court should have been most careful, by reason of the close question of fact involved, to accord to the plaintiff a fair and full opportunity to present his evidence. The plaintiff was not accorded a fair trial and a full opportunity to present his evidence. Before discussing the manner in which the trial was conducted, the substance of the evidence should be stated.

The husband testified that while he was in the navy he destroyed the letters which he had received from his wife; that he first received knowledge in August, 1943, that his wife was pregnant; that she said in a letter that the child was born prematurely; that when he wrote the letters that were received in evidence (wherein he made statements indicating that the child was his) he took it for granted that the child was his; that when he returned home in November, 1944, he told his wife that he knew it was a normal nine-months' child; that he went with his wife to the doctor's office to see him about the case, but the wife went in to see the doctor and came out and said that he could not see the doctor and that the best way to get information on the case was to get a birth certificate; that he got the certificate, and then observed that it was a nine-months' child; that he had a talk with her about the certificate, and she told him that she was on a party and got drunk and did not know what she was doing and made a slip, that she had made a mistake, and that he was not the father of the child; that he then told her that he had made a mistake himself and had contracted syphilis while he was in the navy, but that he had been cured; that she then said she would sue for divorce; that he had been home several days and had had sexual intercourse with his wife before he told her that he had contracted syphilis; that she would not sleep with him the night following the time he told her about syphilis, and he left home the next morning and had never returned.

A witness, Mrs. Finnoe, called by plaintiff, testified that in June, 1943, the wife told her that she (the wife) was a month or two pregnant at that time; that in June, 1943, she saw the wife and a sailor come out of a theater; and that in July, 1943, she saw the wife with another sailor in a cafe drinking beer, that she saw the wife kiss the sailor, and that the wife's dress was unbuttoned down the front.

Another witness called by plaintiff, Mr. Finnoe, who was the husband of the witness last mentioned, testified that in June, 1943, he saw the defendant as she was coming out of a theater with a sailor; that on another occasion in 1943 he saw her in a cafe with a man and that they were drinking together and having a big time.

The wife denied the statements attributed to her by the husband in his testimony to the effect that he was not the father of the child, and that she had had relations with another man. She also denied the testimony of said two witnesses called by the husband. She also testified, in addition to her testimony mentioned hereinabove, that after her marriage she had not gone out with any man other than her husband; that her husband was the father of the child; that she did not know that she was pregnant until she went to see Dr. Rue about her pregnancy on August 26, 1943; that the only consultation that she had with the doctor was about her pregnancy and that consultation was on August 26, 1943, and that she had no other illness that summer; that she did not notify her husband that she was pregnant until after she had been to see the doctor; and that she received several letters from him after she had so notified him and after the child was born. The letters, which were received in evidence, contained affectionate expressions regarding the wife and the child. She also testified that he never mentioned to her the matter of legitimacy or illegitimacy of the child; and that he told her to get a divorce on the ground that he had a contagious disease.

The wife's two sisters and another lady, called as witnesses by the wife, gave testimony which tended to corroborate her testimony that she had not gone out with, or been in the company of, any man other than her husband.

The attending physician, called as a witness by the wife, testified, in addition to his testimony mentioned hereinabove, that his card record regarding the wife had been misplaced and he was unable to find it; that the wife first came to his office concerning her pregnancy on August 26, 1943, and at that time he considered that she was about two months along; that he signed the birth certificate, but he did not have anything to do with respect to preparing it for signature; that the secretary at the hospital prepared it and he signed it; that it was customary for the secretary to obtain the information for the birth certificates and to prepare them and to hand several of them to him for signature at the one time, and that he would then sign them; that the pregnancy and the birth in this case apparently were normal, and that two of the wife's sisters were pregnant at the same time the wife was pregnant, and they were also his patients and were in his office at various times.

On several occasions during the trial and at times when plaintiff's attorney was asking material questions or making proper objections, the trial judge stated that the attorney was taking too much time for the trial of a divorce case. Soon after the trial had started, as shown on page 19 of the reporter's 188-page transcript, the judge said: "How much more time are we going to waste on this?" and "You both know what is going to happen, so let us get through as quickly as possible." At another time the judge said to plaintiff's attorney: "Well, it seems to me you must be getting paid by the hour, and want to waste as much of the Court's time as possible." At another time he said: "I suggest that if you have any evidence to prove your complaint that you put it on, and not waste so much time." He also said: "I do insist, that if you have any evidence * * * to the effect that the Cross Complainant bore a child of which the plaintiff was not the father, that you put that evidence on. So far you haven't put one bit of evidence on in support of it * * *." At another time he said: "Have you any evidence in support of your complaint?" He also said to counsel for plaintiff: "Mr. Reppy, cannot you try the case without wasting so much time? This case should have been tried in 10 or 20 minutes, just like an ordinary divorce case." Counsel for plaintiff replied: "If we didn't have the issue of paternity it would have been tried within that time." The judge then said: "You had better forget that." Counsel for plaintiff said: "I will ask just a few more questions." The judge said: "Make them as few as possible * * * I am getting pretty tired of having you waste the Court's time." On another occasion the judge said: "I have tried many thousands of these cases. I cannot remember one that has taken as much time as this case." Later the judge said: "Well, I am going to state for the record that you have been wasting the Court's time so unconscientiously in this case, and * * * there are several hundred lawyers * * * who would not have wasted so much time in this case."

On several occasions during the trial the judge indicated that he had already decided the case. Soon after the trial started (p. 19 of reporter's transcript), as stated above, the judge said: "You both know what is going to happen, so let us get through as quickly as possible." That statement indicates that the judge had theretofore decided the case and had told both attorneys what his decision would be. The attorney for appellant states in his brief, and it is not denied by respondent, that the judge had advised counsel in chambers before "the case" that there was no point in the husband making the contention in his court that the child was a bastard. At another time, after the judge had commented to the effect that it was a peculiar case in that the plaintiff had acknowledged the child in his letters and then in the action had denied that it was his child, the attorney for plaintiff said that plaintiff had an explanation. Thereupon the judge said: "He will have to have an awfully good explanation." The judge then announced a recess until the next day and said: "You had better think over what I have said." Plaintiff's attorney asserts in his brief, as above stated, that said reference to "what I have said" was a reference to said statement, above mentioned, made by the judge in chambers before the trial started. At another time after the judge had commented again regarding the letters written by plaintiff, and after plaintiff's attorney had stated that plaintiff would explain the letters, the judge said: "Well, he will have to do a lot of explaining, and the Court still has the presumption to rely on, that the child is presumed to be the child of the party." That statement indicates that irrespective of any explanation that the plaintiff might make the judge would rely on the presumption in support of his then existing opinion that plaintiff was the father. On another occasion the judge said: "After hearing the testimony [before the testimony was concluded] I haven't the slightest doubt but that it was" a legitimate child. At that time he also said: "The only specific instance of cruelty pled by the plaintiff was that the wife bore this child that he claims was illegitimate, and that disposes of his case, because that allegation is not true." At another time the judge said: "[T]he more you develop your case the more certain I am that you haven't any case." At another time, in referring to a statement of plaintiff's attorney that if he did not have the issue of paternity he could try the case in a shorter time, the judge said: "You had better forget that."

On occasions when plaintiff's attorney offered testimony for the purpose of impeaching the defendant, the judge made statements to the effect that even if he did impeach her the question still remained as to whether the child was legitimate, and that the court could still rely on the presumption that the child was legitimate. (The judge did say during the trial that he did not regard it as a conclusive presumption.) On one occasion after plaintiff's attorney had offered testimony as shown above that defendant had, contrary to her testimony, been out with a man other than her husband, the judge asked if he had any evidence to prove the allegations of his complaint, and the attorney replied that he wanted to impeach the defendant. Thereupon the judge said: "All right; suppose you impeach her all the way around, you just still haven't got away from these letters that this man wrote admitting that the child was his," and "the Court still has the presumption to rely on." On another occasion plaintiff's attorney asked if she knew where plaintiff was on August 27, 1943 (that being the date of a letter from plaintiff wherein he referred to the expected child). The judge asked how that could be of any help in deciding the matter. The attorney for plaintiff replied in effect that he wanted to show that there was a discrepancy between defendant's testimony and the fact as to the time when defendant notified plaintiff that she was pregnant,—it being the attorney's intention, as then indicated to the court, to show that plaintiff was located so far away in the navy that the reference in his letter of August 27th to the expected child would indicate that he had been notified of defendant's pregnancy much earlier than August 26th (that being the date after which defendant had notified plaintiff, according to her testimony). Thereupon the judge said: "Well, suppose there was [a discrepancy]."

The conduct of the judge in adjudging one of plaintiff's witnesses guilty of contempt of court and sentencing her to five days in jail, when the witness said she did not want to answer a certain question, and his conduct in calling her a liar after she had testified, tended to intimidate the witnesses and to prevent a full presentation of the evidence. When plaintiff's attorney was attempting to impeach the defendant, and after Mrs. Finnoe had testified that she had seen the defendant kiss a man, the witness, Mrs. Finnoe, testified that the defendant's clothing was not properly arranged at the time she was with the man. Thereupon the judge said: "What did you see? I am getting tired of all this petty gossip. What did you see?" The witness said that she would rather say no more. Then the judge said: "Well, will you tell us what you saw there, or do you want to go to jail for contempt?" The witness said: "I don't want to say, your Honor." The judge said: "All right; you are adjudged guilty of contempt of court, and sentenced to jail for five days, unless you tell me exactly what you saw." The witness then said: "Well, she had her dress unbuttoned down the front, and when she talked it exposed her." Then the following occurred:

"The Court: Have you got anything but just innuendo in this petty gossip?

"Mr. Reppy: Well, I had a different story from the witness, your Honor.

"The Court: Well, I will remit the contempt business, but I wish if you have any evidence you will put it on. If you have any real evidence to put on, I would like to have it.

"Mr. Reppy: Well, she [defendant] testified, your Honor, that she never did any of those things. I want to show your Honor that she did."

Then after some discussion between the judge and plaintiff's attorney regarding impeachment of the defendant and the proposed explanation of plaintiff's letters, the plaintiff's attorney said he wanted to ask Mrs. Finnoe another question. Thereupon the judge said: "Well, if you did ask her I wouldn't believe her. I think I know a liar when I see one." No further question was asked that witness.

Next thereafter, Mr. Finnoe was called as a witness and after testifying as above stated, that he saw the defendant and a sailor come out of a theater and that he saw defendant and a man in a cafe drinking together, he said that he did not remember anything as to the conduct of defendant and the man in the cafe except that they were drinking.

[5, 6] It is therefore clear that such conduct on the part of the trial judge deprived the plaintiff of a fair trial. In such a case, which included close questions pertaining to the laws of nature and to medical science, the judge's comment that the case should be tried in 10 or 20 minutes and his many other ill-advised and unnecessary comments with respect to wasting his time establish definitely that he did not consider that the issues presented by plaintiff were worthy of consideration. The judge's comments, before the case was submitted to him, such as those that both attorneys "know what is going to happen," and "that disposes of his case" because the allegation regarding illegitimacy is not true, and that plaintiff "had better forget" the issue of paternity, clearly indicate that he had prejudged the case. The comments of the trial judge to the effect that it was unimportant whether defendant was impeached, indicates that he refused to consider all the evidence. The trial judge was wholly unjustified in adjudging one of plaintiff's witnesses guilty of contempt of court. His conduct in adjudging her guilty of contempt, sentencing her to jail, and calling her a liar prejudicially affected plaintiff in the presentation of his case. The fore-

going prejudicial conduct of the trial judge is corroborative of the opinions relative to such conduct heretofore expressed in the cases of Etzel v. Rosenbloom, 83 Cal.App.2d 758, 189 P.2d 848 and Podlasky v. Price, 87 Cal.App.2d 151, 196 P.2d 608.

[7] The trial judge abused his discretion in denying plaintiff's motion for a continuance, which motion was made in order to produce further testimony by the attending physician. After the defendant had finished her testimony and had rested her case, the attorney for plaintiff stated that he wanted to recall Dr. Rue in rebuttal. The doctor was not present at that time. The attorney for plaintiff stated that he did not ask the doctor to return, at the time the doctor was in court, because the attorney did not have knowledge at that time of the facts he desired to present. Thereafter the following occurred:

"Mr. Reppy: If the Court please, as I stated, the other witness that I wished to call is Dr. Rue, and if you will permit me to again 'phone his office, I will attempt to have him here.

"The Court: Why didn't you have him here? Why didn't you ask him to stay here?

"Mr. Reppy: As I told you, your Honor, I didn't have possession of the facts that I have now. If your Honor wants me to, I will make an offer of proof.

"The Court: You may do that.

"Mr. Reppy: I expect to prove that if Dr. Rue testified, were called and testified, that he would bring his date book with him, and that it would disclose, and he would testify that Mrs. Ida Murr consulted him at his office on June 28th, 1943.

"The Court: Well, what of it?

"Mr. Reppy: She testified, your Honor, that she consulted him only on the question of her pregnancy, and that she has not consulted him for any other purpose.

"The Court: Well, what of it?

"Mr. Reppy: I will tell you: that was before Mr. Murr came home on his leave, when he had access to his wife, and she consulted him prior to the time that he came home.

"The Court: Consulted him for what?

"Mr. Reppy: For her pregnancy.

"Mr. Halverson [counsel for defendant]: I am sure that Dr. Rue will testify to no such thing.

"Mr. Reppy: I have just been talking with his nurse.

"The Court: Well, I am going to state for the record that you have been wasting the Court's time so unconscientiously in this case, and I do not think that I am exaggerating when I say that there are several hundred lawyers that appear over in Department 1 who would not have wasted so much time in this case.

"Mr. Reppy: Well, I would like a continuance of the case, your Honor, to get Dr. Rue here.

"The Court: I am not inclined to grant any continuance, because the Doctor was here and you didn't ask him to stay.

"Mr. Reppy: I didn't know the facts at that time.

"The Court: You should have. Anything further?

"Mr. Reppy: No, your Honor.

"Mr. Halverson: No, your Honor.

"The Court: Submitted?

"Mr. Reppy: I have made the offer of proof, your Honor.

"The Court: The Court has denied it because there is no legal showing, and no legal showing has been made for a continuance of this matter.

"Mr. Reppy: If your Honor will permit me to I will be sworn and testify as to how I obtained the information, and when.

"The Court: Wouldn't that be more hearsay?

"Mr. Reppy: Only hearsay to this extent, that I will have to testify as to my conversation with the doctor and his nurse to show you how I obtained the information.

"The Court: If I heard you testify to that, it still wouldn't change my view in the matter."

The trial judge should have granted the continuance. The proposed evidence was very material in that if true it would have indicated that the defendant was pregnant in June before the plaintiff returned home in July.

[8] The trial judge abused his discretion in denying plaintiff's motion for a new trial on the ground of newly discovered evidence. As above stated Dr. Rue testified that he had lost his card record relating to defendant. He testified by refreshing his memory from notes that were made at the time he discussed the matters prior to the trial. An affidavit of the attorney for plaintiff, filed in support of the motion, shows that he did not interview the doctor prior to the trial because he considered that the relationship between the doctor and defendant was confidential; that after the doctor had testified at the instance of defendant concerning her pregnancy, the attorney considered that the defendant had waived the right to regard the relationship as confidential and that he was then entitled to discuss the matter with the doctor; that after the doctor had testified and before the case was submitted for decision, the attorney requested the doctor to locate a daybook or some record which would show when defendant first visited his office in 1943; that in the morning of the following day, which was the last day of the trial, the doctor's nurse told the attorney that the doctor had located a daybook which indicated that defendant had consulted the doctor on June 28, 1943; that after the decision in the case, the attorney again visited the office of the doctor and found that the doctor had located his record which he kept in the regular course of his profession, and that the attorney copied the record insofar as it related to matters material herein, and that the record reads in part as follows: "Murr, Mrs. Ida 116 No. Bisel 6–28–43 Uterus tipped backward * * * has not menstruated since—May 19— * * * 6–28–43 Will return in 3 wks for examination Aug. 26, 1943 Uterus size of 3 mo. pregnancy * * *"; that the attorney could not have obtained the record earlier because the doctor himself could not locate it; that the daybook entry of June 28, 1943, and the patient's card record were material for the reason defendant testified that she visited the doctor in regard to her pregnancy and for no other reason. An affidavit of Dr. Rue, filed by plaintiff in support of the motion, shows that after the decision in the case the doctor located the card record of defendant; and that, among other things, the card contains items specifically relating to the pregnancy of the defendant.

A counter-affidavit of Dr. Rue, filed by defendant in opposition to the motion, states that on the face of the folded card record relating to defendant the following appears: "Murr, Mrs. Ida * * * 116 No. Bixel, City"; that on the back and inside of the card certain information, specifically stated in the affidavit, appears; that a date notation, "6–28–43," is written diagonally across the upper left corner of the inside page; that said date "was evidently written at a later date as the next following date is 12–28–42"; and that omitting the diagonally written date, the history would indicate that the record made on the upper third of the sheet should bear a 1942 date, the same as the preceding page and the paragraph following. An affidavit of one of the defendant's sisters, filed in opposition to the motion, stated that she accompanied defendant to Dr. Rue's office on August 26, 1943; and that she accompanied another sister, Mabel Murr (the wife of plaintiff's brother), to Dr. Rue's office on June 28, 1943.

Under the circumstances of this case, where as above shown a close question of fact was presented by reason of the birth of a mature child after such an alleged short period of gestation, the daybook and the card record were very material evidence. If defendant did consult the doctor on June 28, 1943, as indicated by the daybook and card record, that would be a very material circumstance in determining whether she was pregnant before the plaintiff returned home in July, 1943, especially in view of her testimony that she consulted him in 1943 in regard to pregnancy only. Also such evidence would tend to impeach the defendant, since she said the first time she consulted the doctor in 1943 was August 26th. Furthermore, it is to be noted that the card record indicates that on August 26, 1943, the defendant was three months pregnant. That circumstance would also be a very material circumstance in determining whether she was pregnant before plaintiff returned home in July, 1943.

For the foregoing reasons the judgment is reversed and the cause is remanded for a new trial.

SHINN, P. J., and McCOMB, Justice Assigned, concur.

87 Cal.App.2d 699

KAN et al. v. TSANG et al.

TSANG et al. v. BUTTERWORTH et al.

Civ. 13805.

District Court of Appeal, First District, Division 2, California.

Sept. 24, 1948.

Appeal and error 🔑71(4)

Order confirming a sale of property, ruling on objections to a receiver's report, and directing payment of attorney's fees and distribution under certain conditions, was a final and appealable order, though order also contained interlocutory portions directing that amount of fees to be paid should be fixed by agreement of parties subject to court's approval, and directing receiver to operate business until final distribution of assets pursuant to court's order.

Appeal from Superior Court, City and County of San Francisco; Thomas M. Foley, Judge.

Action by John Kan and others against Ernest Tsang and others, and Charles T. Butterworth, receiver, and another. From an adverse order, Ernest Tsang and others appeal, and Charles T. Butterworth, receiver, and another move to dismiss the appeal.

Motion denied.

Alden Ames and Sidney A. Romer, all of San Francisco, for plaintiffs.

Robert E. Hatch, of San Francisco, for appellants.

W. J. Mahaney, of San Francisco, for respondents.

NOURSE, Presiding Justice.

Motion to dismiss an appeal.

An appeal was taken from an order confirming a sale of property, ruling on objections to a receiver's report, and directing payment of attorney's fees and distribution under certain conditions. Paragraph 7 of the order directs that "the amount of fees to be paid * * * be fixed by agreement of the parties, subject to the approval of this court." Paragraph 14 directs the receiver to operate the business "until such time as the assets * * * have been fully and finally distributed pursuant to the order of this court * * *."

These portions of the decree would appear to be interlocutory. But the real elements of the decree, which confirms a sale of property, unconditionally orders reimbursement of certain persons rendering sevices to the estate, and orders distribution of the assets, are final and contemplate no further judicial action except consideration of the fact of compliance or noncompliance with the terms of the decree. These features determine the finality of the decree for purposes of appeal whereas paragraphs 7 and 14 merely reserve to the court the power to approve the agreement of the parties fixing attorney's fees and the power to determine whether the receiver has made distribution "pursuant to the order of this court." Neither calls for judicial action "essential to a final determination of the rights of the parties." Lyon v. Goss, 19 Cal.2d 659, 670, 123 P.2d 11, 17.

Motion denied.

GOODELL and DOOLING, JJ., concur.

87 Cal.App.2d 581

PEOPLE v. MARTIN.

Cr. 711.

District Court of Appeal, Fourth District, California.

Sept. 16, 1948.

1. Criminal law 🔑473, 486

A medical expert is entitled to express his opinion on a medical question presented in issue, and the expert may then support that opinion by giving the reasons assigned in support of the opinion.

2. Criminal law 🔑494

Expert evidence is really an argument of an expert to the court, and is valuable only in regard to the proof of the facts and the validity of the reasons advanced for the conclusions.

3. Criminal law 🔑494

The weight to be given to the opinion of an expert depends on the reasons he assigns to support that opinion.

4. Criminal law 🔑1170½(1)

In murder prosecution, wherein defendant's medical expert testified that he did not believe that defendant was mentally capable of assisting his attorney in his defense because defendant was suffering from a major mental disorder, refusal to permit defendant to show on direct examination basis of expert's opinion was not prejudicial error, where matter was fully gone into otherwise. Pen.Code, § 1368; Code Civ.Proc. § 1870, subd. 10.

5. Criminal law 🔑339

In murder prosecution, wherein defendant pleaded not guilty by reason of insanity, ruling precluding defendant's ex-wife who had not conversed with defendant for over 15 years, from identifying a copy of a divorce complaint containing allegations made by ex-wife concerning defendant's unnatural conduct during their married life, was proper.

6. Criminal law 🔑625

In murder prosecution, evidence sustained findings that at time of hearing defendant was sane and mentally capable of understanding the nature and object of the proceedings against him and mentally able to conduct his defense in a rational manner. Pen.Code, § 1368.

7. Homicide 🔑253(3)

Evidence was sufficient to establish specific intent to kill so as to warrant first-degree murder conviction, and so as not to require reduction of the homicide to second-degree murder or manslaughter. Pen.Code, § 1181, subd. 6.

8. Criminal law 🔑1122(6)

Where record did not show that defendant in murder prosecution requested an instruction on involuntary manslaughter, and there was no evidence justifying a verdict of involuntary manslaughter, defendant could not claim error because only instruction given by the court concerning manslaughter was that involving voluntary manslaughter. Pen.Code, § 1105.

9. Criminal law 🔑824(4)

Where defendant offered some evidence that at time of homicide he was not conscious thereof, and jury was adequately instructed on defense of unconsciousness, failure to give unrequested instruction that if defendant, through prior insanity, was not able at time of commission of act to be sufficiently aware of his surroundings to act and reason as an average man, then such facts could be considered in determining whether he had ability deliberately to weigh the consequences, and in determining the degree of murder, was not error. Pen. Code, § 26, subd. 5.

10. Criminal law 🔑48

A defense of insanity and a defense of unconsciousness are not the same.

11. Homicide 🔑237

In murder prosecution, evidence sustained jury's finding that defendant was sane at time of homicide. Pen.Code, § 1368.

12. Criminal law 🔑1166(1)

Defendant in murder prosecution was not prejudiced because a new jury was not selected to try issue presented by his plea of not guilty by reason of insanity. Pen.Code, § 1368.

13. Criminal law ⚷981(2)

In murder prosecution, wherein court found prior to trial that defendant was presently sane and capable of conducting his defense in a rational manner, and jury found that at time of homicide defendant was sane, refusal to entertain a motion to examine defendant again as to his sanity before pronouncing judgment was not error. Pen.Code, § 1368.

14. Criminal law ⚷625

In determination of a motion for hearing on issue of defendant's sanity at time of the trial, trial judge's determination must be allowed a wide latitude. Pen.Code, § 1368.

15. Criminal law ⚷927(1)

Where on return of jury in murder prosecution to court from lunch, two or three jurors, just before reaching stairway, turned and proceeded about ten feet toward elevator when the other jurors started to and proceeded partially up one flight of stairs, and those two or three jurors who had proceeded toward elevator were brought back by deputy sheriff, and no juror held any conversation with any outsider, defendant was not entitled to a new trial on ground that jury was illegally separated. Pen.Code, § 1128.

◆

Appeal from Superior Court, San Diego County; Gordon Thompson, Judge.

John Arthur Martin was convicted of murder in the first degree, and he appeals.

Affirmed.

Harry P. Bowman, of San Diego, for appellant.

Fred N. Howser, Atty. Gen., and Henry A. Dietz, Deputy Atty. Gen., for respondent.

GRIFFIN, Acting Presiding Justice.

Defendant was charged with the offense of murdering one Fred Buck. He entered a dual plea of not guilty, and not guilty by reason of insanity. Prior to trial, a doubt arose in the mind of the judge as to the sanity of the defendant. He appointed three alienists to examine him. See Sec. 1368, Penal Code. A trial by jury on this issue was not demanded. Defendant personally and through counsel waived such a trial. At the conclusion of the hearing defendant, on November 19, 1947, was held presently sane; that he was then capable of understanding the nature and object of the proceedings against him and was mentally able to conduct his defense in a rational manner. Thereafter, a trial by jury on the plea of not guilty resulted in a verdict of guilty of murder in the first degree and life imprisonment was recommended. By the same jury defendant was subsequently found to be sane at the time of the commission of the offense. A motion for new trial was denied. Defendant's counsel then suggested that the court again determine defendant's sanity under sec. 1368 of the Penal Code before judgment was pronounced. The request was denied. This appeal followed.

The first point raised involves the ruling of the court as to the admissibility of certain evidence in the hearing of November 19, as to the present sanity of defendant. He produced Dr. Cozby, a specialist in neurology and psychiatry. He testified that in his opinion he did not believe defendant was capable of assisting his attorney in his defense because defendant was suffering from a major mental disorder and had so suffered for many years. Counsel for defendant attempted to show the basis for the conclusion of the doctor on direct examination but was advised by the court to leave it for cross-examination.

[1–3] A medical expert is entitled to express his opinion on a medical question presented in issue and then he may support that opinion by giving the reasons assigned in support of it. 10 Cal.Jur. p. 970, sec. 227. Expert evidence is really an argument of an expert to the court, and is valuable only in regard to the proof of the facts and the validity of the reasons advanced for the conclusions. Estate of Scott, 1 Coff.Prob. 271. The weight to be given to the opinion of an expert depends on the reasons he assigns to support that opinion. Barker v. Gould, 122 Cal. 240, 54 P. 845; Gazzera v. City and County of San Francisco, 70 Cal.App.2d 833, 838, 161 P.2d 806; People v. Perkins, 75 Cal.App.2d 875, 171 P.2d 919; Sec. 1870, subd. 10, C.C.P.

[4] On cross-examination both the court and the prosecution went fully into that question and again on redirect examination by defendant's counsel the doctor was permitted to give the basis for his conclusions. Under the circumstances, no prejudicial error resulted.

[5] Defendant's counsel placed defendant's ex-wife on the witness stand. She had not conversed with the defendant for over 15 years. She was called only for the purpose of identifying a copy of the divorce complaint filed by her at that time. The purpose, as stated by counsel for defendant, was to identify an instrument which contained allegations she made therein about defendant's unnatural conduct committed by him during their married life. The intended use of the instrument was not disclosed. In the absence of some proper showing as to its competency and materiality the ruling of the trial court precluding her from identifying the document was proper.

[6] Counsel contends that he was precluded by the trial court from producing evidence showing that the defendant was, on November 19, suffering from a mental illness affecting his ability to reasonably proceed with his defense; that such illness was of a chronic, progressive and insidious type, first affecting him some 20 years before, and that he could have presented evidence showing a chain of events over that period indicating insanity on his part. The materiality or competency of the evidence suggested cannot be determined from the records before this court. Considerable testimony was produced by both parties as to his present sanity. Although there was a conflict in the evidence, the finding of the court on that subject is adequately supported by the testimony of lay witnesses as well as by medical experts. We perceive no prejudicial error or abuse of discretion in this respect. People v. Perry, 14 Cal.2d 387, 94 P.2d 559, 124 A.L.R. 1123. People v. Vester, 135 Cal.App. 223, 26 P.2d 685, relied upon by defendant, is factually dissimilar and is not analogous to the instant case.

Defendant owned a radio repair shop in San Diego. He first met deceased in 1945, at a bar where deceased worked as bartender. They had a heated argument, Buck and the proprietor forcibly removed defendant from the barroom. Defendant's arm was broken in the scuffle. He did not speak to Buck for over two years. About 6 p. m. on July 28, 1947, defendant left his shop on Adams Avenue, in the rear of which he had living quarters, and went to a near-by bar. There he saw Buck but did not speak to him. He told his friend Weaver not to mention Buck's name in his presence. He then proceeded to another bar across the street, which was about 450 feet from defendant's radio shop, and sat there drinking some ale. Buck came into that bar where he was working. About 11:30 p. m. Buck and defendant again got into an argument involving the facts pertaining to the removal of the defendant from the bar two years previous, and also pertaining to the arm-breaking incident. Buck started around the bar to put defendant out when Buck's wife came up and separated the two. She asked defendant to leave quietly. He did so but he was angry. Defendant immediately went to his home and from the bedroom took a 22 caliber rifle from the drawer, loaded it and accidentally discharged the gun. He reloaded it, put on the safety, and walked back to the bar. He stopped at the window in front of it, then raised the rifle and fired through the window in the direction of Buck, who was standing talking to some man. Mrs. Buck saw defendant through the Venetian blinds aiming the gun at them. She warned deceased that defendant had a gun, and about that time a shot was fired. Fragments of the bullet hit Buck in the neck and he later died as a result of the wound. A waitress in the kitchen was also hit by a fragment of the bullet and her arm was injured. Defendant fired a second shot but it apparently went into the air. Immediately thereafter defendant walked down the street. He was later apprehended by some of the occupants of the bar and asked if he knew what he had done. He was told that he had hit Buck and he said: "Well, I am glad I did," and repeated it several times. The officers arrived and defendant stated his story to them. He told them about the same arm-breaking incident two years prior and stated that on this evening he and Buck were arguing about it; that he left the bar, went home, secured the rifle, accidentally fired a shot into the wall at home, went back to the cafe and "when he arrived at the window outside the bar he withdrew the safety and saw Buck and shot at him; that he fired only one shot because he didn't want to hurt anyone else." He told one officer that when Buck admitted in the bar that he was the one who broke his arm two years before, that "he saw red"; that he went home, got his gun, loaded it, returned to the window of the bar, saw Buck "and I said to myself 'I will get at least one good shot at you' "; that he said he then "took the safety off and fired at him"; that he asked him if he thought he had hit him and he said: "I should have. I tried to. I am a pretty good shot." Defendant also made a written statement in his own handwriting confessing the crime just about as above related and said that he had gone to two or three lawyers and tried to sue Buck for damaging his arm but that the lawyers refused to take the case.

Defendant's counsel now argues that there was no specific intent to kill decedent shown by the evidence, and therefore this court should, under sec. 1181, subd. 6 of the Penal Code, reduce the crime to second degree murder or manslaughter, citing People v. Holt, 25 Cal.2d 59, 153 P.2d 21, and People v. Bender, 27 Cal.2d 164, 163 P.2d 8. He contends that the evidence "preponderantly indicates that the lead bullet passed through the glass and along the pathway virtually intact, except for two or three minute pieces of soft copper which entered the soft tissue of the bartender's throat (claimed 'lost' by the police); that at the time the shot was fired, the victim was standing south of the pathway of the bullet; that the burden rested upon the people to prove beyond a reasonable doubt facts from which it might be rationally inferred that there was, on the part of defendant, a wilful, deliberate and intentional purpose to take the life of the deceased, and that the people failed to meet this burden," citing People v. Thomas, 25 Cal.2d 880, 900, 156 P.2d 7.

[7] The cases cited by defendant merely require that the deliberation be arrived at or determined as a result of careful thought and weighing of consequences; as a deliberate judgment or plan; and according to a preconceived design. They held that intentional and deliberate homicide is murder in the first degree and that intentional homicide without deliberation is, in the absence of mitigating and exonerating circumstances, murder in the second degree; that in the absence of proof of these elements a verdict of first degree murder cannot stand. It appears to us, from the facts related, that the evidence sufficiently satisfies these requirements and does support the verdict. People v. Shaver, 7 Cal.2d 586, 61 P.2d 1170; People v. Murphy, 1 Cal.2d 37, 32 P.2d 635; People v. Cancino, 10 Cal.2d 223, 73 P.2d 1180; People v. Ottey, 5 Cal.2d 714, 56 P.2d 193.

[8] Defendant next contends the only instruction given by the court concerning manslaughter was that involving voluntary manslaughter. The record does not show that defendant requested such an instruction and we perceive no evidence justifying a verdict of involuntary manslaughter. Under these circumstances defendant cannot claim error. People v. Cancino, supra; Penal Code sec. 1105.

The court gave an instruction that the defendant, as to the plea of not guilty, was conclusively presumed to have been sane at the time of the commission of the alleged offense. Defendant offered some evidence that at the time he committed the act he was not conscious thereof, under subdivision 5 of section 26 of the Penal Code. In this connection the court instructed the jury that if it found that at that time "the conscious mind of the defendant had ceased to operate and that his actions were solely controlled by his subconscious or subjective mind, * * * then you will find that the defendant * * * did not thereby commit a crime even though such an act would constitute a crime if it had been committed by the defendant when he was conscious".

[9, 10] As we perceive defendant's argument, he contends in his brief that this instruction should have been further qual-

ified, i. e., "if the jury had been told that if defendant, through prior *insanity* was not able at the time of the commission of the act to be sufficiently aware of his surroundings to act and reason as an average man"—then these facts could be considered in determining whether he had the ability to coolly and deliberately weigh the consequences in determining the degree of the murder. (Italics ours.) In the first place the record does not disclose that defendant offered any such instruction. People v. Malone, 82 Cal.App.2d 54, 185 P.2d 870; and People v. Troche, 206 Cal. 35, 47, 273 P. 767, preclude such an instruction in reference to insanity. The trial court thoroughly and properly instructed the jury pertaining to the proof required in fixing and determining the degrees of murder. The degree fixed by the jury is supported by the evidence. The defense of insanity is one thing, and the defense of unconsciousness is another. People v. Cox, 67 Cal. App.2d 166, 153 P.2d 362. The jury had adequate instructions on the point presented and decided that defendant was not in a state of unconsciousness at the time the crime was committed. It apparently gave to the testimony of the experts the weight that it thought reasonable. People v. Freeman, 61 Cal.App.2d 110, 142 P.2d 435. No error appears in this respect.

[11] Defendant earnestly contends that the evidence which he presented at the trial under the plea of not guilty by reason of insanity proved his insanity by a preponderance of the evidence, and the rebutting evidence of the prosecution was insufficient to sustain the verdict. Dr. Cozby again testified on the hearing of this issue. He stated that his numerous examinations of the defendant included the Rorshach test, the Minnesota multibasic personality test, the administration of truth serum or sodium pentathol, as well as confirming facts through intimate acquaintances, and that he thought "that this man was insane * * * and has been insane for twenty years or fifteen years before * * *." This testimony was corroborated by other medical evidence. Thirteen lay witnesses testified concerning certain acts that led them to believe that over a period of many years defendant had been and was then insane. It was stipulated between counsel that the testimony of the doctors and of the acquaintances and police officers used by the prosecution at the hearing under section 1368 of the Penal Code may be considered as being given under this plea and that if asked whether at the time of the shooting the defendant was able to distinguish right from wrong, their answer would be "yes." It cannot be said that the jury, observing the defendant during the trial, with the entire evidence adduced on the subject, in addition to the presumption that defendant was sane, did not have sufficient evidentiary support for its verdict, although there were many witnesses who testified to the contrary. See, People v. Chamberlain, 7 Cal. 2d 257, 60 P.2d 299; People v. Troche, 206 Cal. 35, 50, 273 P. 767.

[12] The contention that defendant was prejudiced by reason of the fact that a new jury was not selected to try the issue presented by his plea of not guilty by reason of insanity is disposed of in People v. Willison, 116 Cal.App. 157, 160, 2 P.2d 543; and People v. French, 12 Cal.2d 720, 765, 87 P.2d 1014.

[13] We see no error in the refusal of the trial court to entertain a motion to again examine defendant under section 1368 of the Penal Code before pronouncing judgment. In this connection Dr. Cozby filed an affidavit containing many of the same allegations contained in his former affidavit together with the facts and conclusions reached and related by him at the trial. He stated that in his opinion the defendant was then and still is medically and legally insane.

Section 1368 of the Penal Code provides in part that "If at any time during the pendency of an action and prior to judgment a doubt arises as to the sanity of the defendant, the court must order the question as to his sanity to be determined by a trial by the court without a jury * * *."

In People v. Perry, 14 Cal.2d 387, 94 P. 2d 559, 124 A.L.R. 1123, it was held that where the record on appeal and testimony of the defendant and the written statement made by him show indisputably that he thoroughly understood the nature and object of the proceedings against him and that he was capable of conducting his defense in a rational manner, no error was committed by the trial court in its order denying the defendant's motion that the question of his sanity be determined before pronouncing judgment.

[14] In People v. Lindley, 26 Cal.2d 780, 161 P.2d 227, it was said that a determination of a motion for hearing on the issue of the defendant's sanity at the time of trial is one which rests within the sound discretion of the court and its denial of the motion will not be disturbed on appeal where there is no abuse of discretion; that the "doubt" mentioned is one that must arise in the mind of the trial judge rather than in the mind of counsel for the defendant or in the mind of any third party. In this determination the trial judge must always be allowed a wide latitude.

Since the affidavit presented attempting to create the doubt was based on facts that had already been heard and determined in the first instance by the trial judge and in the second instance by the jury, and they determined that he was sane at the time and able to properly conduct the defense of his action, no prejudicial error resulted in the denial of this motion.

Lastly, on a motion for new trial, defendant argues that the jury was illegally separated after it retired to deliberate upon its verdict, contrary to section 1128 of the Penal Code, citing People v. Thornton, 74 Cal. 482, 16 P. 244; People v. Hawley, 111 Cal. 78, 43 P. 404; People v. Cross, 64 Cal. App. 443, 221 P. 684.

The affidavit in support of the motion was based on claimed information obtained from six members of the jury, which affidavit stated that as the jury was returning to court from lunch, two or three jurors, just before reaching the stairway, turned and proceeded approximately ten feet toward the near-by elevator but did not enter it; that the other jurors and the officer sworn to take charge of the jury, started to and did proceed partially up one flight of stairs; that these two or three jurors were brought back from the elevator by the deputy sheriff who was trailing the jury; that the two or three jurors then caught up with the rest of the jury; that the bailiff was in sight of all of the jurors at all times except a possible momentary separation, and no juror held any conversation with any outsider.

In People v. Thornton, supra, the rule was stated to be that if the separation was such that the juror *might* have been improperly *influenced* by others, the verdict should be set aside.

People v. Truesdell, 124 Cal.App. 360, 12 P.2d 476, analyzes some of the cases relied upon by defendant and holds the rule to be in criminal cases that when a separation of the jurors is shown, the burden rests upon the prosecution to rebut the presumption of prejudice, but if that presumption is rebutted, the trial court *may* properly deny the application for a new trial based upon such grounds. See also, McDowd v. Pig'n Whistle Corp., 26 Cal.2d 696, 700, 160 P.2d 797. In the instant case we see no presumption of prejudice that has not been fairly and sufficiently overcome by evidence.

[15] No new trial should have been granted under the circumstances here related because of such a fleeting separation, where there was a showing that no juror was or might have been improperly influenced by others during the time of separation. See People v. Murphy, 92 Cal.App. 729, 268 P. 927; People v. Nakis, 184 Cal. 105, 193 P. 92; People v. Pompa, 192 Cal. 412, 221 P. 198.

The judgment and order affirmed.

MUSSELL, J., concurs.

87 Cal.App.2d 535

CITIZENS NAT. TRUST & SAVINGS BANK OF LOS ANGELES v. HAWKINS et al.

Civ. 16221.

District Court of Appeal, Second District, Division 3, California.

Sept. 13, 1948.

Hearing Denied Nov. 8, 1948.

1. Divorce ⚿255

In divorce action where allegations presented issues as to which party was entitled to trust income, divorce decree declaring each party entitled to half of income was res judicata respecting ownership thereof in trustee's subsequent interpleader suit against wife and executrix of deceased husband's will.

2. Judgment ⚿634

In determining validity of plea of res judicata, pertinent questions are whether issue decided in prior adjudication was identical with that presented in present action, whether there was final judgment on merits, and whether party against whom plea is asserted was a party or in privity with a party to prior adjudication.

3. Divorce ⚿249(3)

While court should not assign separate property of one spouse to the other in divorce action, court may determine whether property is separate or community and quiet title thereto in rightful owner when such issue is made.

4. Divorce ⚿249(3), 255

Generally, court's power respecting parties' property in divorce action is limited to disposition of community property, but, where pleadings make issue as to separate property and both parties submit question to court without objection, court has power, under its general jurisdiction, to hear questions as to ownership of separate property and make proper disposition thereof by decree, which becomes res judicata as to parties' property rights. Civ.Code, § 137 et seq.; Code Civ.Proc. §§ 1908, 1962 subd. 6.

5. Divorce ⚿255

Where decree granting wife divorce conclusively determined that husband owned half of income of trust created by him for wife's benefit, her offers of proof concerning issues in divorce action and whether evidence respecting them was received therein were inadmissible in trustee's subsequent interpleader suit against divorced wife and executrix of deceased husband's will to determine defendants' claims to trust income, and wife's offers of proof concerning parties' intention respecting her assignment of half of such income to husband were immaterial.

6. Divorce ⚿255

A divorce decree, declaring each spouse entitled to half of net income of trust created by husband for wife's benefit, was res judicata against wife's contention, in trustee's subsequent interpleader suit against wife and executrix of deceased husband's will, that spendthrift provisions of trust declaration prevented wife from making agreement with husband that he should be owner of half of such income, even if decree was erroneous in such respect.

7. Divorce ⚿255

A divorced husband's interest in income of trust created by him for wife's benefit, as adjudicated by interlocutory divorce decree which became res judicata on question of ownership of such income in trustee's subsequent interpleader suit against wife and executrix of husband's will, passed to his legatees on his death, subject to administration. Civ.Code, § 954; Probate Code, § 300.

◆

Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

Suit by the Citizens National Trust & Savings Bank of Los Angeles, as trustee of a trust for the benefit of Elves Dwight Hawkins, against such beneficiary, Ruth H. Hawkins, as executrix of the will of Samuel C. Hawkins, deceased, and the Regents of the University of California, a corporation, to compel defendants to interplead and litigate their claims to the trust income, in which defendant executrix filed a cross-complaint to recover half of the income during the beneficiary's life. From a judgment declaring the executrix and distributees of testator's estate entitled to half of the income during the life of defendant Elves Dwight Hawkins, she appeals.

Affirmed.

Bodkin, Breslin & Luddy, of Los Angeles, for appellant.

Ray W. Bruce, of Los Angeles, for respondent Ruth H. Hawkins, executrix.

Zach Lamar Cobb, of Los Angeles, for respondent Citizens Nat. Trust & Savings Bank of Los Angeles.

VALLÉE, Justice.

Citizens National Trust & Savings Bank of Los Angeles, as trustee of its Trust No. 6125, commenced this suit in interpleader against Elves Hawkins, divorced wife of Samuel C. Hawkins, Ruth Hawkins, as executrix of the will of Samuel C. Hawkins, and Regents of the University of California, to compel them to interplead and litigate their several claims to the income of the trust. Elves Hawkins answered claiming that she was entitled to receive all of the income of the trust during the balance of her life. Ruth Hawkins, as executrix of the will of Samuel C. Hawkins, answered and filed a cross-complaint claiming that she, during the administration of the estate of Samuel C. Hawkins, and thereafter the distributees of his estate, was entitled to receive one-half of the income of the trust during the balance of the life of Elves Hawkins. Regents of the University of California answered praying that nothing be taken as against it. Judgment was that Ruth Hawkins, as executrix, and the distributees of the estate of Samuel C. Hawkins were entitled to receive one-half of the income of the trust during the balance of the life of Elves Hawkins. Elves Hawkins appealed. The controversy is between Elves Hawkins and Ruth Hawkins, as executrix, and involves the ownership of the income of the trust from the death of Samuel C. Hawkins until its termination. Regents of the University of California is not interested in the income.

In June of 1930, Samuel C. Hawkins, Elves Hawkins and Citizens National Trust & Savings Bank of Los Angeles executed a declaration of trust. Under the terms of the trust Elves Hawkins, then the wife of Samuel C. Hawkins, was named beneficiary and entitled to receive all the net income therefrom during her lifetime. Upon her death the trust is to terminate and the trust estate go to Regents of the University of California. The trust instrument contained spendthrift provisions. It restrained the beneficiary from transferring or in any other manner affecting or impairing her interest in the income, and provided that the income should be payable only to the desigated beneficiary.

Elves Hawkins, on November 24, 1930, filed a suit in the Superior Court of Los Angeles County seeking a divorce from Samuel C. Hawkins. In her amended and supplemental complaint she alleged that the corpus of the trust was community property; that the declaration of trust recited that the corpus was the separate property of Samuel C. Hawkins; that she was induced to sign the declaration of trust because of the refusal of Samuel C. Hawkins to sign it otherwise; that the income of the trust was Five Hundred ($500) Dollars per month and that under its terms she was "entitled to receive during her liftetime the said Five Hundred ($500.00) Dollars per month income therefrom." The complaint prayed for judgment that all property held by defendant or in which he had an interest be declared community property and that the same be equitably divided. In his answer to the amended and supplemental complaint Samuel C. Hawkins admitted that "under the written terms of which [declaration of trust] an income of approximately Five Hundred Dollars ($500.00) per month is provided to be paid to plaintiff"; denied that the corpus of the trust was community property; denied that Elves Hawkins was induced to sign the declaration of trust containing the recital that the corpus was the separate property of Samuel C. Hawkins because of his refusal to sign it otherwise; alleged that he was induced to execute the declaration of trust through the fraud and undue influence of Elves Hawkins and upon "the express promise, representation and agreement upon the part of the plaintiff [Elves Hawkins], that she would pay over and deliver to the defendant [Samuel C. Hawkins], as his separate property, all and every part of the income of said trust when, as and if received by her; that pursuant to said promise, representation and agreement plaintiff has paid over and delivered to the defendant all and every part of the income received by her from said trust since its declaration, except such parts thereof as she has been permitted to retain by express agreement between the plaintiff and the defendant and/or with the express consent and approval of the defendant."

After a contested trial in the divorce action the court found that the corpus of the trust was the separate property of Samuel C. Hawkins and was not community property; that Elves Hawkins had not been induced to sign the declaration of trust because of the refusal of Samuel C. Hawkins to sign it otherwise; that under the terms of the declaration of trust Elves Hawkins was entitled to receive during her lifetime the net income thereof; that Samuel C. Hawkins was not induced to sign it through fraud or undue influence; that "at or about the same time the said declaration of trust was executed by defendant [Samuel C. Hawkins], plaintiff [Elves Hawkins] freely and voluntarily and as a part of the consideration to defendant, entered into and agreed to the creation of an oral trust wherein and whereby she made herself and became a trustee as to the entire income of said trust, under the terms of which trust she agreed to take and hold the entire income of said trust at and with the Citizens National Trust & Savings Bank of Los Angeles, California, as Trustee, for the joint benefit of the plaintiff and defendant, and to pay one-half said income to him, which trust was at all times thereafter and until the commencement of this action in full force and effect," and that "plaintiff is entitled to receive one-half of the net income of said trust fund as her separate property and the defendant is entitled to receive the remaining one-half of said income as his separate property."

The Interlocutory Decree, entered June 10, 1932, adjudged that Elves Hawkins was entitled to a divorce from Samuel C. Hawkins. It decreed that Elves Hawkins and Samuel C. Hawkins "are each entitled to receive one-half the net income" of the trust and ordered that "when plaintiff [Elves Hawkins] receives the income from said trust fund she shall pay one-half of such net income promptly to defendant." The parties waived their respective rights to appeal from the Interlocutory Decree and it became final. A final decree of divorce was entered July 11, 1933.

On July 7, 1932, Elves Hawkins executed an assignment to Samuel C. Hawkins in which she recited that the Interlocutory Decree decreed "that the said Elves D. Hawkins and the said Samuel C. Hawkins are each entitled to receive one-half of the net income of said trust fund" and that it was "desired that full force and effect be given to said Interlocutory Judgment of Divorce, and that the rights and obligations of the parties hereto be formally settled and determined," and in which she transferred to Samuel C. Hawkins one-half of all the net income due and to become due, or that has been or may be derived from said trust.

Samuel C. Hawkins died March 18, 1945.

On the trial of the instant suit Ruth Hawkins offered and there was received in evidence the entire file in the divorce action. Elves Hawkins then offered to prove: (1) That the pleadings in the divorce action did not present any issue that any oral trust was created whereby Elves Hawkins was to receive the income of the trust and to pay Samuel C. Hawkins one-half thereof; (2) that the divorce action was not tried on the theory that the question of the existence of the oral trust in favor of Samuel C. Hawkins in respect to one-half of the income from the trust was in issue; (3) that no evidence was introduced in the divorce action to support the finding that Samuel C. Hawkins was the owner of one-half of the income of the trust; (4) that the parties intended that the assignment should confer upon Samuel C. Hawkins only a life interest in one-half of the income of the trust; (5) that the assignment was prepared by counsel for Samuel C. Hawkins; (6) that Elves Hawkins understood and believed that Samuel C. Hawkins understood that the assignment was to confer only a life interest in one-half of the income of the trust; (7) that th parties construed the assignment as conferring upon Samuel C. Hawkins only a life interest in one-half of the income of the trust; (8) conversations had during negotiations leading to the execution of the assignment indicating that the parties intended that the assignment confer upon Samuel C. Hawkins only a life estate in one-half of the income of the trust. Objections of Ruth Hawkins to the several offers of proof were sustained.

Judgment followed that Ruth Hawkins, as executrix of the will of Samuel C. Hawkins, is the owner of and entitled to one-half of the net income from the trust from the date of death of Samuel C. Hawkins to the date of death of Elves Hawkins, and it ordered the trustee to pay one-half of the net income which had accumulated since the death of Samuel C. Hawkins to Ruth Hawkins, as executrix, for purposes of administration, and to continue to pay to Ruth Hawkins, as such executrix, for purposes of administration, one-half of the net income from the trust during the administration of the estate of Samuel C. Hawkins so long as Elves Hawkins continued to live, and that upon completion of the administration of the estate of Samuel C. Hawkins to pay one-half of the net income to the persons and in the proportions designated in the decree of distribution to be made in said estate so long as Elves Hawkins continues to live. It further adjudged that the other one-half of the net income be paid to Elves Hawkins so long as she continues to live, and that upon her death the entire trust estate remaining be delivered to Regents of the University of California.

Appellant, Elves Hawkins, contends that she is entitled to receive all of the income of the trust during her life. She asserts that the findings and decree in the divorce action, with respect to the ownership of the income of the trust, were not within the issues; that the court was without jurisdiction to make an adjudication with respect thereto; and that the decree in the divorce action is not res judicata in the present action. She also asserts that the assignment was void, and that the court erred in rejecting her offers of proof.

[1] Appellant's contention that the decree in the divorce action with respect to the ownership of the income is not res judicata in this action is predicated upon the assumption that the ownership and right to receive the income was not in issue in that action. The assumption is erroneous. Appellant herself tendered the issue. She alleged that the corpus of the trust was community property and that she was entitled to receive all of the income. In reply Samuel C. Hawkins alleged that the corpus was his separate property. He admitted that under the *written* terms of the declaration of trust Elves Hawkins was entitled to all of the income but he alleged that it was executed upon the express promise, representation and agreement upon the part of Elves Hawkins that she would pay over and deliver to him, as his separate property, all of the income when, as, and if received by her, and that she had done so with the exception of such parts as he had permitted her to retain. He also alleged that in her sworn questionnaire theretofore filed in the divorce action she had listed the income from the trust as part of his income. The question—which of the parties was entitled to the income of the trust—was thus squarely presented as an issue for adjudication in the divorce action. In its written opinion in that action, which is a part of the file introduced in evidence in the instant action, the court stated "both parties claim the income from this trust fund" and that it appeared from the evidence "that at no time was there any intention that plaintiff should have the full control and use of the income from said trust fund as her sole and separate property, recitals in the trust agreement notwithstanding, but at all times since the establishment of the fund it was, as shown by their acts and words, the express intention of the parties that the income from said fund should be the property of both of the parties jointly." It also appears from that file that in her sworn questionnaire Elves Hawkins listed the income of the trust as part of the income of Samuel C. Hawkins.

[2–4] In its latest exposition of the doctrine of res judicata the Supreme Court in

Bernhard v. Bank of America, 19 Cal.2d 807, at page 813, 122 P.2d 892, at page 895, said: "In determining the validity of a plea of res judicata three questions are pertinent: Was the issue decided in the prior adjudication identical with the one presented in the action in question? Was there a final judgment on the merits? Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?" Each of these questions is answered in the affirmative in the case at bar. The issue decided in the divorce action was identical with the one presented here. There was a final judgment on the merits in the divorce action with respect to that issue. Elves Hawkins, against whom the plea is asserted here, was a party to the prior adjudication. The court in the divorce action had jurisdiction to decide the issue. Its decree as to the ownership and rights of the parties in the income of the trust is res judicata in the present suit between one of the parties to the divorce action and a privy of the other party. It may not be collaterally attacked. Appellant says that in the divorce action the court had no jurisdiction over the separate property of either party and that as the income of the trust was her separate property the court had no jurisdiction with respect to it. The correct rule is stated in Huber v. Huber, 27 Cal.2d 784, 167 P.2d 708. In that case the wife obtained a divorce on the ground of cruelty. The husband had purchased real property with his separate funds and had had the title conveyed to himself and his wife as joint tenants. The husband, by his pleadings, claimed the real property as his separate property, and the wife, by her pleadings, claimed an interest therein by reason of the joint tenancy deed. The trial court ruled that the real property was the separate property of the husband and that the wife had no interest therein. On appeal the court stated, 27 Cal.2d at page 793, 167 P.2d at page 714: "Finally, plaintiff contends that the court could not properly in this divorce action determine that plaintiff had no joint tenancy separate property interest in the real property and that it belonged to defendant alone as his separate property. She urges that a court in a divorce action is limited to the disposition of the community property and cannot pass upon a dispute as to the separate property, citing Allen v. Allen, 159 Cal. 197, 113 P. 160; Reid v. Reid, 112 Cal. 274, 44 P.2d 564; Roy v. Roy, 29 Cal.App.2d 596, 85 P.2d 223; Callnon v. Callnon, 7 Cal.App.2d 676, 46 P.2d 988; and Glass v. Glass, 4 Cal. App. 604, 88 P. 734. While the court in a divorce action should not 'assign the separate property of one of the spouses to the other', Fox v. Fox, 18 Cal.2d 645, 646, 117 P.2d 325, 326, yet when the issue has been made the court may determine whether the property is separate or community and quiet title in the rightful owner. Salveter v. Salveter, 206 Cal. 657, 275 P. 801; Allen v. Allen, 159 Cal. 197, 113 P. 160; Spahn v. Spahn, 70 Cal.App.2d 791, 162 P.2d 53. Here the pleadings put in issue the status of the property and the rights of the parties therein both separate and community." In Roy v. Roy, 29 Cal.App.2d 596, 603, 85 P.2d 223, 226, the court said: "The jurisdiction of the court with respect to the disposal of property in a divorce action is found in section 137 et seq. of the Civil Code. As a general rule, and subject to certain exceptions not material here, the power of the court is limited to a disposition of the community property and the court is without power to pass upon a dispute as to separate property or the disposition of the same. Allen v. Allen, 159 Cal. 197, 113 P. 160; Reid v. Reid, 112 Cal. 274, 44 P. 564; Glass v. Glass, 4 Cal.App. 604, 88 P. 734; Callnon v. Callnon, 7 Cal.App. 2d 676, 46 P.2d 988. Another exception to the general rule arises where an issue is made by the pleadings as to separate property and both parties, without objection, have submitted the question to the court, in which case it has been held that under its general jurisdiction the court has power to hear the questions raised as to the ownership of separate properties and to make proper disposition thereof. Glass v. Glass, supra; Carr v. Carr Co., 39 Cal. App. 53, 177 P. 856; Marshall v. Marshall, 138 Cal.App. 706, 33 P.2d 416." In Callnon v. Callnon, 7 Cal.App.2d 676, at page 680, 46 P.2d 988, at page 990, the court said:

"Where the property rights are put in issue in a divorce proceeding, either by specific allegations describing such property, or by allegation that no community property existed, the decree is res judicata of such rights. Allen v. McCrary, 220 Cal. 508, 510, 31 P.2d 388; Brown v. Brown, [supra], 170 Cal. [1, 6], 8, 147 P. 1168." To the same effect, Spahn v. Spahn, 70 Cal. App.2d 791, 796, 162 P.2d 53. Both parties having invited a determination of the ownership of, and their rights in, the income of the trust, the court had jurisdiction to determine that issue as between them and to quiet the title of the rightful owner in his share thereof. The interlocutory decree became a conclusive adjudication and is res judicata in the present action as to the ownership of the income of the trust. Code Civ.Proc., secs. 1908, 1962, subd. 6; Leupe v. Leupe, 21 Cal.2d 145, 148, 130 P.2d 697.

[5] It having been conclusively determined by the decree in the divorce action that Samuel C. Hawkins was the owner of one-half the income of the trust, it is unnecessary to determine the validity of the assignment. Whether valid or invalid it added nothing to the force of the interlocutory decree. In effect, it was merely a direction by Elves Hawkins to the trustee to pay one-half of the income direct to Samuel C. Hawkins rather than to pay all of it to Elves Hawkins and she in turn pay one-half to Samuel C. Hawkins. For the same reason appellant's offers of proof were properly rejected. Those concerning the issues in the divorce action and as to whether evidence was received in that action with respect to those issues were contrary to the judgment roll in that action and are not admissible in this, a collateral proceeding, to change the legal effect of the interlocutory decree in any material respect. Harston v. Dill, 151 Cal. 137, 142, 90 P. 530; Wendt v. Gates, 102 Cal.App. 342, 344, 283 P. 312; Kirkpatrick v. Harvey, 51 Cal.App.2d 170, 173, 124 P.2d 367; 15 Cal.Jur. 290, sec. 276. Those concerning the intention of the parties with respect to the assignment and their practical construction of it were immaterial for the same reasons.

[6] Appellant argues, with much force, that the spendthrift provisions of the declaration of trust prevented Elves Hawkins from making any agreement with her then-husband by which she agreed that he should be the owner of one-half of the income of the trust. Whether Samuel C. Hawkins, the trustor who created the trust and imposed the spendthrift restrictions, could by an executed oral agreement with the beneficiary, Elves Hawkins, waive them is not argued or presented. Whether Elves Hawkins was effectually restrained by the spendthrift provisions from making any agreement as to the disposition of the income of the trust, irrespective of any executed oral agreement which was a consideration for the creation of the trust, necessarily was decided in the divorce action contrary to appellant's present contention and may not be raised in this suit. Even if the decree in the divorce action was erroneous in that respect it bars appellant in this subsequent proceeding. Bendlage v. Kohlsaat, 54 Cal. App.2d 136, 139, 128 P.2d 691. As was well stated by the learned trial judge, appellant's remedy, if any, was by some appropriate proceeding in the divorce action.

[7] It appears to be conceded that if the interlocutory decree is res judicata, the interest of Samuel C. Hawkins in the income of the trust passed to his legatees upon his death subject to administration. That by his will it did so pass is clear. Civ.Code, sec. 954; Prob.Code, sec. 300.

Judgment affirmed.

SHINN, P. J., and WOOD, J., concur.

87 Cal.App.2d 553

DYNAN et al. v. GALLINATTI.

Civ. 13689.

District Court of Appeal, First District, Division 2, California.

Sept. 14, 1948.

1. Husband and wife 🔑267

Code section providing that husband has management and control of community personalty, with like power of disposition provided, however, that he cannot sell, convey or incumber "the" furniture, furnishings, or fittings of the home, or the clothing or wearing apparel of wife or minor children that is community, without wife's written consent, refers to all of such enumerated personalty, and not merely to the wife's half of the personalty, and does not permit a husband to encumber his half share of the community property. Civ. Code, § 172.

See Words and Phrases, Permanent Edition, for all other definitions of "The".

2. Statutes 🔑190

When the legislature has spoken in plain and unmistakable language, statute must be followed as written.

3. Husband and wife 🔑272(2)

Where husband, without wife's knowledge executed a mortgage on community household furniture and furnishings located in family home, to secure payment of a note, and he forged wife's name to both note and mortgage, and thereafter husband died and mortgage was recorded one day after his death, holders of mortgage were not entitled to foreclose lien of mortgage on husband's half of the community household furniture and furnishings. Civ.Code, § 172.

4. Husband and wife 🔑273(1)

Husband's interest in community household furnishings is an interest which may be set aside to surviving wife under statute. Code Civ.Proc. §§ 690.2, 690.50; Probate Code, § 660.

◆

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by George E. Dynan and Percy E. Marquis, copartners doing business as the Dynan Finance Company, against Edith Gallinatti, as executrix of the last will of Mack Gallinatti, deceased, and Edith Gallinatti, individually, to foreclose the lien of a chattel mortgage on community household furniture and furnishings. From an order denying the defendant's motion for a new trial and from that portion of the judgment rendered in favor of the plaintiffs, Edith Gallinatti, individually and as executrix, appeals.

Judgment and order reversed.

Irving M. Liner, of Oakland, and G. Fred Skaff, of San Francisco, for appellant.

Herman W. Mintz and J. A. Gunning, both of Oakland, for respondents.

NOURSE, Presiding Justice.

Edith Gallinatti, individually and as executrix of the will of her husband, Mack Gallinatti, appeals from the order denying her motion for a new trial; and from that portion of the judgment rendered in favor of plaintiffs, a copartnership engaged in the financing of loans, decreeing that certain sums of money are secured by a chattel mortgage upon decedent's interest in the community property consisting of certain household furniture and furnishings.

The oral stipulation of facts upon which the case was tried is as follows:

Mack Gallinatti on June 19, 1946, made and delivered to respondents a promissory note and a chattel mortgage to secure the payment, the mortgage being upon the community household furniture and furnishings located in the family home. He signed his name and forged that of his wife to both the note and mortgage, having both signatures acknowledged before a notary public. Appellant did not give her consent to the signing of her name on either note or mortgage and had no knowledge of them.

Mack Gallinatti died on July 4, 1946. The chattel mortgage was recorded one day after his death. On July 29, 1946, Edith Gallinatti was appointed executrix of the will of her husband. Respondents duly presented and filed a claim against the estate which was rejected by the executrix as a secured claim but allowed as an unsecured claim. Thereupon respondents filed this action to foreclose the lien of the chattel mortgage on the community household furniture and furnishings. It is conceded that as the chattel mortgage was not recorded until after the death of her husband that appellant had no knowledge of its execution and no opportunity to set it aside during her husband's lifetime.

Appellant contends that said chattel mortgage is void, basing this contention on section 172 of the Civil Code which states in part: "The husband has the management and control of the community personal property, with like absolute power of disposition * * * provided, however, that he cannot * * * sell, convey, or encumber the furniture, furnishings, or fittings of the home, or the clothing or wearing apparel of the wife or minor children that is community, without the written consent of the wife." Appellant argues the language of the code is clear and unambiguous and therefore when Mack Gallinatti attempted to make a chattel mortgage covering the furniture and furnishings of the home without first securing the consent and signature of his wife his act was an idle act insofar as creating any lien. Appellant agrees that respondents have a valid claim against the estate for the money loaned but she denies that they have a lien on any portion of the household furniture.

Respondents argue that section 172 is intended to be a limitation of the husband's power of disposition only during the continuance of the marital relationship and that, when such relationship is dissolved by death, the wife can disaffirm as to only her one-half of the community property, hence, that the mortgage is good as to the husband's undivided half-interest. The trial court adopted the reasoning of respondents and gave judgment against the estate with a lien "upon decedent's interest in the * * * community property" covered by the mortgage.

[1, 2] The code section is clear and calls for no judicial interpretation. It declares in positive terms that a husband "can not" encumber the household furniture of the community. It does not say that he can encumber his one-half share of such community property, but that he cannot encumber "the" furniture, wearing apparel of the wife, etc. Here the word "the" means any or all and it is used without any exception or qualification. When the legislature has spoken in plain and unmistakable language it is our duty to follow the statute as written.

[3] The respondents' position as to the effect of the death of the husband on the interpretation of the statute is logically unsound. It is in short that, assuming that the husband was without power to create the lien in his lifetime such a lien attached to his undivided share in the property immediately upon his death, because he had not disaffirmed the mortgage during his lifetime. This is another way of saying that, during his lifetime, the husband could encumber his community interest in the household furniture and that, because he attempted to encumber the entire property his death imposed a lien on his undivided one-half. This theory is not based upon any statutory rule and is directly contrary to section 172 which expressly prohibits the husband from encumbering the furniture without the wife's consent. And what he could not have done directly during his lifetime cannot be done by interpretation after his death.

A careful reading of section 172 of the Civil Code discloses the legislative intent. After giving the husband the management and control of the community personal property it follows with two provisos—first, that he cannot make a gift or dispose of any such property "without a valuable consideration" without the wife's written consent, second that he cannot, without the written consent of the wife, dispose of or encumber the furnishings of the home or the wife's wearing apparel with or without valuable consideration. Manifestly there was no reason for the second proviso if the legislature had intended that the husband could dispose of his undivided interest in the household furnishings and the wife's wearing apparel for "a valuable consideration" and thus call for a division of these furnishings and apparel after his death and the consequent distribution of the husband's share to a stranger to the community.

The purpose of the proviso is clear—it is to render free from execution and sale the furnishings of the home and the wearing apparel of the surviving wife and minor children. We may assume that it would be conceded without argument that under this statute a creditor of the deceased husband would not be permitted to come into the home and seize one-half of the wearing apparel of the surviving wife or of the minor children. But these items are placed in the same sentence and in the same category as the household furnishings. As the legislature sought to protect the wife and the minor children in the use of their wearing apparel—all of it, not only an undivided interest therein—so it sought to protect the family in the use of the household furniture.

[4] This legislative intention finds further expression in section 660 of the Probate Code which reads in part: "The decedent's surviving spouse and minor children are entitled to remain in possession of the homestead, the wearing apparel of the family, the household furniture and other property of the decedent exempt from execution, until the inventory is filed. Thereupon * * * the court, * * * may in its discretion set apart to the surviving spouse * * * all or any part of the property of the decedent exempt from execution, * * *." This section ties in with section 690.2 of the Code of Civil Procedure which exempts from execution all "necessary household" furniture "wearing apparel" etc. of the judgment debtor. Since the husband's interest in the household furniture is exempt from execution (except on foreclosure of a valid lien thereon—section 690.50) his interest in the community household furniture is an interest which may be set aside to the surviving wife under section 660 of the Probate Code.

Respondents cite a line of cases commencing with Spreckels v. Spreckels, 172 Cal. 775, 158 P. 537, and running to Trimble v. Trimble, 219 Cal. 340, 26 P.2d 477, holding that, under the first clause of section 172, a husband's conveyance of the community property was voidable as to the wife's half, but valid as to the husband's half. No one of these cases involved the second proviso of the code section prohibiting the sale, or encumbrance of the household furniture or wearing apparel. The reason for the distinction is clear. Personal property such as stocks, bonds and equipment used in the husband's business being easily divisable present an entirely different picture than the furnishings of the home and wife's clothing. The legislature has recognized that these items are necessary for the maintenance of the surviving family—more necessary in fact after the death of the husband than during his lifetime when he would be able to make proper provision for the support of the family.

The distinction between the cases cited and our case appears from further reference to the wording of the code section. All these cases involved the prohibition against the husband's disposition of the community property "without a valuable consideration". The household furnishings and wearing apparel cannot be encumbered without the written consent of the wife with or without consideration. It is apparent that in disposing of his stocks, bonds, and similar personal property the husband is merely giving up his community share which he could dispose of by will. But as to his interest in the household furniture the husband's dispository interest is wholly within the hands of the probate court which can set aside the whole of it to the widow under section 660 of the Probate Code.

Judgment and order reversed.

GOODELL, J., concurs.

87 Cal.App.2d 703

PEOPLE v. MORANDA.

Cr. 2080.

District Court of Appeal, Third District, California.
Sept. 25, 1948.

1. Indictment and Information ⚷176

Variance between information charging commission of burglary on or about December 16, 1947, and evidence of commission thereof on December 18, 1947, was not fatal. Pen.Code, §§ 955, 960, 1404.

2. Indictment and Information ⚷176

Variance between information and evidence as to time of commission of offense charged is immaterial, unless time is of essence of offense. Pen.Code, §§ 955, 960, 1404.

3. Indictment and Information ⚷176

Variance between information and evidence as to time of commission of single offense, alleged to have been committed before filing of information and within applicable limitations period, is immaterial. Pen.Code, §§ 955, 960, 1404.

4. Indictment and Information ⚷171

Immaterial variance between information and evidence should be disregarded, and test of materiality is whether informaton so fully and correctly informs defendant of crime charged that, considering proof against him, he is not misled in making defense or placed in danger of being twice put in jeopardy for same offense.

5. Criminal law ⚷772(4)

Instruction to find defendant guilty of burglary, if jury believed that defendant entered building at time alleged in information with intent to steal, and jury's verdict finding him guilty as charged in information, were not erroneous because of variance between information and evidence showing commission of offense two days after alleged date thereof.

6. Criminal law ⚷1120(1)

In prosecution for burglary, shown to have been committed two days after date alleged in information, defendant's complaint, on appeal from conviction, that he was denied opportunity to question witnesses regarding such date, presented no question for review, in absence of showing in record that his counsel made any such attempt or court ruling denying such opportunity.

7. Criminal law ⚷338(1)

In prosecution for burglary, shown to have been committed two days after date alleged in information, police officer's testimony on cross-examination by defendant's counsel as to whether witness searched burglarized premises within day or so before his search thereof on day of burglary was properly excluded as immaterial.

◆

Appeal from Superior Court, Humboldt County; Delos A. Mace, Judge.

Harold Charles Moranda was convicted of burglary, and he appeals.

Affirmed.

Harold Charles Moranda, in pro per.

Fred N. Howser, Atty. Gen., and Doris H. Maier, Deputy Atty. Gen., for respondent.

ADAMS, Presiding Justice.

In an information filed in Humboldt County defendant was charged with burglary committed on or about December 16, 1947, in that he did "wilfully, unlawfully, feloniously and burglariously enter those certain premises and building known as Shafer's Hardware Store, located at 2750 "E" Street, in the City of Eureka, County of Humboldt, State of California, and occupied by A. F. Shafer and Frank Kitchen, with the felonious intent then and there to commit the crime of theft therein." A trial resulted in defendant's conviction, and he has appealed, contending first that there was a fatal variance between the pleading and the proof of the offense; second, that he was unduly restricted in the questioning of witnesses.

[1-3] Appellant's claim of a fatal variance is based upon the fact that while the information charged the burglary to have been committed "on or about" December 16th, the evidence shows it to have been committed on December 18th. There is no

merit in this contention. It is well established that such a variance is immaterial unless time is of the essence of the offense; and that where it clearly appears, as it does in this case, that but a single offense is charged to have been committed anterior to the filing of the information, and within the period designated by the applicable statute of limitations, the variance is of no significance. Section 955 of the Penal Code of California provides that the precise time at which an offense was committed need not be stated in an information, but it may be alleged to have been committed at any time before the filing thereof, except where the time is a material ingredient. And it is set forth in section 960 of that code that no information is insufficient, nor can a judgment be affected by reason of any defect or imperfection in matter of form which does not prejudice a substantial right of defendant upon the merits. Also, section 1404 provides that neither a departure from the form or mode prescribed by that code in respect to any pleading, nor any error therein, renders it invalid unless it has actually prejudiced the defendant or tended to his prejudice in respect to a substantial right.

In the early case of People v. Rice, 1887, 73 Cal. 220, 221, 14 P. 851, where the evidence showed that the offense was committed three months before the time stated in the information the variance was held immaterial. In People v. Vincilione, 1911, 17 Cal.App. 513, 516, 120 P. 438, a variance of twelve days was held immaterial. Also see People v. Triplett, 70 Cal.App.2d 534, 541, 161 P.2d 397, and cases there cited; People v. Baker, 25 Cal.App.2d 120, 122, 76 P.2d 715; People v. Andrew, 43 Cal.App.2d 126, 130, 131, 110 P.2d 459; People v. Branch, 77 Cal.App. 384, 392, 246 P. 811; People v. Allen, 144 Cal. 298, 301, 77 P. 948; 14 Cal.Jur., secs. 72, 73, pp. 96, 97.

[4] In People v. LaMarr, 20 Cal.2d 705, 711, 128 P.2d 345, the court said that an immaterial variance should be disregarded, and that the test of materiality is whether the information so fully and correctly informs the defendant of the criminal act with which he is charged that, taking in consideration the proof which is introduced against him, he is not misled in making his defense, or placed in danger of being twice put in jeopardy for the same offense. And in People v. Williams, 27 Cal.2d 220, 226, 163 P.2d 692, the same rule is stated, the court adding that on a plea of double jeopardy extrinsic evidence is admissible to identify the crime of which a defendant has been convicted. To like effect are People v. Becker, 140 Cal.App. 162, 164, 35 P.2d 196; People v. Barnett, 99 Cal.App. 409, 414, 278 P. 885; People v. Andrew, supra.

In the case before us defendant did not demur to the information, and could not have been misled. The evidence showed but one burglary and that such burglary was committed at the place alleged in the information. The evidence before the committing magistrate must have advised defendant that only a burglary of that place was claimed to have been committed by him and that such burglary was committed on the 18th, rather than the 16th, of the month. Also two confessions made by defendant were in evidence in both of which he admitted the offense and that same was committed on the 18th.

[5] Defendant also makes reference to one of the instructions of the court containing the words: "If, therefore, you believe from the evidence in this case to a moral certainty and beyond a reasonable doubt that the defendant entered the building of A. F. Shafer and Frank Kitchen, known as Shafer's Hardware Store, at the time alleged in the information, with the intent to steal, you should find the defendant guilty of the crime of burglary." He points out that the court there used the words "at the time alleged in the information." He also refers to the verdict of the jury which found him guilty "as charged in the information on file." It is not asserted that the court's instruction aforesaid was incorrect, and appellant's discussions of same and of the verdict are merely reiterations of his arguments on variance. They are disposed of by what we have said on that subject.

[6, 7] As for appellant's complaint that he was denied the opportunity to question witnesses regarding the 16th day of De-

cember, 1947, we have examined the record and find no place therein where defendant's counsel made any such attempt, nor any ruling of the court which denied defendant such opportunity. In one place we find that defendant's counsel asked Officer Gray, who had testified to a search on the 18th of the premises where some of the stolen goods had been secreted by defendant, if he had not searched such premises within a day or so prior to the search on the 18th, and objection thereto was sustained on the ground that it was immaterial. Such ruling was right, since that would have been before the commission of the burglary. There was no effort or offer on the part of defendant or his counsel to show any relevancy of the question or that, if allowed, it would have elicited a reply tending in the slightest degree to show innocence on the part of defendant.

The evidence in the case is entirely sufficient to sustain the verdict of the jury, and no prejudice to any substantial right of defendant has been shown. He would be no better off today if the information had charged the commission of the burglary on the 18th day instead of "on or about" the 16th.

The judgment is affirmed.

PEEK and THOMPSON, JJ., concur.

---

87 Cal.App.2d 600

KAY v. KARAS.

Civ. 13745.

District Court of Appeal, First District,
Division 1, California.
Sept. 20, 1948.

1. Witnesses 🔑178(4)

Executor sued by plaintiff for compensation for personal service rendered deceased and for amount of savings deposit accounts allegedly given by deceased to plaintiff waived plaintiff's disqualification under statute limiting testimony of a party to an action or proceeding brought against an executor, by taking plaintiff's deposition under statute relating to examination of adverse party. Code Civ.Proc. §§ 1880, subd. 3, 2055.

2. Executors and administrators 🔑205(2)

Where there is evidence to show that compensation was contemplated, although no definite rate was agreed upon, reasonable value of services rendered deceased may be recovered from executor of deceased's estate.

3. Gift 🔑30(3)

A gift of a savings pass book may be a gift of the money on deposit, subject to proper notice to the bank of assignment, for the purpose of withdrawal by the donee.

4. Appeal and error 🔑1008(1)

Appellate courts should not interfere with trial court's determination in absence of evidence showing an abuse of trial court's discretion.

5. Gifts 🔑49(5)

Evidence was sufficient to show that deceased made a gift of savings pass books to plaintiff.

6. Executors and administrators 🔑221(5)

Evidence was sufficient to show that plaintiff performed personal services for deceased at his request and that deceased promised to compensate plaintiff for such services and that plaintiff had not been fully paid therefor, entitling plaintiff to recover reasonable value of such services from executor of deceased's estate.

◆

Appeal from Superior Court, City and County of San Francisco; Robert McWilliams, Judge.

Action to recover amount of savings deposit accounts and compensation for personal services by Ruby S. Kay against Speros Karas, executor of the estate of Peter Ganas, alias, deceased. From the judgment, the defendant appeals.

Affirmed.

Jack Flinn and Albert E. Deasy, both of San Francisco, for appellant.

Philander Brooks Beadle, of San Francisco, for respondent.

WARD, Justice.

This is an appeal by Speros Karas, executor of the estate of Peter Ganas from a judgment in the total sum of $6,048.03 in favor of plaintiff based upon two causes of action.

The complaint set forth as a first cause of action that at the date of the death of Peter Ganas, November 16, 1945, plaintiff was the sole owner of two savings deposit accounts standing in the name of Peter Ganas; that on December 21, 1945, plaintiff, who had been appointed special administratrix of the estate of Peter Ganas, permitted defendant, who was subsequently appointed executor of the estate, to have possession of the two pass books, and that thereafter defendant withdrew the balances and became indebted to plaintiff in the sum of $3,676.81; that defendant refused and neglected to pay any portion thereof to plaintiff. The second cause of action stated that the deceased was indebted to plaintiff for personal services rendered by her to the deceased at his request, consisting of "serving as a grocery clerk in the grocery store operated by said deceased * * * checking and keeping account of rationed goods, keeping stock in order and waiting on trade in said grocery store; purchasing, preparing and cooking food for medically prescribed diet for said decedent; nursing care; furnishing transportation to decedent to and from his residence; taking said decedent to and from his doctor's office and hospital for treatments and ex-rays * * * from the 1st day of January 1943 to and including the date of said decedent's death." It was further alleged that the executor rejected a claim for the amount due for personal services.

The answer admitted "that on the 16th day of November, 1945, there were two Savings Deposit Accounts in the name of the decedent, Peter Ganas, one in the Bank of America, National Trust & Savings Association, * * * No. 4819, in the sum of $2,154.89; and one in the Anglo California National Bank, * * * No. 9581, in the sum of $1,521.92." Defendant alleged that plaintiff on November 17, 1945, was appointed special administratrix of the estate involved herein, and that on December 20, 1945, defendant was duly appointed executor "and received said pass books from Plaintiff in her capacity as Special Administratrix and not otherwise." Defendant denied that the deceased was indebted to plaintiff in any amount.

Evidence was introduced and the court made findings of fact including the following: "(2) It is true that on said 16th day of November 1945, plaintiff was the sole owner of two savings deposit accounts standing in the name of Peter Ganas * * * (4) It is true that on or about January 9, 1946, and in his capacity as executor of the estate of said decedent, defendant withdrew the balances of said savings accounts and thereupon became, and ever since has been indebted to plaintiff in the sum of $3,694.95, which sum is the total on deposit in said accounts at the time of such withdrawals * * * [Interest on this amount from January 9, 1946, to the date of judgment was found to be $362.08.] (7) It is true that said Peter Ganas, deceased, was at the time of his death indebted to plaintiff in the sum of $1,991 for personal services rendered by plaintiff to said Peter Ganas, deceased, at the special instance and request of said decedent. That said personal services consisted of the following: serving as a grocery clerk in the grocery store operated by said deceased * * * checking and keeping account of rationed goods, keeping stock in order and waiting on trade in said grocery store. That said sum of $1,991.00 is the reasonable value of said services so rendered * * * almost continuously over a period from the 1st day of January 1943 to and including the date of said decedent's death." In fixing the amount for personal services the trial court allowed only for services performed by plaintiff in connection with the conduct of the grocery business.

Defendant challenges the sufficiency of the evidence to justify the finding that plaintiff was the sole owner of the two savings accounts and that Ganas, the decedent, at the time of his death was indebted to plaintiff in the sum of $1,991 for personal services rendered at the special request of Ganas.

Defendant contends that plaintiff's case failed to show any sum due her for personal services: (1) There was no express or implied promise on the part of decedent to pay any compensation for services rendered by plaintiff. (2) If plaintiff performed any work for compensation she was fully paid therefor.

[1] Plaintiff's disqualification under sec. 1880(3), Code of Civil Procedure, was waived by the defendant in that he took her deposition under sec. 2055 (sec. 2021), Code of Civil Procedure. Moul v. McVey, 49 Cal.App.2d 101, 106, 121 P.2d 83; McClenahan v. Keyes, 188 Cal. 574, 206 P. 454; Lohman v. Lohman, 29 Cal.2d 144, 173 P.2d 657. Defendant argues that there was no agreement, but that the testimony shows only a hope built upon a vague suggestion that she might be paid by decedent. It is further argued that certain salary receipts signed by plaintiff negative any promise to pay in the future. There is evidence that plaintiff acknowledged the payment of certain amounts but that the acknowledgment was made at the decedent's request for use in connection with his income tax returns. This court is not prepared to say that the explanation of plaintiff is untrue. The trial court's conclusion must be accepted on appeal on this factual issue.

Plaintiff came to San Francisco in 1942 and was introduced during the same year by her father's brother to Peter Ganas. Plaintiff testified that she assisted Peter during the Christmas 1942 period. The evidence shows: "A. Well, every so— After the beginning of 1942, when I finished my work, I thought I was through, and then my Uncle Shoras said to me, 'Peter Ganas' niece you are, and you should help him more often', and I says, 'Well, Uncle, I don't see how I can do it, because I work all day'; he says, 'You will work at night, after work, a few hours; that wouldn't be so very much for you'; so I agreed to do so; so in 1943, the early part, month of January, we sort of made arrangements which I should go to work.

"Q. Who made that arrangement? A. Peter Ganas.

"Q. Peter Ganas and you? A. And myself * * * At the beginning I thought I was only going to help him just for a few days, and then it eventually grew that I was working all the time. He told me I was going to work all the time.

"Q. Peter Ganas did? A. Peter Ganas. * * *

"Q. Was anything said by you or him as to whether you would be paid for your work? A. At first I thought I didn't want to come to work, thinking that I wouldn't get paid, and then he says—he told me, 'I want you to work and I am going to take care of you for working for me'.

"Q. Did he ever say how much he was going to pay you for working for him? A. No.

"Q. Did he repeat the fact that he was going to take care of you for working for him? A. Yes, in the latter part of the year, yes.

"Q. About when was that? A. When I had been there at least working with him six months, then he started to tell me that. He says, 'All this time you have never mentioned about pay or how much you are going to get,' and he said that, 'I have watched you faithfully to see if you are honest and you were'; that he was satisfied with my work and the way I never questioned him about being paid all the time, or what I expected to get; that—he then told me that he has sufficient of money provided for me to get paid, and when the proper time arrived.

"Q. Is that as close as he came to tell you when you would be paid? A. At that time.

"Q. About when was this conversation? A. About, oh, I would say, '43, when I have been there with him at least six months.

"Q. Where did the conversation take place? A. In the store.

"Q. Was there anyone present? A. No, the two of us.

"Q. Did he ever again at any other time mention the subject of paying you? A. Yes, in early—in early '44—in early

'44, he mentioned that, let's see—oh, in early '44, he told me then that he had it—he had money—he had more money than the books that he had given me; that he had a safe deposit box and in that safe deposit box I would get my wages for all the work I had done for him. * * * Well, he never exactly fixed the amount. He told me that I would get all what is proper amount that I should earn and whatever the amount is to be paid.

"Q. In your claim which you have filed against his estate, did you fix the amount? A. I fixed the amount, figuring what is right.

"Q. How much did you fix it? A. A dollar an hour.

"Q. The claim which you have filed is based upon wages of one dollar per hour? A. Per hour. * * *

"Q. How many hours a day did you work each week? A. Each week? Oh, you mean the hours a day?

"Q. Yes. A. About two and a half hours a day, and seventeen and a half hours for the week, I think." The evidence also shows that defendant delivered his safe deposit box keys to plaintiff and said she would find her pay in the box. On a number of occasions he asked for the keys but plaintiff always had them returned to her. The transcript shows that she did not have access to the box until after the death of Ganas. The following testimony appears:

"Q. You were working for him merely because of your love and affection for him? A. No, he told me at the beginning he was going to take care of me, sir.

"Q. You went to work depending on getting something out of it, isn't that right? A. I was going to get paid for it, because he told me I was going to get paid.

"Q. There was no agreement to pay?

"The Court: Other than his pomise and the fact that she did actually work.

"Mr. Flinn [attorney for defendant]:

"Q. There was no definite agreement?

"The Court: Express agreement, you mean?

"Mr. Flinn: Q. Express agreement as to the amount of the payment? A. At that beginning of the six months, no.

"Q. Or time of payment?

"Mr. Beadle [attorney for plaintiff]: Object to that: a misstatement of the evidence. She stated what he said as to time of payment and we can draw our own inference from that as to whether there was an agreement or not.

"The Court: Yes.

"Mr. Flinn: Q. When did he give you the keys to the safe deposit box? A. In June, 1944, the time when he was so very sick.

"Q. You had those keys right up to this time, is that right? A. Yes, even today I have them.

"Q. Is your name on the safe deposit box? A. When?

"Q. Any time. A. When he was lying sick?

"Q. At any time has your name been on his safe deposit box? A. Well, it is now, sir.

"Q. Since when? A. Since he died." There was ample corroborative evidence to prove that plaintiff worked for Ganas, and two of the witnesses testified that Ganas had commented on the work she performed and that he would take care of her.

[2] When there is evidence to show that compensation was contemplated, although no definite rate was agreed upon, the reasonable value of the services rendered may be recovered. Lundberg v. Katz, 44 Cal.App.2d 38, 111 P.2d 917; Manford v. Coats, 6 Cal.App.2d 743, 45 P.2d 395; Zellner v. Wassman, 184 Cal. 80, 193 P. 84.

A review of the evidence upon the issue whether a gift of the two savings deposit accounts was made, shows that plaintiff testified that in the presence of Mrs. Manley Harris he gave the books to plaintiff. The following testimony appears: "A. When he had taken the books, he turned to me and says, 'Ruby, I want you to have these books for yourself. These are your books.' * * * Well, I looked at him surprised, then he says, 'Don't look at me surprised. These two books are yours. I want you to have them. I'm giving you these two books.' * * * I says, 'Uncle Peter, why are you giving me these two books and the money in those two books?' He says, 'Ruby,' he says, 'I have watched—I have studied you. You have been faithful, you have been honest, and you gave me great happiness that no other persons has given me.' He said, 'Your grandmother was the same in many ways.' He says, 'When I was a younster, I was an orphan and I was banged around left and right. When I was in trouble, when I needed something or food, I run to your grandmother and she would feed me. She would mend my clothes, she would wash my face, and she would take care of me and comfort me, and you are exactly like your grandmother and I have studied you being so much like your grandmother that I got very fond of you. For that reason I want you to have these two books for all the good kindness that you have offered me, and which I am sure you will take care of me and will still offer me more,' and that's the reason—that's the reason he gave me those books." Plaintiff further testified: "I have a little box upstairs. It's a tin box and I hid them in there until I had decided to go back east to my sister's wedding. Then I handed them to Mrs. Harris so I wouldn't lose them."

Mrs. Manley Harris testified: "We had our dinner, and all of a sudden Uncle Peter lifted up—he wore many coats, heavy woolen, warm coats, and he lifted up his sweater, or opened one, and lifted up the sweater and reached in his pocket and took out a pocket book about the size of an envelope, like that (illustrating).

"Q. The size of an envelope, you think? A. About that size. You know, a man's wallet, that shape, that type of purse, and he took out of that some papers, looked like they were just papers, and then he took out bills, and then he took out the two books, and he said, 'Ruby, I am giving you these books and I'—'You have been good to me, nobody has ever been so good, I have tested you, I have watched you, and you are honest and good, you are like your grandmother, and you have lost a great deal, you lost your business, and I want to give you these books, these are yours, these will help you later.' I was quite surprised, and Ruby was * * * seemed to be stunned. * * *A. Well, she—Ruby spoke—she said, 'Why, Uncle Peter, why do you do that?' He said, 'Because I want you to have it, and I want you to have what I give you, I want it for you, to make up for all the goodness you have shown me, help you.'" Mrs. Harris also testified that when plaintiff went east to visit a relative she kept the books for plaintiff; that Peter Ganas asked for the books, several times to make deposits but made no withdrawals. After the death of Ganas the books were delivered to the plaintiff's attorney who subsequently turned them over to defendant executor.

The trial court decided that the withdrawal of the books from plaintiff and the making of nine additional deposits did not constitute ownership of the books or the money by decedent. This conclusion is supported by evidence that interest on deposits were entered, new deposits made, and that decedent never withdrew any of the money for his own use. Events occurring after the date of the gift may show whether the gift was completed or not. Decedent reported the income from the savings accounts in his income tax returns, but this may have been merely to relieve plaintiff of the tax problem.

[3] A gift of a savings pass book may be held to be a gift of the money on deposit, subject to proper notice to the bank of the assignment, for the purpose of withdrawal by the donee. Ornbaun v. First Nat. Bank, 215 Cal. 72, 8 P.2d 470, 81 A.L.R. 1146. In the present case there were no withdrawals by Ganas and none by plaintiff. Notice to the bank of the assignment was not necessary unless plaintiff sought to withdraw part or the whole of the funds. If the trial court believed the statements of plaintiff and Mrs. Harris, the gift was complete. In Wilson v. Crocker First Nat. Bank, 12 Cal.App.2d 627, 630, 55 P.2d 1208, 1209, the court said: "The rule that a gift of a savings passbook is a gift of the money on deposit rests upon the well-settled doctrine that a gift of the symbol of a thing is a

gift of the thing itself. This rule has been accepted and affirmed by all the authorities in this state." Each case may present a different problem—involving intent.

[4-6] Unless there is evidence showing an abuse of the trial court's discretion appellate courts should not interfere. Here the conduct of the parties corroborates the gift of the pass books (Moore v. Spremo, 72 Cal.App.2d 324, 164 P.2d 540) and the performance of personal services at the request of decedent, which should be compensated for upon the basis of their reasonable value. Zellner v. Wassman, supra.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

87 Cal.App.2d 636

SWEELEY v. LEAKE et al.

Civ. 16236.

District Court of Appeal, Second District,
Division 3, California.
Sept. 20, 1948.

1. Appeal and error 🔑933(1)

On appeal from order granting new trial, presumption is in favor of the order as against the judgment.

2. Appeal and error 🔑979(2)

When a new trial is granted on ground of insufficiency of evidence, an appellate court will not interfere with the order in the absence of a showing of a manifest or unmistakable abuse of discretion.

3. New trial 🔑71

A trial court, in hearing a motion for a new trial on ground of insufficiency of the evidence, is not bound by the rule of conflicting evidence, and must weigh all evidence and determine the just conclusions to be drawn therefrom.

4. Appeal and error 🔑979(1)

Trial court's ruling on motion for new trial on ground of insufficiency of the evidence will not be disturbed on appeal where there is conflict in the evidence or where there is substantial evidence which would support a judgment in favor of the moving party.

5. Appeal and error 🔑979(1)

Fact that motion for new trial on ground of insufficiency of evidence was heard and determined by a judge other than one who presided at the trial did not extend power of District Court of Appeal in reviewing the matter, since judge hearing motion stood in shoes of former judge and had same power and was charged with same duty as if motion had come before former judge.

6. New trial 🔑70

In wife's action against husband's attorneys to set aside a chattel mortgage given by husband to attorneys, and to set aside an assignment executed by husband to attorneys, on ground that instruments were made without consideration and with intent to defraud wife, who had an unsatisfied execution for separate maintenance, granting of new trial to attorneys on ground of insufficiency of evidence to sustain verdict for plaintiff was proper.

7. Fraudulent conveyances 🔑271(3)

Fraud is never presumed, but must be affirmatively established by evidence amounting to proof of fraud, and, where circumstances of transfer comport equally with honesty and fair dealing, fraud will not be found in the transfer.

8. Fraudulent conveyances 🔑271(3)

The presumption is always in favor of fair dealing with respect to a transfer of property, except, perhaps, where confidential relations are involved.

9. Husband and wife 🔑299(4)

In wife's action against husband's attorneys to set aside a chattel mortgage given by husband to attorneys, and to set aside an assignment executed by husband to attorneys, on ground that instruments were made without consideration and with intent to defraud the wife, who had an unsatisfied execution for separate maintenance, evidence authorized finding that there was no fraud in connection with execution of the instruments.

◆

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by Ruth M. Sweeley against E. O. Leake, J. J. Leake, and another, to set aside a chattel mortgage on certain furniture, furnishings and equipment used by plaintiff's husband in practice of medicine, and to set aside an assignment executed by the husband. From an order granting the motion of E. O. Leake and J. J. Leake for a new trial, the plaintiff appeals.

Order affirmed.

Zagon, Aaron and Sandler, of Los Angeles, for appellant.

Brown, Beery & Rognes and E. O. Leake & J. J. Leake, all of Los Angeles, for respondents.

VALLÉE, Justice.

Appeal by plaintiff from an order granting a motion for a new trial in an action to set aside a chattel mortgage upon certain furniture, furnishings and equipment of Dr. Merle E. Sweeley and used by him in the practice of medicine, securing a note in the sum of $2,500, executed by him and made payable to defendants E. O. Leake and J. J. Leake, and an assignment executed by Dr. Sweeley to defendants E. O. Leake and J. J. Leake of $2,025, now in the possession of the defendant Byram, County Treasurer.

The motion for new trial was heard and passed upon by a judge other than the one who presided at the trial of the case and was based upon the following grounds: (1) insufficiency of the evidence, (2) the decision was against the law, and (3) errors in law occurring during the trial and excepted to by the defendants. The order appealed from granted the motion "on all grounds given in the notice of intention to move for new trial including insufficiency of the evidence to justify the decision."

Briefly, the events leading up to the filing of the instant action, as revealed by the pleadings and evidence, are as follows:

In October, 1943, Dr. Sweeley came to California from Illinois and opened an office for the practice of medicine. Considerable marital difficulties existed between Dr. Sweeley and his wife, Ruth M. Sweeley, who was then residing in Illinois. On September 7, 1944, Dr. Sweeley retained defendants E. O. Leake and J. J. Leake as his attorneys. In October of that year they filed on behalf of Dr. Sweeley, an action for divorce. His wife cross-complained for separate maintenance. Pending the trial and determination on the complaint for divorce and cross-complaint for separate maintenance, an order was made directing Dr. Sweeley to pay $225 monthly for the support of his wife and their minor child. An appeal was taken by him from this order. A further order was made staying execution, conditioned upon the depositing by Dr. Sweeley with the Clerk of the Court of the sum of $225 each month until the determination of the appeal. On June 21, 1946, approximately two months before the filing of the instant case, the order appealed from was reversed. Sweeley v. Sweeley, 28 Cal.2d 389, 170 P.2d 469. The accumulated deposits made pursuant to the order staying execution amounted to $2,025.

Between the 20th and the 27th of September, 1945, a trial was had upon the complaint for divorce and the cross-complaint for separate maintenance. On October 16, 1945, a notice from the clerk of the trial judge was mailed to the defendants Leake informing them that the trial judge had determined the litigation in favor of the cross-complainant wife on her cross-complaint for separate maintenance. On the 3rd or 4th of November, 1945, the defendants Leake received a copy of the proposed findings of fact and conclusions of law and the decree for separate maintenance. On November 15, 1945, the decree was signed and filed. It directed Dr. Sweeley to pay for the support and maintenance of his wife and minor child the sum of $400 a month, and further provided that within 30 days he assign to his wife certain accounts receivable of the face value of not less than $9,000, or in lieu thereof, and within six months after the date of the decree, to pay to his wife the sum of $8,000. The decree further provided that so long as the marriage between the parties remained in force all of his earnings and accumulations were to continue to be community property. No payments were ever made by Dr. Sweeley pursuant to the decree. The record does not indicate when Dr. Sweeley left the State of California, but there is evidence to the effect that in the month of December, 1945, he was sojourning in Mexico. Thereafter, his wife sought execution on the judgment in the separate maintenance action, which execution was returned unsatisfied.

On August 22, 1946, the wife, Ruth M. Sweeley, filed the instant action. Dr. Sweeley was not made a party defendant since he was outside the jurisdiction of the court. The gist of the complaint was that Dr. Sweeley had executed a promissory note, dated November 1, 1945, in the principal sum of $2,500, payable to defendants Leake, which note was secured by a chattel mortgage, dated November 1, 1945, but not acknowledged until November 28, 1945, upon the furniture, furnishings and equipment used by him in his practice of medicine, and that he likewise had executed an assignment to defendants Leake of the fund of $2,025, deposited by him to stay the execution of the order directing him to pay temporary alimony pending the determination of the appeal taken from the order; that the execution of these instruments were made "without consideration and with the intent to hinder, delay and defraud the creditors of the said Merle E. Sweeley, including this plaintiff," and that the defendants E. O. Leake and J. J. Leake, accepted the note and chattel mortgage and assignment "with knowledge of the said fraudulent intent on the part of said Merle E. Sweeley"; that these instruments were made by Dr. Sweeley after the entry of the decree of separate maintenance and were made by him with the knowledge that the assets sought to be affected by these instruments were the only assets he had in this state which could be subject to execution to satisfy the separate maintenance judgment, other than certain accounts receivable which he had succeeded in removing from the jurisdiction of the court. Defendants Leake filed a joint answer, denying the aforesaid allegations and alleging that at the time of the execution of the disputed instruments, Dr. Sweeley was indebted to them for professional services rendered; that at that time they agreed to render such additional services as might be necessary to complete the disposition of the action between Dr. Sweeley and his wife; that the instruments were executed to secure the payment of the reasonable value of all services rendered and to be rendered to Dr. Sweeley; that the reasonable value of the services rendered by them was the sum of $5,000.

Upon these pleadings the action went to trial. Findings were made in favor of the plaintiff and were to the effect that the instruments were executed by Dr. Sweeley after the entry of the decree of separate maintenance without adequate consideration and with the intent to hinder, delay and defraud his creditors, and that the defendants Leake received the instruments with knowledge of the fraudulent intent on the part of Dr. Sweeley; that by reason of the fact that the furniture, furnishings and equipment of Dr. Sweeley were exempt from the execution (Code of Civ.Proc., sec. 690.4), plaintiff could not complain of the transfers irrespective of the intent on the part of Dr. Sweeley in making such transfers. The judgment decreed that the purported assignment was fraudulent and void, that defendants Leake had no interest therein as against plaintiff, and made the fund subject to a levy of execution upon the judgment for separate maintenance. Defendants Leake then filed a motion for new trial, which was granted and an order entered accordingly. It is from this order that plaintiff appeals

[1-5] The principles of law applicable to an appeal from an order granting a motion for new trial are well established. The presumption is in favor of the order granting a new trial and against the judgment. Rosenberg v. George A. Moore & Co., 194 Cal. 392, 396, 229 P. 34; Busby v. Silverman, 82 Cal.App.2d 393, 186 P.2d 442. When a new trial is granted on the ground of insufficiency of the evidence, an appel-

late court will not interfere with the order in the absence of a showing of a manifest or unmistakable abuse of discretion. The trial court, in hearing such motion, is not bound by the rule of conflicting evidence. It must weigh all the evidence and determine the just conclusions to be drawn therefrom, and its ruling will not be disturbed on appeal where there is a conflict in the evidence or where there is substantial evidence which would support a judgment in favor of the moving party. Hames v. Rust, 14 Cal.2d 119, 124, 92 P.2d 1010, and cases cited therein. The fact that the motion in the instant case was heard and determined by a judge other than the one who presided at the trial does not extend the power of this court in reviewing the matter. The judge hearing the motion stands in the shoes of the former judge and has the same power and is charged with the same duty as if the motion had come before the former judge. Wendling Lumber Co. v. Glenwood Lumber Co., 153 Cal. 411, 417, 95 P. 1029; Churchill v. Flournoy, 127 Cal. 355, 362, 59 P. 791.

[6] The record is replete with substantial evidence which would have supported a judgment in favor of the moving parties, and it cannot be said as appellant contends, that the court erred or abused its discretion in granting the new trial.

Defendant E. O. Leake, called as a witness by plaintiff under section 2055, Code of Civil Procedure, offered the only evidence with respect to the circumstances leading to the execution of the note, chattel mortgage and assignment. He testified that he and defendant J. J. Leake had been retained by Dr. Sweeley as attorneys in connection with his marital difficulties. He testified at great length and in great detail concerning the extensive legal services performed by them in connection with Dr. Sweeley's matter, including among other activities, the following: preparation of all necessary papers in the divorce action and the action for separate maintenance; the exact number of court appearances, not only prior to and subsequent to the trial of the action, but during the trial; the taking of an appeal from the order awarding temporary alimony to the District Court of Appeal, necessitating a great deal of research, filing of briefs, and a court appearance for purpose of argument, the filing of a petition for hearing in the Supreme Court, and an appearance for the purpose of argument, which appeal resulted in a reversal of the order in favor of their client; many conferences with Dr. Sweeley and others. He testified that Dr. Sweeley had given them certain amounts of cash at different occasions,—"$25, and $125, and then another time $250," all of which were used up in costs; that a retainer had not been asked of Dr. Sweeley "because practically all this time he was putting up this $225 a month"; that, however, "either the last day or two of October, or the first day of November, 1945" he had a conversation with Dr. Sweeley concerning fees and told him he would like "some money on account," even though the case had not been completed; that Dr. Sweeley stated "he could not pay me anything at that time in cash, and I told him I would like to have some kind of security. We discussed the amount, and I told him I believed my services were reasonably worth up to that time around $4,000, but that there was some more work to do and it would probably run between $4,500 and $5,000 altogether. And he said * * * he was perfectly willing to give me anything he had but he couldn't pay me in cash at that time. I suggested to him he give me an assignment of the moneys which were on deposit with the county clerk. I felt reasonably sure I would get a reversal there, but it was still in litigation. And he said that was perfectly agreeable, and I told him I would also like to have a chattel mortgage on his office equipment, something so I would be sure of being paid. And he said, all right, go ahead and draw them up. Which I did"; that at that time there was no discussion concerning Dr. Sweeley's leaving California; that the note, chattel mortgage and assignment were dictated by him on November 1st; that he again saw Dr. Sweeley on November 28th, when he executed the chattel mortgage and assignment; that the first time Dr. Sweeley made a statement to him that he was planning to leave California was "either the 29th of November or the 28th, when he came in to execute the documents or about that time." He further testified that since 1912 he had been actively engaged in California in general civil practice, specializing in trial work, and that, in his opinion, the reasonable value of the services rendered were in excess of $6,000.

[7, 8] Fraud is never presumed but must be affirmatively established. The evidence must amount to proof of fraud, and where the circumstances of the transfer comport equally with the theory of honesty and fair dealing, fraud will not be found. Hedden v. Waldeck, 9 Cal.2d 631, 636, 72 P.2d 114; Levy v. Scott, 115 Cal. 39, 42, 46 P. 892; 12 Cal.Jur., sec. 96, p. 1057. The presumption is always in favor of fair dealing except, perhaps, where confidential relations are involved. This presumption has been held to approximate in strength that of innocence of crime. Hedden v. Waldeck, supra; 12 Cal.Jur., sec. 71, p. 816.

[9] The evidence which we have recited would have been sufficient to support a judgment in favor of the defendants. As heretofore stated, the only evidence regarding the circumstances under which the instruments were drawn and executed was testified to by defendant E. O. Leake. This testimony is unassailed in the record. The judge who heard the motion was warranted in concluding that the evidence disclosed no irregularities from which an inference of fraud on the part of the parties could be reasonably drawn; that the instruments executed by Dr. Sweeley were given for a valuable consideration; and that the transactions were made in good faith and without intent to give any fraudulent preferences. As the court stated in Hedden v. Waldeck, supra, 9 Cal.2d at page 638, 72 P.2d at page 118: "The attorneys were entitled to a reasonable fee for their services. In case their client owned no other property, they had the right to take in payment the property in controversy, Hibernia Savings & Loan Soc. v. Belcher, 4 Cal.2d 268, 48 P.2d 681, and the transaction may not be declared fraudulent for the reason that by deeding the property the client was rendered insolvent, Hibernia Sav. & Loan Soc. v. Belcher, supra. It is presumed that the attorneys, in fixing their fees, acted honestly, and only asked of their client fees which they considered reasonable. The trial of the cases in the superior court consumed nine days. The record on appeal was voluminous. The amount involved was large, and the issues, in addition to involving property of considerable value, seriously reflected on the honesty and integrity of their client. The attorneys are reputable members of the bar of this state, and then and during a number of years preceding said transaction enjoyed a lucrative practice. No attempt was made to assail their reputation for honesty and integrity."

No abuse of discretion is shown.

Order affirmed.

SHINN, P. J., and WOOD, J., concur.

---

87 Cal.App.2d 608

LOVE v. GULYAS et al.

No. 13826.

District Court of Appeal, First District, Division 1, California.

Sept. 20, 1948.

1. Appeal and error 🔑110

An order denying motion for new trial was not appealable.

2. Appeal and error 🔑931(1)

On appeal from judgment for defendants, the facts would be taken most favorable to defendants together with the reasonable inferences therefrom.

3. Brokers 🔑52

Where prospective purchaser's representative advised broker that purchaser would accept owner's offer to sell if transaction could be financed, a telegram from representative of purchaser accepting offer "per conversation" was a conditional acceptance, and broker did not under the telegram produce a buyer ready, able, and willing to purchase so as to entitle broker to commission.

4. Brokers 🔑52

Acceptance of vendor's offer to sell realty must be unconditional in order to entitle broker to a commission.

5. Evidence 🔑455

In broker's action for commission, where only writing on prospective purchaser's behalf showed an acceptance of offer to sell "per conversation", parol evidence was admissible to explain meaning of quoted words.

6. Evidence 🔑384

The parol evidence rule is a rule of substantive law and not dependent upon objections made at the trial.

7. Evidence 🔑397(2)

The parol evidence rule does not apply where the instrument does not purport to be a complete statement of the agreement of the parties.

8. Evidence 🔑448

The parol evidence rule does not apply where terms of contract are ambiguous or uncertain.

9. Pleading 🔑387

While court should not be technical in the matter of pleading, a plaintiff should not be permitted to base his entire complaint on one theory, and then later adopt another theory which was not even hinted at in the complaint.

10. Brokers 🔑50

The rule of extension of a broker's contract is dependent on a waiver.

11. Brokers 🔑82(4)

Where broker's complaint for commission was based on theory that a sale had been consummated, broker could not recover on unpleaded theory that while a sale had not been consummated, the broker within five days after termination of listing agreement had notified owners that broker had negotiated with ultimate purchaser and that owners had sold property to ultimate purchaser within 90 days after termination of listing agreement, so as to entitle broker to commission under listing agreement.

12. Pleading 🔑427

Where a case is tried without objection upon a theory different than that alleged in the pleadings, the parties cannot complain of the failure to allege facts to support the pleaded theory.

13. Appeal and error 🔑1071(6)

In broker's action for commission, finding that offer to purchase was conditioned upon ability of offeror to finance purchase, and that offeror was unable to finance purchase within time set forth in authorization to sell, negatived broker's allegation that, prior to expiration of listing agreement, owners sold realty to offeror, so that failure to find that prior to expiration of agreement owner sold to offeror was not ground for reversal of judgment for owners.

14. Appeal and error 🔑1071(6)

In broker's action for commission, where from facts, and from judgment for owners, it was evident that, if a finding had been made as to whether prior to expiration of agreement owners sold property to offeror, finding would have been adverse to broker, it would be deemed that trial court had drawn inference adverse to broker, and failure to find issue as to whether prior to expiration of listing agreement owners had sold to offeror was not reversible error.

15. Brokers 🔑56(3)

Owners of realty, by extending broker's time to make sale to a prospective purchaser with whom negotiations had been made until broker himself declared sale to be off, did not extend provision, entitling broker to commission if broker within five days after termination of agreement notified owners that during life of agreement, broker had negotiated with a specific prospective purchaser, and within 90 days from termination of agreement the property was sold to purchaser with whom broker had negotiated, so as to entitle broker to commission under listing agreement.

16. Brokers 🔑43(1)

The time set forth in a real estate broker's contract to sell realty cannot be extended by oral agreement.

17. Brokers 🔑43(1)

Where broker has completed his part of contract with consent of seller after time expressed in listing agreement has

expired, broker's performance takes contract out of statute of frauds and estops seller from relying on the statute in broker's action for commission.

Appeal from Superior Court, San Mateo, County; Edmund Scott, Judge.

Action by Harry J. Love, doing business under the fictitious name and style of Love Realty Company, against E. Gulyas and Albert Balogh to recover a real estate broker's commission. From an adverse judgment and from order denying plaintiff's motion for a new trial, plaintiff appeals.

Judgment affirmed.

Howard E. Gawthrop, of Redwood City, for appellant.

Anthony S. Devoto, of San Francisco, for respondent.

BRAY, Justice.

[1] Plaintiff appeals from a judgment in favor of defendants in an action for a real estate broker's commission. Plaintiff also attempts to appeal from the order denying his motion for a new trial, but, as has been pointed out many times in the decisions, such an order is not appealable.[1]

[2] There was a conflict in the testimony as to some of the facts in the case, particularly with reference to the conversations between plaintiff's agent, Rose, and Frank J. Needles, who represented the prospective buyer. Taking the undisputed facts and the disputed ones most favorable to the defendants, together with the reasonable inferences therefrom, as we are required to do, the facts are as follows: Plaintiff Harry Jay Love, doing business under the name of Love Realty Co., on October 28, 1946, obtained from defendants a written exclusive authorization, for the period of sixty days thereafter, to sell the fixtures, lease and business of the bowling alley owned by the defendants, for the sum of $27,500. Defendants agreed to pay plaintiff a commission of 10% of the selling price. "If, within five (5) days after the termination of this listing said broker notifies me personally or by mail in writing, that, during its life, he negotiated with persons named by him and sale is made within ninety (90) days after termination of this contract to any person so named," defendants agreed to pay plaintiff the commission above mentioned.

On December 13, 1946, plaintiff received a letter from Needles, dated December 12, stating that pursuant to a conversation he previously had with Rose, an employee of plaintiff's he was offering, on behalf of an undisclosed client, the sum of $20,000 for the bowling alley, and he enclosed a check in the sum of $750 as a deposit on the purchase price. Rose reported the offer to defendants, who refused to accept it, but stated that they would accept $22,500 instead of the $27,500 mentioned in the authorization to sell. Rose, in plaintiff's name, signed a deposit receipt, in the usual form, stating that plaintiff had received from Needles $750 as a deposit on account of the purchase of the bowling alley for the sum of $22,500. Following the portion signed by plaintiff appears the printed words, "I agree to purchase the above described property on the terms and conditions herein stated," and two blank lines, and the word "Purchaser." Neither Needles nor his principal ever signed this document. There then followed a paragraph which was signed by defendants, and in which they agreed to sell "the above described property on the terms and conditions herein stated, and agree to pay the above signed broker as commission ten per cent of above purchase price * * *."

Rose phoned Needles and told him that the defendants would sell for $22,500. Needles then contacted his principal, and later phoned Rose, advising him that his client would accept the defendant's offer to sell at $22,500, provided the client could finance the transaction. At Rose's request, Needles agreed to confirm by telegram, saying, "but let's have it understood that these people have to finance this thing." Needles, on December 16, sent plaintiff a telegram reading: "Final offer *per conversation* $22500."

---

[1] See Hughes v. De Mund, 195 Cal. 242, 233 P. 94; Lee v. Dawson, 44 Cal.App.2d 362, 112 P.2d 683.

(Emphasis added.) Needles' principal was one John C. Major. From December 16, 1946, until January 28, 1947, Major was endeavoring, principally from one Howell, to obtain a loan so that he could finance the purchase of the bowling alley. Both Rose and defendants were informed frequently by Needles of the progress of his principal's effort to finance the purchase of the alley. Defendants requested Rose to get the purchaser's signature on the deposit receipt which they had signed. On January 13, Rose wrote Needles enclosing the receipt and requesting that Needles have his client sign it. On January 25, Needles informed Rose that Major could not raise the money to buy the alley. Rose the same day phoned the defendant Gulyas, telling him the deal was off, and giving the reason why. On January 28, Needles wrote plaintiff that the deal was off and asked for a return of the $750 deposit check. The same day, Rose called on defendants and asked for another exclusive authorization to sell, which defendants declined to give. On the same day defendants signed and Rose received a letter stating: "We wish to inform you, to terminate the deposit receipt and all other contracts involved with the sale of STEEL BOWL to party known as Frank R. Needles on deposit receipt, price that was quoted as twenty-two thousand five hundred dollars."

The bowling alley was sold on January 29 to Major through another agent, one Cameron, under the following circumstances: Defendant Gulyas, about August, 1946, saw Major at the bowling alley in the company of Cameron, who was a real estate broker. Cameron did not have an exclusive listing from defendants, but was trying to get a loan for Major so that he could buy. After about two months unsuccessful effort to raise money for Major, Cameron did nothing further, and Major dropped out of sight. Defendants heard nothing of or from Major thereafter, and did not know until January 25 that Major was Needles' principal. On January 29, after Needles had terminated all negotiations with plaintiff, Major called Cameron, told him that the American Trust Company had turned down his application for a loan, and asked Cameron if he could negotiate one for him. Cameron thought he could, and Major agreed to be at his office at two o'clock that afternoon. Cameron communicated with his bank, offering to put up his commission as collateral, and the bank agreed to make the loan. Cameron then phoned defendants, asking if the alley had been sold, and told them he had a buyer for it. Defendants, Major and Cameron met at the latter's office that afternoon, and an agreement to sell to Major, and for him to buy, at $22,500, was executed by the parties. This sale was consummated, Cameron receiving a commission of $2250.

Plaintiff contends that the complaint pleads facts forming the basis of relief upon two theories: (1) That he produced a buyer who entered into a written contract with defendants to buy the bowling alley, and (2) that within the time provided in the listing agreement he notified defendants that he had negotiated with Major, and that the defendants made sale of the alley to such person within the ninety day period, hence entitling plaintiff to the commission.

Major Did Not Contract to Buy.

[3, 4] The facts do not support plaintiff's contention on the first theory. At no time did Major actually agree unconditionally to buy the alley. The only acceptance obtained by plaintiff of the offer of defendants to sell, as set forth in the deposit reecipt, was Needles' telegram, "Final offer *per conversation* $22500." (Emphasis added.) This was obviously a conditional acceptance, conditioned, as set forth in the conversation, upon Needles' principal being able to raise the necessary money to pay the purchase price. Thus, plaintiff did not produce a buyer, ready, able and willing to buy the alley. In the letter of December 12, offering $20,000 for the alley, and accompanied by the deposit check of $750, Needles had set forth the requirement that the lease to be transferred to the buyer should contain an option to renew for a five year term at the expiration of the present term. This deposit was retained by Rose during the entire time of his negotiations with Needles, and is still retained by him. After sending the telegram, Needles agreed that the option requirement set

forth in the letter would be waived. Neither the retention of the deposit nor the references to the conditions set forth in the letter, in any way change the fact that the purchaser's acceptance of the seller's offer was a qualified one. In fact, in agreeing to waive the option requirement, Needles again referred to the fact that everything was conditional upon his client's ability to finance, for he said, "* * * if I can raise the 22–5, we will take it under the present terms of the lease." That the acceptance of the seller's offer to sell must be unconditional to entitle the broker to a commission is well settled. See Edwards v. Billow, 31 Cal.2d 350, 188 P.2d 748.

Plaintiff's position is based upon his assumption that the three documents—(1) Needles' letter of December 12 offering to purchase for $20,000 upon certain conditions; (2) the deposit receipt signed by defendants; and (3) the telegram from Needles—constitute a binding agreement on the part of the defendants to sell and of Needles (for his principal) to buy; and hence, as said in Clark v. Dulien Steel Products, Inc., 54 Cal.App.2d 92, 97, 128 P.2d 608, 610: "The readiness, willingness and ability of the seller was demonstrated by the buyer entering into a contract with it." But the facts show, as pointed out heretofore, that no such contract was entered into.

[5] Plaintiff, relying among others upon the cases of McNamara v. Steckman, 202 Cal. 569, 262 P. 297; Meyer v. Selggio, 80 Cal.App.2d 161, 181 P.2d 690, and Deeble v. Stearns, 82 Cal.App.2d 296, 186 P.2d 173, contends that the evidence showing that the buyer's acceptance was a qualified one, should not have been admitted, as it was varying by parol evidence the terms of the written agreement. These cases are distinguishable from the one at bar, in that in each of them the buyer entered into an unqualified agreement to buy, that is, the writing between the parties showed an unqualified, rather than, as here, a qualified agreement of the buyer, and hence there was nothing ambiguous in the writings requiring explanation. Here the only writing on the buyer's behalf shows an acceptance "per conversation," which necessarily required explanation by parol evidence. In the McNamara case, supra, the difference in the situation with that here is well expressed by this language of the court, 202 Cal. at page 572, 262 P. at page 298: "His unqualified acceptance thereof could have been expressed no more plainly than it was by his signature to that document. * * * 'It is a matter of no consequence that in the beginning somewhat different terms were contemplated. * * *'" In the Meyer case, supra, the seller and buyer entered into a valid written agreement of purchase and sale, under which the buyer failed to perform. That was not the situation here. Likewise in the Deeble case, a binding written contract between the seller and buyer was entered into, which was unambiguous, and to vary the terms of which the court properly refused to permit parol evidence. In our case, the evidence was necessary, not to vary the terms of the contract, but to explain the meaning of the words "per conversation," which obviously cannot be interpreted without explanation.

[6-8] Plaintiff cites 10 Cal.Jur., p. 919, to the effect that it is a well established rule that the parol evidence rule is a rule of substantive law and not dependent upon objections made at the trial, but ignores the statement on page 918, applicable here, that the rule "does not apply where the instrument does not purport to be a complete statement of the agreement of the parties * * *." Where the terms are ambiguous or uncertain, the parol evidence rule does not apply; and as said in 10 Cal. Jur. p. 941, "* * * this is not allowing parol evidence for the purpose of varying or altering the instrument, or of putting a different construction upon its language from that which it would naturally bear, but for the purpose of showing the circumstances under which the language was used, and applying it according to the intention of the parties."

Sale by the Owners.

Plaintiff contends that under his complaint and the facts, he is entitled to recover because of the sale made by the owners to Major. An examination of his complaint, however, discloses that he has failed to plead this theory. His complaint alleges that through his efforts he brought defendants and Major, through his agent Needles, together, and that the said Major, through his agent Needles, "did in writing offer to buy said property for the said sum of * * * $22,500, and said defendants * * * agreed to sell said property to said John C. Major at said price. * * * That subsequently thereto and prior to the expiration of said agreement marked Exhibit 'A', and incorporated herein [the listing agreement, a copy of which was attached to the complaint] defendants did sell said property to said John C. Major, for a price which plaintiff is informed and believes, and upon such information and belief, alleges to be * * * $22,500." The last paragraph of the complaint alleges the receipt by plaintiff of the $750 deposit, which plaintiff is holding for whoever may be entitled to it.

[9-11] There is no allegation in the complaint to bring plaintiff within the terms of that portion of the listing agreement upon which he relies under his second theory. The agreement on its face shows that the listing expired on December 28. There is no allegation that within five days of the termination of the listing plaintiff notified defendants that he had negotiated with Major. Plaintiff now contends that the parties by their acts extended the agreement until January 28, and that on January 25 he gave defendants the name of Major as the party with whom he had been negotiating. But there is no allegation in the complaint that the listing was extended, or that he notified defendants of Major's name. It is apparent that the entire complaint is framed upon the theory that plaintiff brought Major, through Needles, and defendants together; that Major in writing offered to buy and defendants in writing agreed to sell to Major, and "That subsequently thereto and prior to the expiration of said agreement" defendants did sell to Major. While courts should not be technical in the matter of pleading, a plaintiff should not be permitted to base his entire complaint on one theory, and then later adopt another theory which is not even hinted at in the pleading. The rule of extension of a broker's contract is dependent upon a waiver. Moreover, the five day provision does not apply if the broker has otherwise performed the contract. The complaint alleges full performance of the contract, and in no way alleges nonperformance and extension of it. In Baird v. Madsen, 57 Cal.App.2d 465, 134 P.2d 885, there was a situation similar to the case at bar. The broker's contract provided that if the property was sold or exchanged, within three months after its expiration, to any person to whom the broker had previously offered it, the seller would pay the commission. There the broker contended that the contract was extended by negotiations between the seller and a prospective purchaser produced by the broker after the contract had expired. After negotiations by the broker with this purchaser had terminated, and more than three months had elapsed after the contract on its face had expired, the seller sold the property to the person originally produced by the broker. As here, the broker sued for his commission upon the theory that a sale had been consummated by him, and then attempted to recover on the theory that while he had not effected a sale, the owner, within three months of the termination of the contract, *as extended,* had sold to the person produced by him. In holding that this theory could not be sustained, the court said, 57 Cal.App.2d at page 473, 134 P.2d at page 889: "* * * in order to invoke the doctrines of extension or modification of contracts, the essential facts relied upon to bring the situation within the operation of those doctrines must be pleaded; and here no such facts were pleaded. The theories of extension or modification are not even suggested. On the contrary, the cause of action sued upon is based entirely upon the June 20, 1939, sales agency contract as executed. The rule in this regard is that a plaintiff must plead the particular contract which he claims he has performed; he cannot recover on proof of another contract, or of a contract substituted for, or constituting a modification of the contract declared on. [Citing cases.] * * * if plaintiff sought recovery under the contract of July 26, 1939, as an extension of the June 20, 1939, contract, he should have

based his complaint on that contract or pleaded it as an extension of the June contract, instead of pleading full performance of the June contract."

[12] It is contended that although this theory was not pleaded, evidence was admitted on the issue, and hence the case is brought within the rule that where a case is tried, without objection, upon a theory different than that alleged in the pleadings, the parties cannot complain of the failure to allege facts to support that theory.[2] However, here the evidence showing the sale by defendants to Major was admitted over defendants' objection. When the plaintiff called defendant Balogh, and proceeded to prove the sale by defendants to Major, defendants objected, and then requested that the record show that "this examination, relative to this subsequent sale, is all subject to our objection." The court so ruled. Thereafter defendants called Cameron as a witness, to show that Major went to him asking him to help him finance the purchase of the alley, and that Cameron was the one who succeeded in arranging the financing for Major. Plaintiff then objected. Defendants contended that as plaintiff had gone into the subsequent sale, they should be permitted to do so. The court sustained the objection. While the court did permit some evidence to be admitted by Cameron concerning this subsequent sale, it is apparent from the transcript that defendants' purpose in offering this evidence was to answer the testimony which the court had admitted over their objection, and also to show that there were no negotiations between defendants and Major or Cameron, except those by plaintiff, during the period of the listing agreement and its claimed extension. Moreover, plaintiff's examination of his own witness, Rose (the one who handled the entire transaction for plaintiff), shows that plaintiff, in the lower court, was not proceeding on the theory he is now advancing. Rose testified that Needles wanted the name of the buyer kept unknown, and that it was the defendant Gulyas who told him, Rose, the name of Needles' principal; that "he had found out someway, I don't know how."

Thus, the record shows that the issue concerning the claimed second theory was not before the court without objection, and was not advanced there by plaintiff. A reading of the transcript definitely shows that plaintiff's presentation of the testimony of the defendant Balogh was to prove his allegation that he had fully performed his agreement in getting buyer and seller into a written contract of purchase and sale, which actually resulted in a completed sale.

[13, 14] Plaintiff complains that the court did not make a finding as to whether plaintiff gave defendants proper notice of the name of the prospective buyer, and as to whether or when the later sale to Major took place. The court did find on all matters set forth in the complaint, with the exception of the allegation that defendants, prior to the expiration of the listing agreement, sold to Major. It did find that Major. It did find that Major's offer to purchase was conditioned upon his ability to finance the purchase, and that Major was unable to finance within the limitation of time set forth in plaintiff's authorization to sell. Such finding necessarily negatived plaintiff's allegation that prior to the expiration of the listing agreement defendants sold the property to Major. Moreover, if findings were made on this question, they would be adverse to plaintiff. "* * * where from the facts found and the judgment ordered it is evident in the light of the entire record that if more complete findings had been made they would have been adverse to the contention of the appellant, it will be deemed that such inference has been drawn by a trial court, and in those circumstances the failure so to find is not a ground for the reversal of the judgment." Boas v. Bank of America Nat. Trust & Sav. Ass'n, 51 Cal.App.2d 592, 598, 125 P.2d 620, 624. There is nothing in the record to show that the court was ever requested to find as to the giving of notice of the name of the prospective buyer, about which there was no allegation in the complaint.

---

[2] See Swanson v. Hempstead, 64 Cal. App.2d 681, 149 P.2d 404.

[15] The facts, too, are against the plaintiff on this issue. The listing agreement, by its very terms, definitely terminated on December 28. Plaintiff did not notify defendants of Major's name within five days of that date. He claims that because the defendants permitted him to continue negotiations with Needles after that date, the listing was extended until January 28, when defendants in writing terminated the deposit receipt "and all other contracts." However, the acts of the parties did not constitute a continuance of the listing agreement. They merely constituted what would have been an extension of time by defendants, had the sale with Needles been consummated. At most their effect was that, if plaintiff had succeeded in consummating the sale with Needles, there would have been a performance by him of his part of the contract, although late, which would have taken it out of the statute of frauds. The listing agreement itself was not extended. Had plaintiff, after December 28 and before January 28, produced an entirely new purchaser, defendants would have been under no obligation to sell to such person. They were waiving the time element only as to Needles' principal. Their actions did not constitute an extension of any other part of the listing agreement, which terminated and ended in sixty days. Therefore, the plaintiff failed to comply with the contract in not notifying defendants of the name of the prospective purchaser within five days of December 28.

[16, 17] It has been held that the time set forth in a real estate broker's contract to sell real property cannot be extended by oral agreement. Hicks v. Post, 154 Cal. 22, 96 P. 878; Rice Lands, etc., Co. v. Blevins, 61 Cal.App. 536, 215 P. 402. However, there is an exception to that rule where there has been a full performance by the broker. In such case, it is held that the limitation of time mentioned in the writing is waived by the seller continuing with the deal, through the same broker, after the expiration of the time expressed in the writing. See Moore v. Borgfeldt, 96 Cal.App. 306, 273 P. 1114; Umphray v. Hufschmidt, 73 Cal.App. 140, 238 P. 749; Estes v. Hotchkiss, 63 Cal.App. 284, 218 P. 605. The effect of such cases is that where the broker has completed his part of the contract with the consent of the seller, after the time limit has expired, his performance of the contract takes it out of the statute of frauds, and also estops the seller from relying on that statute. Here, there was no performance by the broker even after the time limit had expired, and hence there was no performance to extend the contract beyond the original time limit. The case of Luckhart v. Ogden, 30 Cal. 547, cited by plaintiff, is not in point, as there the extension of the contract was in writing.

This is not a case in which a broker brings a buyer and seller together, and in order to prevent the broker from getting his commission, the seller holds off selling until the broker's agreement has expired, and then sells to the person so produced. Here, prior to plaintiff's entry into the field, there had been some negotiations between Major, the agent Cameron, and defendants. These, however, were completely broken off. After Needles had been unable to arrange financing for Major, and after Rose had notified defendants that the deal was completely off for failure of Major to raise the necessary money, Major went back to Cameron, who then was able to arrange the financing through his own credit, and then notified defendants. The actual sale was not made through any effort of plaintiff, but entirely through the efforts of Cameron, who earned and received the commission. To require the defendants to pay plaintiff an additional commission, on the claim that because defendants were willing to, and did, extend plaintiff's time to make a sale to Major until plaintiff himself stated the sale was off, defendants thereby extended all of the terms of the listing agreement, would be unjust, and contrary to law.

The judgment appealed from is affirmed.

PETERS, P. J., and WARD, J., concur.

87 Cal.App.2d 674

PEOPLE v. MORGAN.

Cr. 591.

District Court of Appeal, Fourth District, California.
Sept. 21, 1948.

1. Criminal law 🔑742(2)

In murder prosecution, whether codefendant was an accomplice whose testimony was required to be corroborated was a question for the jury. Pen.Code, § 1111.

2. Homicide 🔑253(1)

Evidence sustained conviction for first degree murder.

3. Criminal law 🔑1159(5)

Whenever facts are in dispute as to whether a person is an accomplice, jury's finding thereupon cannot be disturbed.

4. Criminal law 🔑742(2)

In murder prosecution, fact that a codefendant was jointly charged with defendant did not as a matter of law make him an accomplice whose testimony was required to be corroborated, where there was a dispute as to his complicity. Pen.Code, § 1111.

5. Criminal law 🔑406(1)

Where denial of accusatory facts is followed by the admission of special facts, rule that if accused responds to accusatory statements with a flat denial there is no admission and nothing to be received in evidence, is inapplicable.

6. Criminal law 🔑406(2)

In murder prosecution, where defendant's statement contained many admissions that implicated him in the murder, fact that statement consisted in part of accusatory questions by prosecuting officer did not preclude its admission in evidence.

7. Witnesses 🔑277(4), 337(6)

In murder prosecution, where defendant testified on direct that he had spent thirty-three days in jail after he was arrested and that he had talked to an officer about the murder, cross-examination as to length of time defendant was in jail and as to what he said to officers was proper, but cross-examination showing that defendant pleaded guilty to vagrancy at that time was improper.

8. Criminal law 🔑369(1)

Introducing evidence of other offenses for the purpose of creating prejudice against defendant is improper.

9. Criminal law 🔑1170½(3, 6)

In murder prosecution, improper cross-examination of defendant whether he had pleaded guilty to vagrancy did not require reversal, where question was not answered, court ordered evidence stricken out, and instructed jury to disregard any reference to other offenses.

◆

Appeal from Superior Court, Kern County; Norman F. Main, Judge.

Alvin Morgan and Robert Lee Gipson were indicted for murder, Gipson was acquitted, and first named defendant was convicted and he appeals.

Affirmed.

Earl C. Broady, of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen. and William E. James, Deputy Atty. Gen., for respondent.

MUSSELL, Justice.

Appellant Alvin Morgan and Robert Lee Gipson were jointly charged with the murder of one George Tomsic. Gipson was acquitted. Appellant was convicted of murder in the first degree and on the jury's recommendation sentenced to life imprisonment. This appeal is from the judgment of conviction. The grounds of appeal stated are that the evidence is insufficient to justify the judgment; that the court erred in admitting into evidence of a statement of the accused, and, that the district attorney was guilty of prejudicial misconduct.

The deceased, an agricultural worker employed on the Barlow Farm near Arvin, in Kern County, lived alone in a small cabin on the farm. He was last seen alive on the evening of May 23, 1947. On the morning of May 25th, a ranch foreman found him lying dead on the floor of the cabin. The evidence of dried blood and the testimony of the autopsy surgeon indicated that death had occurred on or about the 23rd of May. A post mortem examination disclosed multiple skull fractures and lacerations of the head and face and that death had been caused by basal skull fractures. A tire tool or spring leaf was found under the body. A pocketbook, usually carried by decedent, was missing, and a wrench stamped with the letters "B" and "F", kept in the tool box on one of the tractors on the Barlow Farm, was also missing. This wrench was later found in a standpipe a short distance from the farm, the place of its concealment having been pointed out to the officers by appellant and his codefendant. A medical technologist found traces of blood on the wrench.

Appellant and defendant Gipson were seen together at a beer tavern near the Barlow Farm on May 23rd at about 9 o'clock p. m. On Saturday, May 24th, appellant went to Bakersfield where he gave Gipson $22, and Gipson left for Tucson, Arizona. Gipson testified that while at Tucson he heard that the police were looking for him; that he went to Ogden, Utah, and from there to Arkansas where he was arrested. On May 24th, appellant returned to Arvin where he was arrested the following Monday and spent thirty-three days in jail in Bakersfield. On his release he returned to Arvin, remained there about three weeks and then left for Arkansas where he was again arrested. The officers obtained a statement from Gipson at Pine Bluff, Arkansas, and a few days later took a statement from appellant in the presence of Gipson at Wichita, Kansas. Both appellant and Gipson stated they were present at and near the Tomsic cabin on the night of May 23rd when deceased was beaten about the head and face, but each denied striking the fatal blows.

Appellant's testimony was that he first saw Gipson on May 23rd at about 9 o'clock p. m., at the Eagle Cafe in Arvin; that he bought Gipson some beer and then went to a show; that he got out of the show at about 11:30 and saw Gipson on his way to the Barlow Farm; that at the crossroads they parted and appellant went to David Morgan's house; that David was not at home and appellant left to stay at a neighbor's house; that when on his way he heard a noise in Tomsic's cabin like some one "scuffling" and turning his flashlight on the cabin he saw Gipson getting off Tomsic; that Gipson came over near the fence where appellant was standing and said, "Is that you, Arvin?" Appellant said, "Yes", and Gipson walked out toward the road; that he asked Gipson what was the matter and Gipson replied, "That old man hit me with this wrench and I taken it and tried to beat his brains out with it"; that Gipson threw the wrench away and then proceeded to appellant's house where Gipson cleaned himself and put on clean clothes furnished him by appellant; that Gipson took appellant's sweat shirt and wrapped the bloody clothing in it, including a pair of khaki pants belonging to appellant; that they left the house and Gipson threw the clothing into an irrigation pond; that they then went to Bakersfield where Gipson attempted to catch a bus but was unable to do so; that Gipson asked appellant for some money and appellant lent him $22 and they caught a ride back to Arvin; that he did not see Gipson thereafter until the statements were taken in Kansas.

In his statement made at Wichita, appellant stated that before they separated on the night of May 23rd, near Tomsic's cabin, Gipson went out to a hay bailer and when he came back he had a wrench, which looked like a monkey wrench, and was talking to himself; that appellant said, "Robert, I wouldn't do that"; that Gipson told him he was going to have it out with Tomsic and they went to the front door of his cabin; that it was locked and they went around to the back where Gipson hit on the door and called to Tomsic to come out; that Gipson then went in on Tomsic with the wrench and "tusseled around in there" and after he quit bumping around, he said, "Come on with the light, you scarey so and so", and "I just shined the light through the door that way, through the back door, and Robert was getting up from down on the floor with Tomsic when I shined the light through there, and he came out. He got up on the fence. I was standing by the fence. He stepped on my shoulder and jumped down."

An excerpt from the statement of appellant, made at Wichita, Kansas, is as follows:

"Mr. Strasner: Morgan, we are going to point out some facts where you are lying. In the first place, you couldn't see in that door with the door shut. You said you were outside the fence, and you looked in there and saw the old man on the floor, and Robert hitting him.

"Morgan: I said before, when the robbery was going on, I couldn't see in there. When Robert opened the door, he was getting up off the old man.

"Mr. Strasner: And you were outside the fence there?

"Morgan: I shined the light through there.

"Mr. Coughlin: That is about 12 or 14 feet away?

"Morgan: Yes.

"Mr. Strasner: The reason you are lying, Alvin, is because the fence is situated so that when the door is open you can only see a small portion of that room, and that would have been in the opposite corner from where the old man was lying, and there isn't any way possible for you to see the interior of that cabin at all.

"Mr. Coughlin: And another place: You said you opened the door and saw Robert and the old man get up. You said you opened the door and saw Robert get up off of the old man.

"Morgan: When the door opened, that was when I saw Robert. He opened the door, and he was on his knees, getting up this way. The door was always cracked some, but I couldn't see him; and he was holding this door, getting up off his knees and opening the door at the same time.

"Mr. Coughlin: He only has one hand to do that, you know. You realize that. Do you know, Alvin, when anyone lies they always make a mistake.

"Morgan: That's true.

"Mr. Coughlin: Always make a mistake, and you see, you couldn't have possibly seen into that room unless you were over there inside.

"Morgan: O.K. This door opens from this way, and if you are standing right here when this door opens—

"Mr. Coughlin: We tried that.

"Morgan: You can see in the door from outside the fence when the door is opened.

"Mr. Coughlin: Another thing, Alvin, we found a piece of iron under the old man. Robert has only one hand. He couldn't have carried a monkey wrench and a piece of iron, too.

"Morgan: The first piece of iron, he stuck in his pocket. He kept the wrench in his hand.

"Mr. Coughlin: That's the first time I have ever heard of anybody trying to hit somebody in the head, carrying two pieces of iron.

"Morgan: He stuck two pieces in there. He said, 'This piece might be a little light.' He stuck it in his bosom."

One of the officers testified that appellant told him in Pine Bluff that he didn't have anything to do with it, but that he was there at the time it happened and that it was all Robert's fault; that appellant also stated, "I am willing to take my part of the punishment, but I didn't hit the old man. Robert was the guy that done it."

Gipson testified that he met appellant on the evening of May 23rd and that appellant asked him to go with him that night; that he was going to gamble, to get some money to get his car out. He testified that he saw appellant later that evening and that they walked down near David Morgan's house where appellant said, "Wait a minute. I have to go out here and get my rod"; that appellant went to David Morgan's car and got a tire tool, like a part of an automobile spring; that appellant gave him the tire tool and he put it inside his coveralls and carried it to Tomsic's cabin; that appellant said, "The last time I was at this guy's house gambling he acted like he wanted to start something." Gipson further stated that when they arrived at the Tomsic cabin the gate was locked; that Gipson said, "This man don't gamble"; that appellant replied, "That's what you think. Wait a minute. I'm going to jump over here and scare him." Gipson further testified that he then heard a rumbling and wrestling going on against the wall; that he climbed over the fence, opened the door and saw appellant hitting Tomsic with a wrench, similar to the wrench later found in the standpipe. Gipson stated that he "hollered" at appellant, rushed in and said, "Don't do that"; that he pushed appellant and Tomsic; that Tomsic turned on him and they both went down; that after Gipson got up appellant handed the wrench to him and they left; that Gipson asked appellant, "What is the matter in there with you and the old man, what were you fighting for", and that appellant said he hit him. Gipson further stated that appellant told him to throw the wrench into a water pipe; that they then went to appellant's house where he saw the billfold and appellant said he had taken the old man's money; that appellant gave Gipson $22 and told him to go to Bakersfield and catch a bus and go on home, that appellant did not want him involved. He testified that appellant threw the wrench into the standpipe and also threw the billfold and bloody clothes in the pond and that they then went to Bakersfield.

[1, 2] Appellant's contention that the evidence is not sufficient to justify the judgment of conviction is based upon the theory that defendant Gipson was an accomplice and that his testimony lacked the corroboration required by section 1111 of the Penal Code. There might be some merit in this contention if we assume that there was in fact an accomplice. However, the question of whether or not Gipson was an accomplice was one of fact for the jury, and since the verdict was "not guilty" as to him, the question was determined adversely to appellant's contention. The jury was properly instructed as to the law pertaining to accomplices and as to the essential requisites of corroborating evidence. The finding of the jury cannot be disturbed on appeal.

[3, 4] As was said in People v. Coffey, 161 Cal. 433, 436, 119 P. 901, 902, 39 L.R.A.,N.S., 704: "Whenever the facts themselves are in dispute, that is to say, wherever the question is whether the witness did or did not do certain things, which, admittedly, if he did do them, make him an accomplice, the jury's finding, upon familiar principles, is not disturbed." People v. Dobkin, 74 Cal.App.2d 269, 272, 168 P.2d 729. The fact that Gipson was jointly charged with appellant does not as a matter of law make him an accomplice where there was a dispute as to his complicity. People v. Johns, 69 Cal.App.2d 737, 747, 160 P.2d 102.

In addition to the testimony of Gipson, there was evidence that appellant pointed to the place where the death weapon was found, and where bloody clothes, including those of appellant, were thrown. He admitted his presence at the scene of the crime at the time it was committed.

There was evidence that appellant tried to borrow $1 from a witness on the day of the murder and that after the killing he paid a witness $3 for a ride to Bakersfield. He purchased $20 worth of chips in a poker game on May 24th, paid for them with two $10 bills and had other money in his pockets.

The inconsistencies in appellant's statements and his entire conduct furnished sufficient ground for the jury's finding.

Appellant argues that the court erred in admitting into evidence his statement taken in Wichita, Kansas. He contends that the accusatory statements then made to him were denied and that the statement should not have been admitted.

[5] Where, as here, the denial was followed by the admission of special facts, the rule, that if the accused responds to the accusatory statements with a flat denial, there is no admission and nothing to be received in evidence, has no application here. People v. Simmons, 28 Cal.2d 669, 712, 172 P.2d 18.

In People v. Brown, 71 Cal.App.2d 669, at page 674, 163 P.2d 85, at page 88, it was said: "An accusation and a denial of guilt of an alleged offense are not admissible, but a denial followed by an admission of special facts or circumstances tending to prove guilt is relevant. For instance, an accused may deny the commission of a criminal offense but subsequently acknowledge that he was at the scene of the crime."

[6] Appellant's statement contained many admissions that implicated him in the commission of the crime and the fact that the statement consisted in part of accusatory questions by prosecuting officers does not preclude its admission in evidence. People v. Wade, 71 Cal.App.2d 646, 655, 163 P.2d 59.

[7] The final contention of appellant is that the district attorney was guilty of prejudicial misconduct in his cross-examination of appellant as to the time he spent in jail. The questions and answers were as follows: "Q. When were you arrested? A. On the following Monday, the 26th.

"Q. Monday? A. Yes.

"Q. And you spent how long in jail? A. I think about thirty-three days.

"Q. Were you questioned at that time? A. Yes.

"Q. Did you tell the officers the same story you told the jury now? A. I don't remember.

"Q. You don't remember what you told them? A. No, sir.

"Q. Didn't you plead guilty to vagrancy at that time?"

[8, 9] Appellant testified in his direct examination that he had spent 33 days in jail after he was arrested and that he had talked to one of the officers about the killing. It was proper to question appellant on cross-examination as to the length of time he was in jail, and as to what he had stated to officers, but the last question asked was improper. It is not permissible to introduce evidence of other offenses for the purpose of creating prejudice against appellant. People v. Baylor, 47 Cal.App.2d 34, 38, 117 P.2d 425. However, the question was not answered. The court ordered the evidence stricken out and instructed the jury to disregard any reference to any other offenses. The district attorney did not again ask the question and no further reference was made as to why appellant spent thirty-three days in jail. We do not feel that the conduct of the district attorney was such as to justify a reversal of the judgment. The evidence is sufficient to support the verdict of the jury.

The judgment is affirmed.

GRIFFIN, Acting P. J., concurs.

---

87 Cal.App.2d Supp. 938

PEOPLE v. HIGGINS.

Cr. A. 2429.

Appellate Department, Superior Court,
Los Angeles County, California.
Sept. 8, 1948.

1. Statutes 🔑181(1), 183

In construing a statute a court must make effective the legislative intent; and literal interpretation is to be avoided when it conflicts with manifest legislative intent.

2. Automobiles 🔑142

Motor vehicle operator's license is mere evidence of driving privileges which have been granted. Vehicle Code, §§ 250, 254, 265(d), 270(b), 276, 291, 302, 305(c), 332, 763.

3. Automobiles 🔑326

The statute punishing any person who drives a motor vehicle after he has been refused a license or after his license has been suspended or revoked prohibits operation of a motor vehicle between time driving privileges are suspended or revoked and time that they are restored again; and in a case of a suspension, period covered would end when period of suspension is ended, and in cases of revocation, when once again privilege of driving has been restored. Vehicle Code, § 332.

4. Automobiles 🔑326

Driver whose motor vehicle operator's license was revoked on conviction of grand theft, who filed application for new license, and was issued temporary license for 60 days but thereafter drove upon public highway, was not punishable under statute penalizing any person who drives a motor vehicle when he has been refused a license or after his license has been suspended or revoked, though conviction under statute forbidding a person to drive unless he holds a valid operator's license was proper. Vehicle Code, §§ 250, 332.

5. Automobiles ⟹142

Under the statute permitting driving under temporary motor vehicle operator's license when operator has license in his immediate possession "while" investigation is being completed relative to applicant's right to receive a license and providing that temporary license shall be invalid "when" license has been issued or refused, quoted words are used to mean "during the time that", and temporary license may not be given life beyond 60 days by act of operator in carrying his license with him or by failure of department to conclude its investigation. Vehicle Code, §§ 250, 254, 332.

See Words and Phrases, Permanent Edition, for all other definitions of "When" and "While".

◆

Appeal from Municipal Court of Los Angeles; Philbrick McCoy, Judge.

Edward Joseph Higgins was convicted of driving a motor vehicle after his operators and chauffeur's license and his driving privileges had been suspended and revoked, and he appeals.

Reversed with directions.

Mark F. Jones and W. L. Englehardt, both of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., Donald M. Redwine, Asst. City Atty., and Walter C. Allen, Deputy City Atty., all of Los Angeles, for respondent.

PER CURIAM.

The defendant has appealed from the judgment imposed as a consequence of his conviction upon the charge that he had driven a motor vehicle "after his operator's and chauffeur's license and his driving privileges had been suspended and revoked." The record before us discloses that the defendant's operator's license had been revoked in 1942, following his conviction upon a charge of grand theft (auto). In August of 1946 the defendant filed with the Department of Motor Vehicles an application for a new operator's license. Reference was made to this application in a letter from the Department addressed to the defendant in January, 1947, in which an affidavit form was enclosed. Under date of August 7, 1947, a temporary license was issued the defendant, bearing upon its face the notation that it would become void sixty days from the date of its issuance. More than sixty days thereafter, on February 17, 1948, the defendant drove a motor vehicle upon a public highway, an act which led to the filing of the complaint under which he was convicted. We have concluded that while under these facts the defendant appears to be guilty of a violation of section 250 of the Vehicle Code, he was not guilty, as charged, of having violated section 332 of that code.

Section 250, so far as it is of present interest provides: "(a) It is a misdemeanor for any person to drive a motor vehicle upon a highway unless he then holds a valid operator's or chauffeur's license * * *." The maximum punishment for a violation of this section is set by section 763, Vehicle Code, as either a fine of five hundred dollars, or imprisonment in the county jail for six months, or both. Section 332 covers some of the same territory covered by section 250, but permits a greater punishment for an offense in the field to which it applies: "Any person who drives a motor vehicle upon a highway when such person has been refused a license by the department or after his operator's or chauffeur's license or his driving privilege has been suspended or revoked is guilty of a misdemeanor and upon conviction thereof shall be punished by imprisonment in the county jail for not more than one year or by fine of not more than one thousand dollars ($1,000) or both."

It is at once apparent that a literal interpretation of section 332 is not possible, because such a construction would bring the section in conflict with other clear provisions of the same code. We find in section 291, for example, that a court which convicts a person of a violation of a provision of the code relating to speeding, may suspend that person's license for not to exceed thirty, or sixty, days, or six months, depending upon whether it is the first, second or subsequent conviction. One whose license was suspended on March 1 for a maximum of thirty days would violate section 332, read literally, if he drove at any time during April, for although it would be after the period of suspension was over, it would also be, chronologically, after the suspension. With respect to a revocation of a license upon the ground of grand theft (auto), section 304 of the code states:

"The privilege revoked under subdivision (a) hereof shall not be renewed until the expiration of one year after the date of such revocation * * *." Other sections recognize that after a year a new license may be issued to a person whose license has been revoked. Note the provisions of sections 265(d), 270(b), 302: (A new license may be obtained only as provided in this code); and 305(c). It is manifest that it was not intended by the provisions of the code authorizing the revocation of operators' licenses that a person whose driving privileges have been terminated shall never thereafter be permitted to drive. Yet a literal application of the words of section 332 would require just that result. Suppose that the defendant in this case had been issued a new operator's license in December, 1943, as would have been possible under the code sections noted above. Without more, then, during the four-year period from December 1943 to the same month in 1947, when his new license would expire by virtue of section 276, he would have a valid operator's license, but could not drive without violating the letter of section 332, for all that period would be "after" his operator's license had been revoked. His operation in February, 1948, would be both after his earlier license had been revoked and after his new license had expired.

[1] We are confronted by a case in which we must determine the meaning of section 332. Seeking to make effective the legislative intent, as we must do (Los Angeles County v. Frisbie, 1942, 19 Cal.2d 634, 639, 122 P.2d 526, 529; Gartner v. Roth, 1945, 26 Cal.2d 184, 190, 157 P.2d 361, 364), we are forced to conclude that section 332 should not be applied literally, and as it has frequently been held that a literal interpretation is to be avoided when it conflicts with the manifest legislative intent (for examples, see Robbiano v. Bovet, 1933, 218 Cal. 589, 595, 596, 24 P.2d 466, 469; In re Mitchell's Estate, 1942, 20 Cal.2d 48, 51, 123 P.2d 503, 504; Dickey v. Raisin Proration Zone No. 1, 1944, 24 Cal.2d 796, 809, 151 P.2d 505, 508, 157 A.L.R. 324), another than a literal construction must be found. We cannot, of course, refer our problem to the legislature with a request that it amplify section 332, more clearly to express its meaning. We have no alternative but to resort to judicial construction, that is, to judicial legislation.

[2-4] In this case the amount of redrafting to be done is not extensive. It is not to be doubted, we have concluded, that the act which section 332 is meant to prohibit under the severer penalty there provided, is the operation of a motor vehicle between the time that driving privileges—of which the license is but evidence (People v. Noggle, 1935, 7 Cal.App.2d 14, 17, 45 P.2d 430, 432)—are suspended or revoked, and the time that they are restored again. In the case of a suspension, the period covered by the section would end when the period of suspension is ended. In the case of a revocation, the period would end when once again the privilege of driving had been restored. If thereafter that privilege terminates for any reason, the public is not without protection, for further driving is in violation of section 250. It follows that the defendant was wrongfully convicter under a complaint charging a violation of section 332, for he had had his operating privileges restored since his operator's license had been revoked in 1942.

Because of the judgment we intend to make we find it advisable to refer to the further contention of the defendant that he had a valid license when he operated a motor vehicle in February 1948. This contention is based upon the agreement that by reason of the 1947 amendment to section 254, Vehicle Code, a temporary license is good until the Motor Vehicle Department acts, one way or another, upon a pending application. Section 254, with the significant words of the 1947 amendment enclosed in brackets, reads as follows: "The department may issue to any person applying for an operator's license, a temporary operator's license, and to any person applying for a chauffeur's license a temporary chauffeur's license. A temporary license shall permit the operation of a motor vehicle upon the highways for a period of 60 days, when the licensee has such license in his immediate possession, [and while the department is completing its investigation and determination of all facts relative to such applicant's right to receive such license. Such temporary license shall be invalid when the applicant's license has been issued or refused.]"

[5] We are satisfied that defendant's contention rests upon an untenable premise. Prior to 1947 the temporary license provided for by this section was a permit to operate only so long as two conditions concurred: (1) the sixty days had not expired; (2) the license was in the immediate possession of the operator. A third concurrent condition was added in 1947, viz., the pendency of the investigation and determination referred to. Both "when" and "while" are here used to mean "during the time that." The specific period of sixty days may be shortened, either, in effect, by the failure of the operator to have his license in his immediate possession or by the action of the department in granting or refusing a license. The temporary license may not be given life beyond sixty days by the act of the operator in carrying his license with him nor by the failure of the department to conclude its investigation.

The judgment is therefore reversed with directions to the trial court to dismiss the action for the purpose of filing an amended complaint, if the People so request.

32 Cal.2d 610

ELBERT, Limited, v. NOLAN et al.

L. A. 20051.

Supreme Court of California, in Bank.
Sept. 23, 1948.

1. Partition 🔑32, 114(3, 4)

The owner of unpaid and unforeclosed street improvement bonds, issued as liens on city lots subsequently sold and conveyed to state for delinquent county and city taxes and later conveyed by it to purchasers at tax sales, had right to sue for partition thereof and recovery of costs, including reasonable counsel fees and expense of title abstracts. Code Civ.Proc. §§ 752, 796, 799; Pol.Code, §§ 3771, 3771a, 3785; Revenue and Taxation Code, § 3691 et seq.; St.1911, p. 730, as amended.

2. Taxation 🔑509

Liens for general taxes and for special assessments stand on equal footing before law. Revenue and Taxation Code, § 3900; St.1911, p. 730, as amended.

3. Taxation 🔑733

Proceedings establishing tax sale purchasers of city lots, conveyed to them by state, as owners of lots under titles correlative with tax liens, did not ipso facto destroy rights of owner of unpaid and unforeclosed street improvement bonds, issued as liens on lots before sale thereof to state for delinquent county and city taxes, but left such rights intact as premise for statutory partition action by such owner, though such remedy was not available when bonds were issued. Code Civ.Proc. § 752; Pol.Code, §§ 3771, 3771a, 3785, 3787; Revenue and Taxation Code, §§ 3520, 3691 et seq., 3900; St.1911, p. 730, as amended.

4. Taxation 🔑782

The state may declare effect of its deeds to purchasers of lands at tax sales on conflicting tax liens different from that under law as declared by it when it received deed to such lands, as law in effect when state issues deeds to purchasers governs. Pol.Code, §§ 3771, 3771a, 3785, 3787; Revenue and Taxation Code, §§ 3520, 3691 et seq., 3900.

5. Municipal corporations 🔑564

The statute barring proceedings to foreclose lien of unpaid street improvement bond four years after due date of last installment is inapplicable to action by owner of such bonds against tax sale purchasers of city lots subject to liens of bonds for partition of such lots. Code Civ.Proc. §§ 337, 752; Pol.Code, §§ 3771, 3771a, 3785; Revenue and Taxation Code, § 3691 et seq.; Streets and Highways Code, § 6610; St.1911, p. 730, as amended.

6. Limitation of actions 🔑60(1)

An action, commenced in 1946, pursuant to 1943 statute, by owner of unpaid and unforeclosed street improvement bonds, issued as liens on certain city lots, against purchasers thereof at subsequent tax sales, for partition of lots, was not barred by general four-year statute of limitations. Code Civ.Proc. §§ 343, 752; Pol. Code, §§ 3771, 3771a, 3785; Revenue and Taxation Code, § 3691 et seq.; St.1911, p. 730, as amended.

7. Municipal corporations 🔑521

The statute, providing that street improvement assessment is conclusively presumed paid after time fixed thereby for commencement of proceedings prescribed by legislation of any political unit other than state to foreclose assessment lien, is inapplicable to unpaid and unforeclosed street improvement bonds issued under state law. Code Civ.Proc. § 329; St.1911, p. 730, as amended.

8. Partition 🔑32

The statute authorizing action for partition of realty, subject to lien on parity with that on which owner's title is based, by owner or holder of lien, according to respective rights of persons interested in property, is remedial only and does not increase substantive rights of party invoking its aid. Code Civ.Proc. § 752.

9. Partition 🔑111(3)

In statutory action by corporate owner of unpaid and unforeclosed street improvement bonds, constituting liens on certain city lots, against purchasers of such lots at tax sales, for partition thereof, plaintiff's enforcement of liens is measure of its maximum interest in lots, and it cannot participate in proration of excess proceeds of partition sale thereof under theory of its tenancy in common status with holders of tax deeds, so that quantum of plaintiff's lien is amount which trial court may find due on bonds and quantum of defendants' liens is amount found to have been paid by them for their interests in lots. Code Civ.Proc. § 752; St.1911, p. 730, as amended.

10. Partition ⚷114(3, 4)

In action by owner of unpaid and unforeclosed street improvement bonds, constituting liens on city lots, against purchasers of such lots at tax sales, for partition thereof, plaintiff is entitled to allowances for attorneys' fees, court costs, and expense of procuring abstracts of title to lots. Code Civ.Proc. §§ 752, 796, 799; St.1911, p. 730, as amended.

11. Partition ⚷111(3)

In effecting sale of city lots under partition judgment in action by owner of unpaid and unforeclosed street assessment bonds, constituting liens on such lots, against purchasers thereof at tax sales, court should order separate sale of each lot and discharge of parties' liens thereon on parity basis after payment of costs of sale and appropriate portion of plaintiff's costs allocable thereto and before payment of balance of proceeds to holder of legal title to lot, and, if any lot sells for insufficient amount to pay such costs and discharge liens, amount available for discharge thereof should be divided on parity basis in proportion to amount due on each lien. Code Civ.Proc. § 752; Pol.Code, §§ 3771, 3771a, 3785, 3787; Revenue and Taxation Code, §§ 3520, 3691 et seq., 3900; St.1911, p. 730, as amended.

◆

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Elbert, Ltd., a corporation, against Whitfield P. Nolan, J. J. Missler, Elizabeth Missler, R. W. Snow, and others for partition of three city lots and declaratory relief. From a judgment denying partition and quieting title to the lots in named defendants, subject to the lien of plaintiff's unpaid street improvement bonds, plaintiff appeals.

Reversed with directions.

Prior opinion, App., 186 P.2d 1020.

Robt. E. Rosskopf, John F. Bender, and G. Loshoncy, all of Los Angeles, for appellant.

Arthur V. Kaufman, of Los Angeles, for respondents.

Marshall Stimson and Arthur C. Fisher, both of Los Angeles, amici curiae on behalf of respondents.

SPENCE, Justice.

This action involves the right to effect a partition of three vacant lots in the city of Los Angeles, the facts being undisputed. Plaintiff's claim stems from the ownership of three unpaid street improvement bonds which were issued as liens, respectively, on each of the three lots—one in 1924 and two in 1928—pursuant to the Improvement Act of 1911 (Stats.1911, p. 730; Deering's Gen. Laws, 1937, Act 8199), as amended. No foreclosure proceedings were instituted following the maturity dates of said bonds. Meanwhile the county and city taxes on the three lots became delinquent and under the statutes then in force, the lots were "sold to the State" (Pol.Code, sec. 3771) and five years thereafter in each case—1937, 1938, and 1939, respectively—were deeded to the state pursuant to the prior sales thereof (Pol.Code, secs. 3771a and 3785). In 1945 defendants Missler purchased two of the lots and defendant Snow purchased the other at respective tax sales, and received deeds accordingly from the state in pursuance of division 1, part 6, chapter 7, of the Revenue and Taxation Code.

In 1946 plaintiff commenced the present action "for partition and declaratory relief." Following a trial, the court denied plaintiff's right to partition, but found that a bona fide controversy did exist and rendered its judgment quieting title in the defendant tax buyers against all parties, subject to the lien of plaintiff's bonds for "all amounts unpaid" thereon. From such judgment, plaintiff prosecutes this appeal.

[1] As authority for its procedure, plaintiff relies on section 752 of the Code

of Civil Procedure, as amended in 1943, which provides, so far as here material, that "* * * an action may be brought * * * where real property is subject to a lien on a parity with that on which the owner's title is based, by the owner or by the holder of such lien, for a partition thereof according to the respective rights of the persons interested therein and for a sale of such property * * * if it appears that a partition can not be made without great prejudice to the parties." Upon the premise that the lots here in question "can not be physically partitioned without injury" thereto "and without great prejudice to the parties," plaintiff urges the propriety of a "decree of partition * * * ordering [the] property sold and the proceeds distributed on the basis of the bond liens being on a parity with the tax titles." As a further consideration, plaintiff claims the right to an allowance for the costs of this action, including "reasonable counsel fees" (Code Civ.Proc. sec. 796) and the expense of "abstract[s] of title" on the three lots (Code Civ.Proc. secs. 799). Plaintiff's "right" to the remedy of partition and to the recovery of the mentioned litigation expenses incident to the prosecution of such action is not open to dispute in the light of prevailing judicial decisions and the applicable statutory law, but there are certain limitations to be recognized as affecting the measure of its relief, as will hereinafter appear.

[2] The proposition is well settled in this state that liens for general taxes and liens for special assessments stand upon an equal footing before the law. La Mesa Lemon Grove and Spring Valley Irr. District v. Hornbeck, 216 Cal. 730, 737, 17 P.2d 143; Neary v. Peterson, 1 Cal.2d 703, 705, 37 P.2d 82; Monheit v. Cigna, 28 Cal.2d 19, 24, 168 P.2d 965, 167 A.L.R. 995; Security Investment Company of Riverside v. Douglas, 76 Cal.App.2d 592, 597, 173 P.2d 672; Oswald v. Salter, 77 Cal.App.2d 599, 603, 176 P.2d 425. Forceful illustration of this doctrine of parity as to the liens of "all taxing agencies" under the "declared * * * policy of [this] State" (Rev. and Tax.Code, sec. 3900) is found in the case of Monheit v. Cigna, supra, stating that a person holding title by deed after foreclosure of street assessment bonds issued under the Improvement Act of 1911, which specifically provides that such a deed conveys absolute title free from all encumbrances except liens for taxes, "does not have a right superior to that of the plaintiff-holder of a deed from the state based upon a sale for delinquent general taxes, and the reverse is also true." 28 Cal.2d at page 25, 168 P.2d at page 969, 167 A.L.R. 995. In line with such decision as to the existing equality of rights between the parties as there presented in the quiet title action, the court pertinently continues its observations, 28 Cal.2d at page 26, 168 P.2d at page 970, 167 A.L.R. 995, as follows: "Not only do the *tax deeds* from the respective taxing agencies stand on a parity with relation to whether one destroys the other when we are not concerned with the time when the liens from which they flowed arose, but, moreover, in order that that parity and equality be made real and fully significant, it must follow that the time such liens arose or the deeds were executed with reference to each other, is immaterial." (Emphasis added.) Then turning to the "question of the character and extent of the interest and the nature of the estate in the property of the holders of deeds from the respective taxing agencies," the court reaches the following conclusion, 28 Cal.2d at pages 27, 28, 168 P.2d at page 970, 167 A.L.R. 995: "*Since there is no priority as between the several tax and assessment liens and since several purchasers of the same property hold the interests conveyed on a parity with each other, the respective purchasers become tenants in common.* Also, *since the property was originally subject to more than one lien on an equal basis, that is, without priority,* the property should be subject to liens to the extent of the respective *purchase prices paid.* In that manner *each purchaser* is given the full benefit of the investment made by him in the *purchase* of the property. Otherwise absurd results would follow. One purchaser of the property would receive his interest for a few dollars, while another might have paid thousands. To effect equality and parity as between the *co-owners* there is therefore necessarily an equitable lien against the property in favor of

each co-tenant to the extent of the amount paid by him. The result of such liens as between the co-tenants would be that in the event of the subsequent sale of the entire property, each co-tenant would be entitled to reimbursement for the amount paid by him before equal division of any excess. Should the property bring an amount less than the aggregate purchase sums, the amount of each co-tenant's reimbursement would be decreased proportionately. In the event of sale by one co-tenant, or *in the event of partition, each co-tenant's share would be subject to one-half the amount of each lien as continued against the property.*" (Emphasis added.)

So in considering the pertinency of the Monheit case, defendants properly attach significance to the fact that there the rule of parity was applied in disposition of the rights of the litigants under recognized *coexisting title claims* derived from *deeds* executed by the various taxing agancies in consequence of the respective delinquency sales, while here a variant premise prevails between the parties where an *unforeclosed bond lien* is urged as on a "complete parity" with a *deed* based on a tax sale. In short, the parity principle operates to prevent the extinguishment of existing liens standing "upon an equal footing before the law" (La Mesa Lemon Grove and Spring Valley Irr. District v. Hornbeck, supra, 216 Cal. 730, 737, 17 P.2d 143, 146), and such equality is carried into the *titles* conveyed by the taxing agencies. Thus the *deed* received after foreclosure of a street assessment bond is of equal rank with a *deed* pursuant to "a sale for delinquent general taxes" (Monheit v. Cigna, supra, 28 Cal.2d 19, 25, 168 P.2d 965, 167 A.L.R. 995), but an unforeclosed lien manifestly does not represent a like state of finality, though, as the doctrine of parity envisages, it may achieve such status if the holder elects to enforce it through appropriate proceedings under the law. So it is said in Monheit v. Cigna, supra, 28 Cal.2d at page 25, 168 P.2d at page 969, 167 A.L.R. 995, that "in order to preserve the priority of a right (here to preserve parity), a lien is not considered merged by a subsequent transaction." Such principle coincides with the earlier decisions of this court cited and followed in the Monheit case: La Mesa Lemon Grove and Spring Valley Irrigation District v. Hornbeck, supra, 216 Cal. 730, 17 P.2d 143, holding that tax and assessment liens of various political subdivisions remain valid and enforceable encumbrances on the land after a tax deed has issued to the subdivision whose period of redemption first expires; and Neary v. Peterson, supra, 1 Cal.2d 703, 37 P.2d 82, 83, holding that a lien for "street improvement assessments" remains intact notwithstanding the sale of the property for delinquent taxes, and the right of foreclosure on the bond can not be denied. In brief, these cases involving "separate taxing agencies and purposes, and a general tax lien against a special assessment lien," apply "the parity rule without qualification" (Monheit v. Cigna, supra, 28 Cal.2d at page 27, 168 P.2d at page 970, 167 A.L.R. 995) to preserve rights stemming from the fact of coexistence of the liens of equal rank. The parity so found to prevail between the liens of the "taxing agencies" continues into the titles conveyed by the deeds based on the delinquent tax or assessment sales, and there is no room for the operation of the doctrine of merger of the existing liens in derogation of such parity because of a deed to any one of these agencies—a "subsequent transaction" not affecting the established equality. Monheit v. Cigna, supra, 28 Cal.2d at page 25, 168 P.2d at page 969, 167 A.L.R. 995. But such declaration of equality in rank as between co-lienholders pending enforcement of their respective interests or as between co-owners of property interests as conveyed by respective deeds does not foreclose recognition of the disparity here between the respective positions of plaintiff and defendants, where the controversy involves the status of an *unforeclosed lien* as against the "subsequent transaction" of a *title claim* pursuant to a *tax deed.*

[3,4] Section 752 of the Code of Civil Procedure, as above quoted, precisely contemplates the situation here presented, where plaintiff as the holder of "a lien on a parity with that on which the owner's title is based" seeks partition of the property so encumbered. As heretofore recited, the state, upon expiration of the five-year period of redemption, acquired by deed

"absolute title to the property, free of all encumbrances, except [certain specified] liens" (Pol.Code, sec. 3787; Rev. and Tax. Code, sec. 3520; Mercury Herald Co. v. Moore, 22 Cal.2d 269, 273, 138 P.2d 673, 147 A.L.R. 1111; People v. Maxfield, 30 Cal.2d 485, 487, 183 P.2d 897), and such title passed to defendants as purchasers of the respective lots at the tax sales in 1945 (Rev. and Tax.Code, sec. 3712; Monheit v. Cigna, supra, 28 Cal.2d 19, 26, 168 P.2d 967, 167 A.L.R. 995). However, such separate proceedings, establishing defendants as "owners" of the property based on titles correlative with the respective tax liens, did not ipso facto destroy plaintiff's rights flowing from its bond liens but, on the contrary, left them "intact" (Neary v. Peterson, supra, 1 Cal.2d 703, 706, 37 P.2d 82) as premise for the statutory partition action in question. In such circumstances, it does not aid defendants to argue, in opposition to plaintiff's claim of relief, that the remedy here sought was not available in enforcement of the bonds at the time they were issued. While it may be said that such remedy would not be available as between the original owners of the property and the bondholder because of the constitutional objection that it would impair the contract between them (Meriwether Investment Company, Ltd., v. Lampton, 4 Cal.2d 697, 702, 53 P.2d 147; see, also, Note 100 A.L.R. 164, 174), here the original owners are not involved. Rather these are the significant factors affecting plaintiff's rights in this regard: defendants purchased the property in 1945 at the tax sales; section 752 of the Code of Civil Procedure, as amended in 1943, was then in effect; and the parity of tax and bond liens had long been definitely established by judicial decisions in this state (La Mesa Lemon Grove and Spring Valley Irrigation District v. Hornbeck, 1932, supra, 216 Cal. 730, 17 P.2d 143; Neary v. Peterson, 1934, supra, 1 Cal.2d 703, 37 P.2d 82. As is aptly stated in Monheit v. Cigna, supra, 28 Cal.2d at page 26, 168 P.2d at page 969, 167 A.L.R. 995: "We know of no reason why the state may not declare a deed from it, with reference to its effect upon conflicting tax liens, to be different from that under the law as declared by it when it received the deed. * * * It is the law in effect when the state issues its deed to the purchaser that governs."

[5–7] Likewise without force is defendants' reliance upon the bar of the statute of limitations applicable to the maintenance of proceedings to foreclose the lien of a bond following "the expiration of four years after the due date of the last installment" thereon. Streets and Highways Code, sec. 6610; see, also, Code Civ.Proc., sec. 337. Plaintiff does not seek foreclosure of its bond liens, but rather a partition of the property pursuant to statutory authority as a "holder of [street improvement] lien[s]"—subsisting claims against the property and "on a parity with [the liens] on which [defendants' respective] title[s] are based" pursuant to the tax deeds. Code Civ.Proc., sec. 752, as amended in 1943, supra. The cited statute, in its provision for the remedy of partition, does not contain a period of limitations, and there is no other statute which specifically limits the time for the commencement of any action for partition. If it be claimed that the general four-year limitation is applicable to such actions (Code Civ.Proc., sec. 343), it is a sufficient answer here to state that since plaintiff's action for partition, instituted in pursuance of the 1943 statutory enactment, was commenced in 1946, the timeliness of its procedure is not open to dispute. Defendants' citation of section 329 of the Code of Civil Procedure, as amended in 1945, for the proposition that since no "action [has] ever been brought to *foreclose* the lien of [plaintiff's] bonds," they "should, therefore, now be declared as 'conclusively presumed paid'" obviously has no relevancy. That section expressly relates to "proceedings * * * prescribed by legislation of [a] political unit *other than the State,*" and since plaintiff's bonds were issued under authority of the Improvement Act of 1911, a state law, they are manifestly excepted from the operation of the cited code provision.

[8, 9] With plaintiff's statutory right to bring a partition action so established, there remains for consideration the matter of effecting the sale of the three lots in question—designated in this action as parcels

nos. 1, 2 and 5—since "it appears that a [physical] partition can not be made without great prejudice to the parties." The statute expressly provides "for a partition * * * according to the *respective rights* of the persons interested" in the property. Plaintiff's rights stem from unforeclosed liens for delinquent street assessments against each of the parcels, while defendants' respective liens have been carried into claims of title by virtue of deeds from the state on sale of the lots for delinquent taxes—the tax titles of defendants Missler relating to parcels nos. 1, and 2, and the tax title of defendant Snow relating to parcel no. 5. If plaintiff's liens had been carried into title, then there would have been created a tenancy in common as to each of the parties involved. Such was the situation in Monheit v. Cigna, supra, 28 Cal.2d 19, at pages 27, 28, 168 P.2d 965, at page 970, 167 A.L.R. 995, where it is declared, that "in the event of the subsequent sale of the entire property, each co-tenant would be entitled to reimbursement for the amount paid by him before equal division of any excess." This language has been correctly construed in subsequent decisions of the appellate court to mean that the purchaser of the tax title from the state has an equitable lien to the extent of the amount he *paid* for such tax title; and the holder of the bond title has an equitable lien to the extent of the amount he *paid* upon foreclosure proceedings. Cate v. Bourzac, 74 Cal.App.2d 422, 423, 168 P.2d 971; Security Investment Company of Riverside v. Douglas, supra, 76 Cal.App.2d 592, 597, 173 P.2d 672; Oswald v. Salter, supra, 77 Cal.App.2d 599, 605, 176 P.2d 425. But analogous reasoning under the parity principle as there applied cannot prevail in the distribution of the proceeds of the sale of property subject to an *unforeclosed bond lien* and a *tax lien carried into a title claim through deed* from the state. The cited partition statute is remedial in nature only and does not purport to increase the substantive rights of a party invoking its aid, so that here "according to the *respective rights*" of the litigants, plaintiff's enforcement of its existing bond liens is the measure of its maximum interest in the property, and it cannot participate in a proration of the "excess" proceeds under any theory of a "tenancy in common" status as prevailed in Monheit v. Cigna, supra, with respect to the "holders of deeds from the respective taxing agencies." Accordingly, as the matter here arises for disposition, the quantum of plaintiff's liens is the amount which may be found by the trial court to be due on its respective bonds; and the quantum of defendants' liens is the amount which may be found by the trial court to have been paid by them for their respective interests in the designated parcels.

[10] At this point consideration must also be given to plaintiff's claim for "attorney's fees and court costs" incurred in the prosecution of this litigation. Section 796 of the Code of Civil Procedure provides that "costs of partition, including reasonable counsel fees, expended * * * for the common benefit * * * and other disbursements, must be paid by the parties respectively entitled to share in the lands divided, in proportion to their respective interests therein, and may be included and specified in the judgment." Section 799 of the same code allows reimbursement for "an abstract of title of the property to be partitioned," procured by plaintiff and open to "use of all the" litigants. In its complaint plaintiff alleged the necessity of having "abstracts of title to [the] properties" here involved and their availability for "the inspection and use of all parties to this action"; and such abstracts were introduced in evidence. The propriety of such allowances is recognized as consistent with a "just and equitable" division of the "expenditures entailed in the maintenance of [partition] actions for the common benefit among those who shall have been found to be entitled to their respective shares and interests in said property by the ultimate judgment of the court * * *." Capuccio v. Caire, 207 Cal. 200, 208, 277 P. 475, 478, 73 A.L.R. 8. Plaintiff's position, therefore, as to the premise of reimbursement for these items of expense is unassailable.

[11] Consistent with these observations then, it follows that in effecting the sale of the three lots in question, the trial court

should order the separate sale of each lot and the discharge on a parity basis of the liens of the parties on such lot, after payment of costs of sale and the appropriate portion of plaintiff's costs allocable to such sale, and before payment of the balance of the proceeds of the sale to the holder of the legal title to such lot. In the event of the sale of any lot for an amount insufficient to pay such costs and to discharge such liens, the amount available for the discharge of the liens on such lot should be divided on a parity basis in proportion to the amount due on each lien upon such lot.

The judgment is reversed with directions to the trial court to take any additional evidence which may be required to determine the amount of the respective liens and plaintiff's reimbursement claims, and thereafter to modify its findings and to enter its judgment in accordance with the views herein expressed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concur.

32 Cal.2d 620

METROPOLITAN WATER DIST. OF SOUTHERN CALIFORNIA v. ADAMS et al. and three other cases.

L. A. 20508–20511.

Supreme Court of California, in Bank.

Sept. 23, 1948.

Rehearing Denied Oct. 18, 1948.

1. Depositaries 🔑8
Eminent domain 🔑165
Interest 🔑20

Where water district deposited with clerk moneys in order to secure immediate possession of lands sought to be condemned and clerk turned over such deposits to county treasurer who commingled them with other funds and deposited all the funds in various banks at interest and final judgments in condemnation proceedings, which included value of lands and value of use thereof from time of taking to entry of judgments, had been satisfied, interest on sums deposited by water district belonged to the district subject to court's control, and no separate action against county auditor and treasurer was necessary to recover such interest since treasurer in handling such deposits acted for the court. Gen. Laws, Act 2834a, § 1; Const. art. 1, § 14.

2. Eminent domain 🔑76

Where moneys were deposited by water district with clerk in order to secure immediate possession of lands sought to be condemned the court took naked security title for property owners, and in absence of water district's default, could only hold funds for safekeeping and return to water district when its obligations to landowners had been met. Const. art. 1, § 14.

3. Eminent domain 🔑76

Moneys deposited by plaintiff in condemnation proceedings in order to secure immediate possession of lands involved is not subject to withdrawal either by the plaintiff or by the defendant in such proceedings until the entry of final decree of condemnation and then only by order of the court in which it is deposited. Const. art. 1, § 14.

4. Depositaries 🔑8

Where moneys were deposited by water district with clerk of court in order to secure immediate possession of lands sought to be condemned and clerk turned over such deposits to county treasurer who commingled them with other funds and deposited all the funds in various banks at interest the court gave only mere possession of the funds to the county treasurer and had no power to give the treasurer or the county beneficial title to such moneys and the court not the county board of supervisors had control of such moneys, which belonged to the water district. Gen.Laws, Act 2834a, Const. art. 1, § 14.

5. Interest 🔑20

Generally mere deposit in court does not give rise to the right to receive interest.

6. Depositaries ⇨8

The Depositary Act covering all moneys belonging to any public or municipal corporation covered moneys which had been deposited by water district with clerk in order to secure immediate possession of lands sought to be condemned and which had been turned over to the county treasurer who commingled such deposits with other funds and deposited all the funds in various banks at interest. Gen.Laws, Act 2834a, § 1.

7. Depositaries ⇨8
Interest ⇨20

Where water district deposited with clerk moneys in order to secure immediate possession of lands sought to be condemned and clerk turned over such deposits to county treasurer who commingled them with other funds and deposited all funds in various banks at interest, the Superior Court which held the entire sum, principal together with accretions of interest, as custodian for the water district was entitled to interest under Depositary Act, and where final judgments in condemnation proceedings had been satisfied, the Superior Court was required to return any balance of principal or interest to the water district. Gen.Laws, Act 2834a, §§ 1, 2; Const. art. 1, § 14.

8. Statutes ⇨181(2)

Where two constructions of a statute appear possible the court follows the rule of favoring that which leads to the more reasonable result.

◆

Appeal from Superior Court, Riverside County; Elmer W. Heald, assigned Judge.

Separate condemnation proceedings by the Metropolitan Water District of Southern California, against E. Bennett Adams and others, against Lawrence Holmes and others, against W. F. Clay and others and against Ashley A. Ash and others, wherein deposits were made by the plaintiff in order to obtain immediate possession of the lands involved. From orders denying plaintiff's application for payment of interest earned by the deposits to which the County Auditor and County Treasurer objected, the plaintiff appeals.

Orders reversed and causes remanded for further proceedings not inconsistent with opinion.

For prior opinion see 187 P.2d 806.

James H. Howard, Gen. Counsel, and Charles C. Cooper, Jr., Asst. Gen. Counsel, both of Los Angeles, and H. L. Thompson, Sp. Counsel, of Riverside, for appellant.

Earl Redwine, County Counsel, of Riverside, for respondents.

SCHAUER, Justice.

Plaintiff, the Metropolitan Water District of Southern California, seeks to collect approximately $30,000 which is being held in the treasury of the County of Riverside and which, it is claimed, belongs to the water district. The moneys involved constitute interest on funds which were deposited with the clerk of the court at the commencement of proceedings in eminent domain, in accord with constitutional provision, as security in order to obtain immediate possession and use of the subject land. The amounts deposited in court were turned over to the treasurer of the County of Riverside who deposited the money in various banks where it drew the interest now the subject of controversy. The water district filed its application for "return" to it of the interest as a part or continuation of the eminent domain proceedings, and at that time brought in as parties to the action the clerk of the superior court, the county auditor and the county treasurer of the County of Riverside, hereinafter referred to as "respondents."

[1] The trial court denied the plaintiff's application on the ground that if the water district did have a cause of action against the county officials above mentioned for the alleged interest, it could proceed only in a separate and original suit against those parties. We have concluded that moneys deposited with the court as in the nature of security or a cash bond in order to gain possession of the subject property in eminent domain proceedings are legally in the custody and within the control of such court and that any interest paid on such moneys by a bank in which they are deposited attaches in ownership to the owner of the moneys and, being in the

custody of the court, is, like the principal sum, subject to the court's control. A separate action to determine the disposition of such interest is, therefore, under the circumstances of this case, unnecessary. We further conclude that in making the bank deposits, the county treasurer was representing the court and, acting as the court's ex-officio treasurer, was depositing moneys belonging to the water district.

Plaintiff water district, a public and municipal corporation, instituted, in the period from 1934 to 1936, four actions in eminent domain to condemn an aggregate of some four hundred parcels of land in Riverside County to be used as a reservoir site. After filing the complaints in eminent domain and in order to gain immediate possession and use of the land, the water district, pursuant to section 14 of article 1 of the Constitution, deposited with the clerk of the superior court in the County of Riverside sums of money for the various parcels aggregating approximately $500,000. The court maintained a record of such funds, hereinafter sometimes referred to as "security deposits," under an account entitled "Trust Fund." These moneys were turned over to the treasurer of the County of Riverside who commingled them with other funds and within a short time thereafter deposited all the funds in various banks in the immediate area.

In making such bank deposits the county treasurer assertedly acted pursuant to the Depositary Act (Stats.1933, p. 642; 1 Deering's General Laws, Act 2834a) which provides in section 1 that "All moneys *belonging to or in the custody of* any county, city and county, * * * or other public or municipal corporation within the State, including all moneys * * * paid to the treasurer of any county * * * or other official having authority to * * * receive the same, for the payment of principal, interest or penalties of bonds required by law * * * to be paid to * * * such * * * official, shall, so far as possible, be deposited in such State or National bank or banks * * * as the treasurer of the county, city and county, * * * or other official having the *legal custody* thereof, shall select for the safe-keeping of such deposits, and any sum so deposited shall be deemed to be in the treasury of such county, city and county, city, town, municipality or other public or municipal corporation * * * such depositary bank or banks be selected from those agreeing to pay the highest rate of interest * * * for such deposits * * * Such deposits, with interest thereon, shall be subject to withdrawal at any time upon the demand of the treasurer or other authorized official (subject to certain immaterial notice requirements in the case of inactive or term accounts)." (Italics added.)

The condemnation suits proceeded to trial and judgment was rendered on the issues of compensation and damage to the property owners. In Metropolitan Water District v. Adams (1940) 16 Cal.2d 676, 680, 107 P.2d 618, it was determined that if possession is taken by the condemnor prior to judgment then just compensation for the taking of property includes not only the actual value of the property, but also the actual cash value of the use of said property from the date of taking possession thereof up to the date of judgment. Legal interest, awarded by the jury in that case, was held a proper basis for the measurement of the compensation for use of the property. The interlocutory judgments entered in favor of the various landowners were satisfied in the main by deposit into court of moneys to be turned over to defendant property owners. Some of these "judgment deposits" were effected by a withdrawal by plaintiff of amounts on deposit as security and a redeposit in favor of the landowner.

No insurmountable problem is presented regarding the amount of interest attributable to the deposits. Because of the commingling and the procedure followed by the county treasurer, it is impracticable if not impossible to trace or identify the particular funds deposited with the court by the appellant and to determine the exact amounts of interest received by the county for the use of those specific funds for the various periods. There is evidence, however, as to the total amounts on deposit from time to time in various banks and the amount of interest earned thereon, and the amount of court deposits or "security deposits" in the hands of the county treasurer at various times. Using a proportionate share theory, the interest fairly allocable to the funds deposited by the water district apparently can be determined with reasonable accuracy.

When all defendant property owners had been paid and the cases were otherwise concluded, the plaintiff water district asked for a return of the unwithdrawn money deposited as security at the commencement of the actions. By March, 1942, the principal of all moneys so deposited had been returned to the water district. On March 7, 1944, the district filed "an application for orders for return to plaintiff of interest earned on moneys deposited by plaintiff in the court as security to enable plaintiff to take immediate possession and use of the properties under condemnation, and for order to show cause why such orders should not be made." Requested were an order directing the clerk of the court to withdraw moneys on deposit and to return and pay same to the plaintiff and an order directing the county auditor to draw a warrant on the treasurer in favor of the plaintiff for the "said amount" and directing the treasurer to honor such warrant. In a memorandum opinion the trial judge denied the plaintiff's application, stating that the judgments in the eminent domain proceedings had become final, that no moneys remained on deposit which were originally deposited to gain possession and that, if the water district is entitled to share in the interest received by the county treasurer on his bank accounts, it must proceed in separate actions brought against the proper parties.

If for any reason the original deposits for security or a part thereof had remained in the court's custody, it is conceded by the defendants that the water district could have applied for withdrawal of the same even after judgment became final. As said in G. H. Deacon Inv. Co. v. Superior Court, (1934), 220 Cal. 392, 397, 31 P.2d 372, quoting from Marblehead Land Co. v. Superior Court, (1923), 60 Cal.App. 644, 653, 213 P. 718, 722, "It is certain that, when such money deposits are made and the consequent order for possession and use follows, the court making the order has exclusive control of the money deposited. The cash is to be deposited merely as security (that is to say, as a cash bond) for the immediate payment of compensation when the amount of compensation is ascertained * * * If the compensation is not paid * * * to the defendant immediately, or perhaps within a reasonable time, * * * then the court must make some order transmuting the money deposited from security into payment * * * If the compensation be promptly paid by the plaintiff, then the court, perforce, must order the cash to be returned to the plaintiff. The money is undoubtedly in the possession and control of the court until condemnation decree, and perhaps until a reasonable time thereafter." Appellant water district contends that the court has jurisdiction to direct the payment of the moneys involved here because the interest was an incident or accretion, and became a part, of the deposits made in court; that the principal fund and all increments or accretions were under the exclusive control of the court, to be exercised in the particular action in which the deposits were made; and that the court has jurisdiction to dispose of the funds through special orders after final judgment. The court having continuing jurisdiction to dispose of the "security deposits" after final judgment (G. H. Deacon Inv. Co. v. Superior Court, (1934), supra, 220 Cal. 392, 397, 31 P.2d 372), no reason appears why the interest, if it follows the principal as an accretion thereto in this case, should not also be so disposable.

The superior court has no treasury or treasurer of its own and the legislature has directed that "Whenever money is paid into or deposited in the court, the same must be delivered to the clerk * * * [who] must, unless otherwise directed by law, deposit such money with the *county treasurer, to be held by him subject to the order of the court.*" (Italics added; Code of Civ.Proc., § 573.) Also relating to deposits with the court is section 188 of the Code of Civil Procedure which provides, "When any money is deposited with the clerk * * * of any court * * * or when any money is to be paid to the treasurer pursuant to any provision of this code, such money shall be forthwith deposited with such treasurer and a duplicate receipt of the treasurer therefor shall be filed with the auditor * * * When any money so deposited is to be withdrawn or paid out, the order directing such payment or withdrawal shall require the auditor to draw his warrant therefor and the treasurer to pay the same."

[2, 3] Prior to the determination of the applicability of the Depositary Act to moneys deposited with the county treasurer pursuant to the above noted section of the Code of Civil Procedure, it is necessary to clarify the status of the moneys on deposit as security and to assign to the public bodies their various interests therein. It must be kept in mind that the water district deposited the moneys pursuant to a statute the pertinent purpose of which is to protect the defendant property owners against any failure by plaintiff to comply with such judgment as may eventually be rendered. All that the court can claim in the funds is the naked security title which it holds for the property owners. The court obtained possession, but it had no right to make use of the funds other than for the limited purpose for which they were deposited; all that it could do, in the absence of default by plaintiff, was hold the funds in safekeeping to be returned to the plaintiff water district when and if it (the district) met all its obligations regarding the land of defendant property owners. The plaintiff, for loss of possession and use of the moneys, in one sense may be said to have gained the immediate use and possession of the lands, but for title to those lands it was required to pay the actual value, together with interest thereon from the date of taking; actually the money deposited is essentially in the nature of a cash bond and unless and until the condemnor does something to warrant the court's turning the funds over to the defendant property owners, the money remains the district's property. As stated in G. H. Deacon Inv. Co. v. Superior Court, 1934, supra, 220 Cal. 392, 397, 31 P.2d 372, 374, "It [the security deposit] is not subject to withdrawal either by the plaintiff or defendant in the condemnation proceeding until after the entry of the final decree of condemnation, and then only by order of the court in which it is deposited." Also, in Marblehead Land Co. v. Superior Court, (1923), supra, 60 Cal.App. 644, 653, 213 P. 718, 722, the court, as above noted, said, "It is certain that, when such money deposits are made and the consequent order for possession and use follows, the *court making the order has exclusive control of the money deposited.*" (Italics added.)

[4] The respondents argue that the deposits do not belong to the water district because while in the hands of the court it is impossible to determine to whom they will go eventually. To whom the "security deposits" might eventually be "transmuted" is not the question here. The defendant property owner has the legal right to have adequate deposits maintained as in the nature of a cash bond or security to assure the payment of the final judgment but he has no ownership or right of possession or other interest whatever in the funds until and unless the plaintiff defaults and the court makes an appropriate order. To that moment, at least, the moneys *belong* to plaintiff water district and the court acts solely as a trustee or bailee, holding the moneys as the property of the plaintiff water district, without any divestiture of the district's title, with power to "make some order transmuting the money deposited from security into payment" if the plaintiff should default but bound to return the plaintiff's property if no default occurs. See Marblehead Land Co. v. Superior Court, (1923), supra, 60 Cal.App. 644, 653, 213 P. 718. For safekeeping the court is directed to place the money with the county treasurer "to be held by him subject to the order of the court." To the county treasurer the court gave only actual custody, bare possession; it had no power to give the treasurer or the county the beneficial title to the money and such money still belongs to the water district (and, in this case, as previously noted, the balance of principal has been repaid).

Respondents contend that in making the deposits in the banks the county treasurer was depositing money which was in the custody of the county, was acting directly as county treasurer, representing the county and its treasury, and, therefore, the interest on funds deposited belonged to the county. It is clear that the funds were not in the custody of the county as such, for the sums remain subject to the order of the court, and the county treasurer in handling the funds must look to the court for direction; the county treasurer is in effect the treasurer of the court, an ex-officio officer, and holds the money for the court, not for the county. The court, not the county board of supervisors, has control of the money. (See Pomona City School Dist. v. Payne, (1935), 9 Cal.App.2d 510, 514, 50 P.2d 822, where the county treasurer, while handling the funds of a school district, was held to be ex-officio treasurer for the school district.)

[5] While in the custody of the treasurer, the latter, wrongfully or rightfully, placed the "security deposits" in banks where they drew interest. (Section 1 of the Depositary Act.) Generally, mere deposit in court does not give rise to the right to receive interest. In the absence of a statute which, in effect, accretes sums to amounts deposited, it is conceded by plaintiff water district that no claim would arise for return of other than the original deposit. Civil Code section 1915 provides: "Interest is the compensation *allowed by law* or fixed by the parties for the use, or forbearance, or detention of money." (Italics added.) In 30 Am.Jur. p. 8, it is said: "By modern decisions, interest is allowed only on the ground of a contract * * * or as damages for the detention of money * * * *or by statutory provisions.*" (Italics added.) In the present case, at least prior to plaintiff's application for payment, there was no wrongful detention of funds belonging to the water district and (unless implied by statute) there is no contract for the payment of interest. A statute (Code Civ.Proc., sec. 573) does provide that funds on deposit in court shall be turned over to the county treasurer, however, and the Depositary Act, pursuant to which the bank deposits were made, does provide for the payment of interest thereon.

[6] The plaintiff district contends that "it is probable that the Depositary Act did not authorize Treasurer to deposit these monies in bank," that in making the deposits, the county treasurer was representing the court, not the county, and that as accretions to the funds belonging to appellant, under ordinary trust principles, the interest should follow the principal to the treasury of the water district. The Depositary Act states that *"All moneys belonging to * * *, [any] public or municipal corporation* within the State * * * shall, so far as possible be, deposited in such * * * bank or banks * * * as the * * * *official having the legal custody thereof,* shall select for the safekeeping of such deposits." (Italics added.) The county treasurer did not deposit moneys which were "in the custody of the county," as claimed by respondent officials, but rather he deposited moneys entrusted to him by the court, acting as the court's treasurer but "belonging to * * * [a] public or municipal corporation," to wit, the Metropolitan Water District of Southern California. The Depositary Act, authorizing placement of public funds in state or national banks, was passed primarily to secure the safety of such public moneys. It would seem that its purpose would not be fully consummated if it were construed as authorizing the county treasurer to deposit at interest funds coming into his custody as an official of the county and as ex-officio treasurer of school or other districts but not including funds in his custody which belong to a public or municipal corporation, simply because the funds entered his hands via an eminent domain proceeding from the court as its treasurer.

There remains the question of who was the proper recipient of the interest under section 2 of the Depositary Act. That section provides: "Interest on all moneys deposited as herein provided for shall belong to and shall be paid quarterly into the general fund of the county, city and county, city, town, municipality or other public or municipal corporation *represented by the* *officer making such deposit*, except where the law otherwise directs." The solution of the above question, therefore, resolves itself into a determination of which "public body" the county treasurer was representing in making the bank deposits under section 1 of the Depositary Act. The two possible contenders are the county and the court (in its representative capacity), who, unfortunately (in the sense that it gives rise to this dispute), have the same official authorized to act as the custodian of funds.

[7] The appellant water district relies on Pomona City School District v. Payne, 1935, supra, 9 Cal.App.2d 510, 514, 50 P. 2d 822, 824, where it was held that a school district is entitled to interest on funds in the custody of the county treasurer and deposited by him in bank accounts. In that case the court stated: "It is pointed out * * * that (assertedly by virtue of the language of the statute) the interest belongs to the county, being the public body 'represented by' the county treasurer who made the deposit. This is too narrow a construction of the words 'represented by.' Certainly the county treasurer, as custodian of school funds, 'represents,' i. e., 'exercises power derived from another' (Davis v. Davis, 26 Cal. 23, 85 Am.Dec. 157), the school district whose funds are in his care, and acts as its agent, and is ex officio treasurer for the school district." (See also Board of Law Library Trustees v. Lowery (1945), 67 Cal. App.2d 480, 482, 154 P.2d 719, which follows the Pomona holding in the case of at law library fund; the county treasurer was held to be an ex officio treasurer of the law library fund.) The appellant water district contends that no sound distinction can be made between funds entrusted to the county treasurer by a school district or the trustees of a law library and funds entrusted to him by a court. This contention appears sound. Aside and separate from his duties as official treasurer for the county, the county treasurer, by legislative direction, is in effect ex-officio treasurer for public bodies without treasurers of their own, including the superior court. In other words, though these public bodies are in their purposes and functions dissimilar, yet their reasons for depositing their funds, or moneys coming into their custody, in the county treasurer's hands, are the same, namely, that none has a treasurer of its own, and for convenience and safekeeping the county treasurer has been designated the proper official to care for them. All are directed by statute to so deposit their funds: the court by Code of Civil Procedure section 573, the school districts by Education Code, §§ 5002, 7517, and the trustees of the library fund by Business and Professions Code section 6320. It is to be noted that the applicable statute here (Code of Civ.Proc., § 573) expressly directs that "The treasurer must keep each fund distinct, and open an account for each." We conclude that it is the superior court which in the view of the law holds the entire sum, the principal together with its accretions of interest, as custodian for the water district, and, inasmuch as the object of such retention has ended, the court must return to the water district the entire sum, or any balance thereof, which it may determine remains on hand.

[8] It may be added that in the interpretation of statutes, when two constructions appear possible, this court follows the rule of favoring that which leads to the more reasonable result. The respondents' interpretation of the statute in issue results in a windfall to the county, substantially undeserved and unearned. On the other hand, the plaintiff-condemnor, if it takes possession as here, must pay interest on the amount ultimately awarded to the landowner from the date of its taking possession, but under respondents' interpretation would receive no interest on the funds deposited by it as security for the claim of the landowners. We do not here reach the question, and intend no implication concerning it, as to whether the legislature legally can or cannot, as compensation to the county for the use of its treasurer, his time and his services, provide for some remuneration to be deducted from interest earned on funds deposited with him. No such provision is present here, and there is no indication or evidence that such may have been the purpose of section 2 of the Depositary Act. (Pomona

City School District v. Payne (1935), supra, 9 Cal.App.2d 510, 515, 50 P.2d 822.)

For the reasons which have been stated the order appealed from is in each case reversed and the cause is remanded to the trial court for further proceedings not inconsistent with the views hereinabove expressed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, and SPENCE, JJ., concur.

EDMONDS, J., did not participate in the decision of this case.

Rehearing denied; EDMONDS, J., not participating.

---

32 Cal.2d 598

NICHOLS v. MITCHELL et ux.

L. A. 19962.

Supreme Court of California, in Bank.
Sept. 23, 1948.
Rehearing Denied Oct. 18, 1948.

1. Appeal and error 🔑110

Order denying a motion for new trial was not appealable. Code Civ.Proc. § 963.

2. Appeal and error 🔑996, 1010(1)

Trial court's findings are conclusive on reviewing court, unless unsupported by any substantial evidence, and where two or more inferences can be reasonably deduced from the facts, reviewing court is without jurisdiction to substitute its deductions for those of trial court.

3. Husband and wife 🔑264

The statutory presumption that property acquired by a married woman by an instrument in writing is her separate property is disputable and may be controverted by clear evidence, direct or indirect. Civ.Code, § 164.

4. Appeal and error 🔑1010(1)

Whether statutory presumption that property acquired by a married woman by instrument in writing is her separate property has been controverted is a question of fact for trial court whose conclusion is conclusive on appeal, unless manifestly without sufficient support in the evidence. Civ.Code, § 164.

5. Husband and wife 🔑264

Testimony of husband and wife as to source of consideration paid for realty title to which was taken in wife's name, was not conclusive on issue as to separate or community character of the realty, but court could consider the situation of the parties at time of purchase, the circumstances that may have occasioned the placing of title in wife's name and the legitimate inferences arising therefrom.

6. Witnesses 🔑311, 315, 363(1)

In passing on witness' credibility, trier of facts may consider witness' interest in result of case as well as manner in which he testifies, character of his testimony, his motives and contradictory evidence. Code Civ. Proc. § 1847.

7. Evidence 🔑588

The trier of facts may reject witness' testimony in toto, though uncontradicted, if trier does not act arbitrarily.

8. Husband and wife 🔑254

Trial court in determining separate or community character of realty, title to which was taken in wife's name, as respects liability for husband's debts could reasonably conclude that proceeds of loan, effected through wife's execution of note and deed of trust, which were applied as part of purchase price of the realty, constituted community property, since such action was undertaken by wife during marriage and the money did not appear to have been borrowed by her upon the faith of existing separate property belonging to her. Civ.Code, § 164.

9. Appeal and error 🔑994(3), 1012(1)

The credibility of witnesses and the weight of their testimony are committed for determination to the trier of facts.

10. Husband and wife 🔑264

In action by purchaser at execution sale of husband's interest in realty to quiet title thereto against wife's claim of ownership, evidence warranted inference that husband had been placing community assets in wife's name in an endeavor to protect them from claims of husband's creditors and that for such purpose husband had purchased with community funds but in wife's name securities which constituted part of the consideration paid for the realty in question, title to which was taken in wife's name.

11. Husband and wife ⚿249

The practice of mingling community funds and separate funds of wife in her separate bank account warranted inference that any separate property that wife may have had was no longer so identifiable but had become commingled with community property of the parties and constituted a part of the community estate.

12. Appeal and error ⚿1010(1)
Husband and wife ⚿264

The statutory presumption that property conveyed to married woman by instrument in writing constitutes her separate property may be overcome by circumstantial as well as direct evidence and the inferences to be drawn from the evidence are for the trier of the facts to determine so long as such inferences find reasonable support in the evidence given. Civ.Code, § 164.

13. Husband and wife ⚿264

In action by purchaser at execution sale of husband's interest in realty to quiet title against wife's claim of ownership, evidence sustained trial court's findings that realty was the community property of parties at time of execution, and as such liable for husband's debts, though title thereto had been taken in wife's name and she alone executed note and deed of trust on realty to obtain loan by which purchase was primarily financed. Civ.Code, § 164.

◆

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Action by Charles L. Nichols against John S. Mitchell and another, to quiet title to realty and for declaratory relief, wherein defendant Helen F. Mitchell filed a cross-complaint for damages for placing a cloud upon her title to the realty. From a judgment for plaintiff and order denying motion for new trial, defendants appeal.

Appeal from order denying a new trial dismissed, and judgment affirmed.

Prior opinion 189 P.2d 734.

Chase, Rotchford, Downen & Chase and Ransom W. Chase, all of Los Angeles, for appellants.

William R. Law, George Acret and Julius V. Patrosso, all of Los Angeles, for respondent.

SPENCE, Justice.

Plaintiff brought this action for declaratory relief and to quiet title to certain real property in the city of Los Angeles following his purchase thereof on execution in partial satisfaction of a judgment for $59,141 stemming from a promissory note for $50,000 which defendant John S. Mitchell had made in favor of Mrs. Genevieve D. Turner and which, after its second renewal, she had assigned to plaintiff. The defense to this action rested upon the claim that Helen F. Mitchell, the wife of the judgment debtor and other defendant herein, had furnished the consideration for the purchase of the realty in question, and it therefore was her separate property. Mrs. Mitchell also cross-complained in this action for $5,000 damages for the placing of a cloud upon her title.

[1] The trial court found, among other things, that the Mitchells were married on March 31, 1928, and that the realty here involved was the community property of the parties at the time of execution; that the separate "interest in said real property" claimed by Helen F. Mitchell [was] unfounded and without right"; that "any right or claim" that defendant "Helen F. Mitchell may have had to said property by reason of a community property interest, or otherwise, was terminated and extinguished by the said sale of said property under execution"; that "all of the money, funds or other property that went into the purchase of said property by the defendants * * * on or about the 27th day of November, 1937, and all the money or funds used to make the payments upon the note secured by deed of trust evidencing a part of the purchase price of said property have been made with community money, funds

or other community property of" the defendants, and that "none of the money, funds or property that went into the purchase of said property was the separate property of Helen F. Mitchell"; that "all the separate property, if any, owned or possessed by defendant Helen F. Mitchell, at the time of her marriage to John S. Mitchell, or that was acquired by her subsequent to her said marriage, became commingled with the community property of said defendants to such an extent that its identity was absolutely lost, and it is impossible to trace said separate property, and the real property herein mentioned was acquired by said parties after marriage by community funds and was the community property of said parties at the time of the sales above mentioned." The court further found that "the reasonable rental value of said property since the 20th day of November, 1944, [was] the sum of $100.00 per month"; and "referring to defendant Helen F. Mitchell's cross-complaint," that it was "not true" that her "title to said property [had] been slandered to [her] damage in the sum of $5,000.00, or in any other sum, or at all," but that "all the acts of [the] cross-defendant Chas. L. Nichols in connection with the sale of said property were legal and in accord with [his] rights under his said judgment against said defendant John S. Mitchell." Accordingly, judgment was entered decreeing that "plaintiff * * * is the owner of * * * and * * * is entitled to the immediate possession of" said real property; that "neither of [defendants]" has "any right, title or interest" therein; that "plaintiff * * * recover from [defendants] the sum of $100.00 per month for the use or rental of said real property from November 20, 1944, to date of this judgment"; and that "defendant Helen F. Mitchell take nothing by her cross-complaint, and that the same be dismissed." From such judgment and the order denying their motion for a new trial, defendants have appealed. Since said order is nonappealable, the appeal therefrom should be dismissed. Code Civ. Proc., sec. 963; 2 Cal.Jur., sec. 34, p. 173; Roberts v. Brae, 5 Cal. 2d 356, 360, 54 P.2d 698.

[2] As ground for reversal defendants urge the insufficiency of the evidence to sustain the findings that the realty involved was their community property, and not the separate property of Mrs. Mitchell. Such contention requires defendants to demonstrate that there is no substantial evidence to support the challenged findings. As was stated in the oft-cited case of Crawford v. Southern Pacific Co., 3 Cal. 2d 427, at page 429, 45 P.2d 183, at page 184: "* * * the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted," which will support the findings, and when "two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court." See, also, Raggio v. Mallory, 10 Cal.2d 723, 725, 76 P.2d 660; Fischer v. Keen, 43 Cal.App.2d 244, 248, 110 P.2d 693; Laherty v. Connell, 64 Cal. App.2d 355, 357, 148 P.2d 895; Wuest v. Wuest, 72 Cal.App.2d 101, 104, 164 P.2d 32. Careful review of the record here, in the light of these fundamental principles of law, does not sustain defendants' attack upon the propriety of the trial court's determination, and the judgment must be affirmed.

From the record it appears that the deed to the property here in question ran to "Helen F. Mitchell, a married woman," and was recorded on November 27, 1937. Defendants testified that the purchase to the extent of $5,000 was handled through an escrow, with a note for that amount and a deed of trust as security therefor, dated November 15, 1937, and covering the property, executed by Helen F. Mitchell alone; that part of the $5,000 was used to retire an existing mortgage on the property and the balance was paid to the seller; that the escrow instructions, which were introduced in evidence, referred to the fire insurance policy on the property as in the name of Helen F. Mitchell, with the "Loss Payable Clause" in favor of the payee of the $5,000 note; that as additional consideration for the purchase of the property—a house and lot—certain securities were delivered to the seller outside of the escrow. Mrs. Mitchell claimed that these securities represented some stocks and bonds, as well as bank savings, which she "had originally had" before marriage and which thereafter "had been transferred, invested and re-invested" by her husband as "he would make a little money and sell it out and put it into something else." At another point in her testimony, Mrs. Mitchell stated that she "had quite a bit of money when [she] was married * * * quite a bit over a thousand dollars and quite a bit of that was invested by [her] husband, [that] there was no reason for [her] to keep it [since] he was doing very well and [she] had a good income from him." She further stated that "the total amount of [the] securities that went on [the] house was approximately $1,200.00 * * * it may have been more," that she "paid between $7,500.00 and $8,500.00 for the property" but that when she "actually bought the property [she] only owed $5,000.00 on it"—the above mentioned loan subject of the escrow.

When questioned as to the handling of the payments on the house since its purchase in 1937, Mrs. Mitchell admitted that she "probably" had not "paid all of them," that her "husband at times would take cash and buy a cashier's check, which [she] would give to him * * * that often [she] would settle the rest of it, he would take it out of [her] allowance." In addition, according to her testimony, Mr. Mitchell "since 1937 * * * made one payment of taxes one year * * * that was one thing he definitely made with his own money." Mrs. Mitchell also maintained that after her marriage she "always" kept "a separate bank account," into which were deposited (1) her earnings as a substitute school teacher for "three and a half months," (2) moneys received from her parents as "presents at Christmas time ($100) and birthdays ($30)" and as reimbursement after visits of a week or more at her home, and (3) such savings as she might have from her household allowance, "$10.00 a week and very often more." At other times in her testimony she correlated her reputed separate savings account with a "household account" opened by her husband in her name, as she herself "was never in the bank," and she stated that it would be "closed out" when her "husband didn't have enough money to keep up that household bank account," that she then "didn't have a bank account" for awhile but then a new one would be opened in her name at some other bank as finances would permit.

Mr. Mitchell testified that after working as a securities salesman for a bank for "about four and one-half years," he formed an investment service in his own name—"John S. Mitchell Company"—"commencing in 1926 or '7" and he continued in such business until March, 1938, when the last of the successive companies that he organized "ceased to operate," and that he then went to work for a brokerage firm. He stated that at the time of their marriage in 1928, Mrs. Mitchell had some stock and cash which he thereupon undertook to handle for her, selling the original securities and "reinvesting" the proceeds "for her." He was unable to "recall what the subsequent transactions were," and he said that he could not find the company records that were kept on the various investments he made for his wife because the company's books had been placed "in storage," then "got in a fire" and were "pretty near ruined." Mr. Mitchell stated that one of the persons whom he interested in his investment enterprise was Mrs. Genevieve D. Turner, who upon his advice "purchased some * * * stock" in the company when it was "originally organized"—in "1926 or '7"—and then turned over to it the management of "securities of the value of more than a hundred thousand dollars"; that shortly thereafter he needed some money to carry through a "financing program" that he was promoting, and Mrs. Turner furnished some of the needed capital by permitting him to sell some of her "securities through John S. Mitchell Company," and with the proceeds—"somewhere between thirty and thirty-five thousand dollars"—to buy stock in his company in his name, for which he "gave her [his] note * * * and the certificates of stock issued"; that at the time of his marriage in 1928 he not only had pledged his "stock in John S. Mitchell Company" to Mrs. Turner, but he had also "hypothecated with her" his other principal property asset, an interest in "seven or eight lots in Palm Springs, California," leaving him only a cash "working account" for his business of "substantially less than a thousand dollars." He stated that he did "pretty well" with his investment service "during the '26, '7, '8, '9 years," "keeping [his] money in the business * * *, also paying on [the] notes to Mrs. Turner," but that "during the depression years" that followed, his "income was nil" and "on account of [the] debts that * * * accumulated, [he] had never been able to get any kind of a surplus to buy securities with or put into anything else as a matter of fact; * * * so that none of [his] earnings were involved in the securities which [he purchased] in Mrs. Mitchell's name." Because of the depression of 1929, he claimed that many of the "securities of Mrs. Turner's * * * eventually became lost or dissipated * * * [and] of no value"; that some of the bonds which the company held on her open account produced a small amount of interest and income which was "delivered" to her and "the company made some additional advances to her to help her"—"in the neighborhood of three to four thousand dollars"; and that "in 1934" he and Mrs. Turner "made a settlement" whereby the "shares of stock" in the John S. Mitchell Company, which were of "no value" and which she had "held as collateral," were "turned back to [him]," and he gave her his "note for $50,000.00" in addition to her holding the Palm Springs property. This was the "first note" to Mrs. Turner; it was subsequently renewed in 1938 and in 1942, and the latter renewal is the one here involved upon assignment by Mrs. Turner to plaintiff.

Mr. Mitchell maintained that "all of the money paid on account of [the] property" purchased in November, 1937, in the name of Mrs. Mitchell was "furnished by [her]"; that he "had nothing to do with that deal at all"; that he "opposed Mrs. Mitchell buying the house at the time"; that the purchase was made through the delivery of his wife's securities plus the $5,000 escrow arrangement; that "outside of escrow there was no cash; the only cash amount that went in was the difference between what the former encumbrance was and the new encumbrance which Mrs. Mitchell assumed to pay off, and [the] securities. That was the total consideration for the property." As heretofore stated, Mr. Mitchell did not sign the $5,000 note or trust deed or any other document involved in the acquisition of the property in question, but only the name of Mrs. Mitchell appeared as concerned in the purchase. He named certain securities as having been delivered in consummation of the sale and of the value of approximately $2,000, but no records were introduced or other testimony elicited in regard to their identity. He admitted that after the purchase of the property, he made "maybe one or two or three of the payments" on the $5,000 note; that "Mrs. Mitchell had made some and sometimes it ha[d] been more convenient for [him] to send a check"; that "in each instance" of transmittal it was his practice to prepare a receipt reading in favor of "Helen F. Mitchell" for the payee's signature and to note "at the bottom" the reduced balance owing as each payment was made; and receipts in such form were accordingly introduced in evidence. Mr. Mitchell admitted that "from the time of [his] marriage on down to the institution of the proceedings resulting in the judgment that [plaintiff] obtained" as here involved, he kept his own "bank account"; but that "there wasn't anything in it to amount to anything during the depression," and "from 1934 on" when he had sufficient earnings for deposits therein, he was only able to make his "interest payments" on Mrs. Turner's note.

In opposition to this testimony of Mr. and Mrs. Mitchell directed to the point that the property in question was "purchased with money borrowed by Mrs. Mitchell and with certain securities" belonging to her as the premise for their claim that it therefore was her "separate property," plaintiff relies on the following evidence. Mrs. Turner, on behalf of plaintiff, testified that she first met Mr. Mitchell "in 1922 or 3, somewhere along there" when he was a "securities salesman" for the bank with which she did business; that she "had perfect confidence in him"; that when he went into business for himself—"in 1926 or '7"—she "turned over" to him securities, amounting to some $100,000, "for safekeeping"; that she never "did * * * get any of the securities back"; that "the last of them he put up at the bank and borrowed some money on them and couldn't pay it, and they were sold to pay, at public auction"; that she "found [this] out in 1930 [or] '31"; that thereafter she "turned [her] affairs over to [plaintiff]," who in 1934 negotiated the settlement involving the $50,000 note executed by Mr. Mitchell in her favor. Mrs. Turner was asked about "a conversation [she] had with Mr. Mitchell after this about what he was going to do with [his] property," and she replied that he had told her "years ago" that "somebody got a judgment against him on an automobile and he never would hold anything in his own name any more, he would put it in his wife's name * * * [so] nobody could touch it." When queried about "the extent of [her] acquaintanceship" with Mrs. Mitchell, Mrs. Turner testified that she first met Mrs. Mitchell after her marriage to Mr. Mitchell, that they became "very close, dear friends," that they went "driving together, to dinners," and "visited back and forth all the time" in "each other's house * * * sometimes two or three times a week"; that she had a conversation with Mrs. Mitchell shortly after the latter's marriage when "she told us about her getting married. She said it took nearly everything she had to get ready for the wedding and her clothes; and for a long time she didn't have any clothes because she didn't have any money coming in from her husband. And she substituted as a teacher occasionally. * * * She said she used her money that she had on hand to finance the wedding." Plaintiff also cites Mr. Mitchell's testimony that in 1943 he transferred to Mrs. Mitchell the title to a Pontiac automobile, which he had purchased "in [his] name in the year '41"; that at the time of the transfer, Mrs. Mitchell had a car of her own; that she did not "give [him] anything for it," and that he continued to "use the Pontiac car exclusively as his own car * * * approximately."

[3, 4] Section 164 of the Civil Code provides, in part, that "whenever any real or personal property * * * is acquired by a married woman by an instrument in writing, the presumption is that the same is her separate property." However, "such presumption is a disputable one, in the form of evidence, and may be controverted by other evidence, direct or indirect (Stafford v. Martinoni, 192 Cal. 724, 221 P. 919); and whether or not it is so controverted is a question of fact for the trial court, its conclusions, unless manifestly without sufficient support in the evidence, being conclusive on appeal." Goucher v. Goucher, 82 Cal.App. 449, 457–458, 255 P. 892, 895; see, also, In re Estate of Cronvall, 220 Cal. 503, 504, 31 P.2d 372; In re Estate of Bruggemeyer, 115 Cal.App. 525, 537, 2 P.2d 534; Truelsen v. Nelson, 42 Cal.App.2d 750, 754, 109 P.2d 996; Williamson v. Kinney, 52 Cal.App.2d 98, 102, 125 P.2d 920; Wuest v. Wuest, supra, 72 Cal.App.2d 101, 111, 164 P.2d 32.

[5-7] Defendants argue that no evidence was introduced to dispel the presumption raised by section 164 of the Civil Code and to establish the community character of the property standing in the name of Mrs. Mitchell. To this end they cite their "uncontradicted testimony" that the purchase was made upon Mrs. Mitchell's delivery of her securities and the proceeds of a loan negotiated by her as her independent obligation (Hogevoll v. Hogevoll, 59 Cal.App.2d 188, 193, 194, 138 P.2d 693), that Mr. Mitchell had nothing to do with the transaction as established by the absence of his name from the papers constituting the escrow for the handling of the sale (In re Estate of Ellis, 203 Cal. 414, 416, 264 P. 743), and that accordingly she, having furnished "the total consideration for the property," was properly named the sole grantee in the deed. But the trial court was not concluded by defendants' testimony as to the source of the consideration for the purchase of the property. It was entitled to consider the situation of the parties at the time of the purchase in 1937, the circumstances that may have occasioned the placing of the title in Mrs. Mitchell's name, and the legitimate inferences arising therefrom which precipitated into essential conflict the issue as to the separate or community character of the property. This province of the trial court to resolve "conflicting evidence or conflicting inferences" and to reach a conclusion that will not be disturbed "on appeal if some substantial evidence or reason-

able inference" lends support thereto (Security-First National Bank v. Bruder, 44 Cal. App.2d 767, 772, 113 P.2d 3) was forcefully declared in the recent case of Hicks v. Reis, 21 Cal.2d 654, at pages 659, 660, 134 P.2d 788, at page 790: *"The trier of the facts is the exclusive judge of the credibility of the witnesses.* § 1847, Code Civ.Proc. While this same section declares that a witness is presumed to speak the truth, it also declares that 'This presumption, however, may be repelled by the manner in which he testifies, by the character of his testimony * * * or his motives, or by contradictory evidence.' In addition, in passing on credibility, the trier of the facts is entitled to take into consideration the interest of the witness in the result of the case. (Citing authority.) *Provided the trier of the facts does not act arbitrarily, he may reject in toto the testimony of a witness, even though the witness is uncontradicted.* (Citing cases.)* * * [As] the court, in Market Street R. Co. v. George, 116 Cal.App. 572, 576, 3 P.2d 41, 43, stated: 'It has always been the rule that courts and juries are not bound by mere swearing no matter how positive, unless it be credible swearing. It may bear within itself the seeds of its own destruction, as where it is inherently improbable, or its destruction may be wrought from without, as where the person swearing is in some manner impeached. In either case court and jury are entitled to disbelieve the testimony if they choose, and, if they do refuse it credence, it is of no more effect than if it had not been given. It disappears from the case and the inference opposed to it is no longer contradicted.'" (Emphasis added.)

[8-11] Plaintiff's theory of recovery rested on the premise that the purchase was made with the proceeds of a loan made on the property—rather than on the personal credit of Mrs. Mitchell in recognition of her alleged separate estate (cf. In re Estate of Ellis, supra, 203 Cal. 414, 416, 264 P. 743; Hogevoll v. Hogevoll, supra, 59 Cal.App.2d 188, 193, 194, 138 P.2d 693)—and with money furnished by Mr. Mitchell, some nine years after their marriage, so that the property thus acquired was a community asset. Admittedly the property was bought for and used as the family home for the Mitchells; the down payment on the property involved no cash advance by Mrs. Mitchell from her funds but only such amount—some $1,500—as constituted the differential in the refinancing of the existing mortgage—$3,500—through the escrow arranged for the handling of the increased encumbrance placed on the property by reason of the $5,000 loan and the deed of trust as security therefor; and the securities claimed to be the separate property of Mrs. Mitchell, and used in the purchase of the property, did not enter into the escrow. In view of these circumstances the trial court could reasonably have concluded that the proceeds of the loan, effected through Mrs. Mitchell's execution of the mentioned note and accompanying deed of trust and applied as part of the down payment, constituted community property, for such action was undertaken by her "during marriage" and the money did not appear to have been "borrowed by her upon the faith of existing separate property belonging to her." Moulton v. Moulton, 182 Cal. 185, 189, 187 P. 421, 422. Moreover, the testimony of both Mr. and Mrs. Mitchell, as above recited, with regard to the securities in question was vague and obscure in many respects—they differed as to the value, she fixing it as $1,200 and he at $2,000 at the time of the property purchase, and no documentary data was produced to support her claim of ownership although she expressly stated that there was "a record of what they were," and that the "various investments" were made "out of * * * money that [she] originally had that had been transferred, invested and re-invested" by her husband in connection with his investment business. Mr. Mitchell claimed that he searched for the company records but that they were nearly all lost in storage as the result of a fire. But in contradiction of the fundaments of the Mitchells' claim—that the source of the said securities was certain stock and cash owned by Mrs. Mitchell at the time of her marriage—there was the testimony of Mrs. Turner relating admissions made to her by Mrs. Mitchell to the effect that at the time of

her marriage, Mrs. Mitchell took "everything she had to get ready for the wedding and her clothes," and that "she was stripped of everything." Furthermore, there was Mrs. Turner's positive statement that Mr. Mitchell had told her that "he never would hold anything in his own name any more [but] would put it in his wife's name." While Mr. Mitchell denied that such a conversation had ever taken place, "the credibility of the witnesses and the weight of their testimony [were] committed for determination to the trier of facts." Security-First Nat. Bank v. Bruder, supra, 44 Cal.App.2d 767, 771, 113 P.2d 3, 5. And Mr. Mitchell admitted that the family car was placed in his wife's name although he used it "approximately" all of the time, and she paid no consideration therefor, and already possessed a car of her own. As above related, Mr. Mitchell's indebtedness to Mrs. Turner was of many years' standing, and particularly evidenced by his first promissory note of $50,000 executed in 1934 and then subsequently twice renewed at four-year intervals. All of these latter considerations, in addition to the fact that Mr. Mitchell concededly had the "continued and exclusive management" of investments allegedly belonging to his wife and purportedly reinvested them for her from time to time (Williamson v. Kinney, supra, 52 Cal.App.2d 98, 102, 125 P.2d 920), would warrant the inference that Mr. Mitchell was placing community assets in the name of Mrs. Mitchell in an endeavor to protect them from the claims of his creditors; that for such purpose the Mitchells purchased securities with community funds but placed them in Mrs. Mitchell's name; and that securities of such character in fact entered in 1937 into the down payment of the property here involved and motivated the entire financial arrangement, with title conveyance to Mrs. Mitchell, as a means of sequestering community assets. While Mrs. Mitchell testified that prior to the purchase of the property in 1937, she had received some desultory gifts of money from her parents at various times and had some slight earnings from her substitute teaching, all of which funds were deposited in her separate bank account, she likewise admitted that part of such account consisted of her savings from her "household allowance" from her husband's earnings. Such banking procedure would support the inference that any separate property that Mrs. Mitchell may have had was no longer so identifiable, but had become commingled with the community property of the parties and constituted a part of the community estate. Falk v. Falk, 48 Cal.App.2d 762, 767, 120 P.2d 714; Buehler v. Buehler, 73 Cal.App.2d 472, 474, 166 P.2d 608. And the fact that Mr. Mitchell admittedly used community funds in making subsequent payments on the property here in question was another circumstance which the trial court might have viewed as indicating that though legal title was in the name of Mrs. Mitchell, the property actually represented a community asset rather than her separate estate. Cf. Truelsen v. Nelson, supra, 42 Cal.App.2d 750, 753, 109 P.2d 996.

[12, 13] The true situation in rebuttal of the presumption created by section 164 of the Civil Code, as to the separate character of property standing in the name of the wife, "can be shown by circumstantial, as well as direct, evidence and the inferences to be drawn from the evidence are for the trier of the facts to determine so long as those inferences find reasonable support in the evidence given." Williamson v. Kinney, supra, 52 Cal.App.2d 98, 102, 125 P.2d 920, 922. As was said in Re Estate of Kane, 80 Cal.App.2d 256, at page 266, 181 P.2d 751, 757: "* * * findings on community property interest are invariably accepted if there is some evidence of substance to sustain the finding," and "to prevail" against them, "appellant must show that there is no other inference, as a matter of law, than that the disputed * * * property was the separate property of [the wife]." From the foregoing review of the record, it is manifest that defendants have not made the showing required for successful challenge of the trial court's findings as to the community character of the property. Accordingly, such property was deemed liable for the satisfaction of Mr. Mitchell's debt (Grolemund

v. Cafferata, 17 Cal.2d 679, 689, 111 P.2d 641) as the premise for the trial court's disposition of this action in plaintiff's favor.

The appeal from the order denying the motion for a new trial is dismissed. The judgment is affirmed.

GIBSON, C. J., and SHENK, CARTER and SCHAUER, JJ., concur.

EDMONDS and TRAYNOR, JJ., concur in the judgment.

---

87 Cal.App.2d 682

HELMER et ux. v. HELMER.

Civ. 3728.

District Court of Appeal, Fourth District, California.

Sept. 22, 1948.

Rehearing Denied Oct. 11, 1948.

Hearing Denied Nov. 18, 1948.

1. Trusts 🔑83

Generally, where the one who furnishes the consideration for the purchase of realty takes legal title thereto in his own name, no resulting trust can be imposed in favor of another.

2. Appeal and error 🔑994(3)

Statute providing that, where trial by jury is not a matter of right or where trial by jury has been waived, reviewing court may make findings of fact contrary to, or in addition to, those made by the trial court, does not authorize an appellate court to pass on the credibility of a witness who testified at the trial. Code Civ.Proc. § 956a.

3. Appeal and error 🔑1011(1)

Where additional evidence taken by trial judge pursuant to order of District Court of Appeal and after appeal was perfected merely added to conflict in evidence on question in issue, District Court of Appeal could not set aside trial court's findings and make other findings, even though it might be convinced that evidence preponderated in favor of appellant.

4. Gifts 🔑47(1)

Where mother-in-law placed money in joint tenancy bank account in names of mother-in-law and daughter-in-law, and daughter-in-law withdrew the money with the full knowledge of the mother-in-law, there arose a presumption of gift of the money. Gen.Laws, Act 652, § 15a.

5. Gifts 🔑49(5)
Trusts 🔑89(1)

Evidence sustained finding that, when mother-in-law placed money in joint tenancy bank account in names of mother-in-law and daughter-in-law and permitted daughter-in-law to withdraw the money, there was a gift of money to daughter-in-law and her husband, and finding that when daughter-in-law purchased realty with that money and title was taken in name of mother-in-law, a resulting trust arose with respect to the realty in favor of the daughter-in-law and her husband.

Appeal from Superior Court, Fresno County; Dan F. Conway, Judge.

Action by Raymond Ronald Helmer and wife against Arabella Helmer to compel the defendant to execute a deed of realty to the plaintiffs, on ground that the defendant held the realty in trust for the plaintiffs, wherein the defendant filed a cross-complaint to quiet title to the realty and to recover rentals for plaintiffs' use of the realty. From an adverse judgment, the defendant appeals.

Judgment affirmed.

Eckhart A. Thompson, of Fresno, and C. Ray Robinson, W. Eugene Craven, and Margaret A. Flynn, all of Merced, for appellant.

Harold M. Child and L. N. Barber, both of Fresno, for respondents.

GRIFFIN, Acting Presiding Justice.

Plaintiff Raymond Ronald Helmer, adopted son of defendant, and his wife, instituted this action alleging generally that on November 4, 1941, they purchased certain described real property in Fresno and paid the purchase price "out of their own money solely," but took title thereto in the name of defendant and her husband, now deceased, as joint tenants; that defendant holds title to the property in trust for them; that although they are in possession of the property, defendant repudiated the said trust and demanded that plaintiffs pay rent for the use and occupancy thereof or deliver possession thereto. Plaintiffs prayed that they be adjudged the owners thereof; that defendant be required to execute a proper deed of conveyance and for other equitable relief.

Defendant answered, denied the allegations made by plaintiffs and alleged that she and her husband purchased the property and took title in their names as joint tenants and that the sum of $2500 was paid by the answering defendant for the property; that she is now the owner thereof and entitled to its possession. By way of cross-complaint defendant asks that her title be quieted and that plaintiffs pay unpaid rent in the sum of $905, since January 1st, 1942, at the rate of $15 per month during the time plaintiffs occupied the premises, and for treble rents and costs.

It appears from the evidence that plaintiffs and their children were having a financial struggle and that defendant had been giving them financial assistance off and on. Plaintiff, Georgine Helmer, the daughter-in-law, testified that defendant lived in Merced and she wrote to her to come there; that defendant said: "I want to get you folks a home, you children * * * 'you go back to Fresno and find you a piece of property that has got a home on it', priced around $2500 and 'then you let me know' and 'I will buy it for you. I will put the money in the bank in Fresno and you buy the property.' She asked me to put it in joint tenancy * * * for the reason * * * my father-in-law * * * knew nothing about this whole proceeding"; and 'For the reason that you children would probably mortgage it and lose it, and I don't want you to lose it. I want you to have it as your home'; and she said: 'I will get you a home, and then, * * * I don't expect you to have to depend on me for any more help' "; that she immediately notified defendant and defendant went to the bank at Merced and had her money transferred to the Fresno bank "and on this check, as near as I can remember, it was a check. It might have been a certified bank check or what, I can't tell you that. On the left-hand corner was marked 'a gift.' " It was deposited in the Security-First National Bank of Fresno to a joint account with Mrs. Helmer. On November 3, 1941, Georgine drew a check on the joint account for $50 in favor of the real estate agent. She later drew a $2500 check on that account and deposited it with the escrow company. The deeds and insurance policies were mailed to defendant. Plaintiffs moved onto the property. Georgine then testified that about a year after that time defendant phoned her and stated that she was afraid that her husband would find out that she had given plaintiffs the property and that she was going to send them a copy of a rent bill; to pay no attention to it because she was only doing it to show her husband that they were paying rent. A copy of a rent bill was received in evidence and was a statement for rent from January 1, 1942, to March 1, 1942, totaling $30, less a credit of $10 for laundry done for defendant. She then testified that she never paid any rent and no demand for further rent was ever made; that plaintiffs improved the property by installation of a pressure system pump at a cost of $375, and also built a pump house, barn, chicken house and made other similar improvements to the place; that defendant told her when she wrote out the checks for the place and moved in that "whatever you put onto this place is yours. It is your home. I want to leave it this way. As soon as Papa passes away I will deed it to you but I can't do it now because he will find it out, and there will be trouble"; that plaintiffs never paid taxes or insurance on the property excepting one payment of $6.75; that Ronald asked defendant to place title in his name so he could claim his service tax exemption but she refused.

Ronald testified that his mother looked at the property here involved prior to its purchase and she told him that she was buying the home for plaintiffs; that he wanted to improve the place and she said: "You go ahead * * * improve this place, do anything you want with it, because it is yours, and yours to have and to keep"; that he later went into the service and when he came out he asked her to put the property in his name on account of the tax exemption; that she refused because she was afraid he would mortgage it and be out of a home; that he had nothing to do with the checking or escrow transaction and that he did not see or talk to his mother from December, 1942, until July 24, 1945.

Defendant testified generally that she was the mother of two adopted boys; that Ronald made continuous demands on her for money; that that displeased his father, who was in poor health; that when Ronald's wife approached her, telling her that she and her two children were being evicted from the home which they were renting, she said she wished "she had a place of her own"; that she told her that she (defendant) would try to get one for her but not to ask for money; that she could live there and pay a little rent and the taxes; that she had a little money in the Merced bank remaining from her father's estate and she had it transferred to a bank in Fresno to an account carried in the names of herself and plaintiff Georgine, as joint tenants "so she could draw her money"; that after Georgine found a place she transferred $2600 to that account; that she received a receipt from that bank showing the transfer. This receipt is in evidence dated December 3, 1941, and shows a deposit to the account of Arabella H. Helmer.

The evidence is confusing as to whether defendant had a personal account with the Fresno bank prior to the time the joint account was established.

Defendant testified that she did establish a joint account with Georgine about that time, either before or just after the transfer; that Georgine opened the joint account and sent the card to her for her signature; that Georgine drew on the joint account to pay for the property and the additional escrow charges; that plaintiffs were sent bills each month for rent then due and the request to pay it. Plaintiffs denied receiving such bills. Copies of these claimed bills thus sent were received in evidence. It was stipulated that defendant paid all taxes on the property excepting $6.75, and also all insurance. Witnesses were produced by defendant indicating that bills were received by plaintiffs from defendant and that plaintiffs referred to the fact that they received a bill for rent "from the old lady." On January 7, 1943, while Ronald was in the service, he wrote a very discourteous letter to his mother indicating great bitterness on his part and denoting some jealousy between himself and his adopted brother regarding money matters and pertaining to defendant's claim for rent. He therein stated: "The place was ours * * * that was a gift." One witness overheard a conversation between Georgine and defendant about the time the property was to be purchased and testified that defendant told Georgine that "she would buy her a home so that the children would not be in jail"; that she told her "If I buy you a home you will have to pay some small amount of rent" and taxes and if "anything happens to me, Papa will have to sell the home to take care of him"; that subsequently plaintiffs wanted money for another car and she heard defendant tell them: "Well, dear, you know you have never paid me any money back, and you know you have never paid me a dime on the rent." A letter to defendant, dated April 25, 1946, admittedly written by Georgine, was received in evidence. It recites that a real estate man had called at her home, apparently at the suggestion of defendant, in regard to the sale of the place. She therein stated: "I would like to, or rather Ronald and I would rather pay you for the place. Then everything would be clear. If it is possible, could you drop us a line, or better still, come down and see us so we can make arrangements. I realize you feel ill towards us and am very sorry this has happened. * * * Mother, please write to me so we can make a settlement on this place, as I know you have been out on it for taxes and insurance, and you reap nothing, so could it be that we could pay you for it? I mean to make it a cash basis, and think it best we do it this way." Through plaintiffs' attorney, they offered to pay $4,000 for the property and they also attempted to negotiate a loan. The reason for the loan was stated to be "to give her back what she gave to me. She gave it to me once, and then she called back and wanted it back. So I figured rather than have her keep going on and on, and begging and saying she had done that, after she had given it to us, I figured we would borrow the money and pay her off and forget it."

Upon this evidence the trial court found that the legal title to the real property described was acquired by defendant under the name of Arabella H. Helmer; that the consideration was paid by the plaintiffs; that the defendant at all times held the legal title in trust for the use and benefit of the plaintiffs and for the purpose of conveying the title to them on demand. Judgment was entered accordingly. A motion for new trial, on all statutory grounds including newly discovered evidence, was denied.

It is defendant's argument that this is not a case where the consideration for the purchase of property was paid by one party and title thereto taken in the name of another; that there is no conflict in the evidence in respect to the origin of the purchase price; that plaintiffs admitted that defendant furnished the funds with which the property was purchased; and that the title to the property was taken in the name of that party; that under the well-established rules, where the party who furnishes the consideration for the purchase of real property takes legal title thereto in her own name, no resulting trust can be imposed in favor of another; and that the trial court's finding that a trust resulted cannot be afforded legal sanction under the evidence.

[1] As to this general rule of law there can be no dispute. G. R. Holcomb Estate Co. v. Burke, 4 Cal.2d 289, 299, 48 P.2d 669; Treager v. Friedman, 79 Cal.App.2d 151, 179 P.2d 387; Los Angeles & Bakersfield Oil & Development Co. of Arizona v. Occidental Oil Co., 144 Cal. 528, 533, 78 P. 25.

Plaintiffs do not dispute the rule stated and concede that the money used to purchase the property came originally from defendant. They argue that there is evidence showing that defendant made a previous gift of the money to plaintiffs and their title to that money was just as unassailable as if they had saved it from their earnings or had borrowed it, and therefore at the time of purchase it was plaintiffs' money; that when they paid the purchase price with their money, a presumption of a resulting trust arose, even though title to the property was taken in the name of defendant, citing 25 Cal.Jur. p. 185, sec. 53; Watson v. Poore, 18 Cal.2d 302, 115 P.2d 478; Restatement of the Law of Trusts, p. 1369, sec. 450, Comment A; Dahne v. Dahne, 49 Cal.App. 501, 193 P. 785.

[2] It should be here noted that after this appeal was perfected defendant made application to this court and it ordered that the trial judge take additional evidence pertaining to the check transaction. An employee of the Fresno bank produced the record of the joint account and the ledger sheet. Copies were received in evidence. He testified that there was no account located in his search other than the joint account of Georgine and defendant; that there was a deposit made in the joint account on November 3, 1941, for $2600. The ledger account so indicates. A letter dated November 1st, 1941, from the bank in Merced to the Fresno bank requests that the Fresno bank credit the commercial account of Arabella H. Helmer with $2600 and charge the bank's account with that amount. He then testified that that sum was taken from defendant's savings account in Merced. The purpose of this testimony, as we understand it, was to affirmatively show that defendant never did give a check payable to Georgine Helmer for $2600, on her personal account, on which was inscribed the words "a gift" as indicated by her. This evidence does impeach plaintiff's testimony in this respect. An appellate court is not authorized under section 956a of the Code of Civil Procedure to pass upon the credibility of a witness who testified at the trial.

[3] In Leal v. Leal, 206 Cal. 513, 274 P. 965, it was held that that section was not intended to have application to cases wherein the production of original evidence was sought to be permitted in an appellate court and the purpose of its production was to lead to a reversal of the cause

on appeal and for the entry of a different judgment. See, Tupman v. Haberkern, 208 Cal. 256, 280 P. 970, where the purpose of allowing additional evidence in a reviewing court is fully discussed. To the same effect is Davis v. Chipman, 210 Cal. 609, 623, 293 P. 40. The evidence here produced merely added to the conflict in the evidence on the question of whether the money was in fact a gift to plaintiffs. Under these circumstances this court may not set aside the trial court's findings and make other findings even though we may be convinced that the evidence preponderates in favor of appellant. Burton v. Los Angeles Ry. Corp., 79 Cal.App.2d 605, 180 P.2d 367.

[4] Counsel for plaintiffs now argue that notwithstanding the additional evidence produced in opposition to plaintiffs' testimony may be correct, there still remains sufficient evidence of a gift of the money to plaintiffs. Under the contract creating the joint tenancy bank account between defendant and Georgine and the placing of the money in that account by defendant and the withdrawal thereof by Georgine, with the full knowledge of the other joint tenant, there arises a presumption of a gift. Wheeland v. Rodgers, 20 Cal.2d 218, 124 P.2d 816; Estate of Gaines, 15 Cal.2d 255, 100 P.2d 1055; Sec. 15a California Bank Act, Deerings' California General Laws, Vol. 1, Act 652, sec. 15a; Kennedy v. McMurray, 169 Cal. 287, 146 P. 647, Ann.Cas.1916D, 515; Klindera v. Smith, 15 Cal.App.2d 115, 59 P.2d 156.

[5] The testimony of both parties in this action was to the effect that they signed papers for the purpose of opening the joint account. Defendant understood this transaction, authorized and knew that Georgine was to draw the $2500 for the purpose of purchasing the property. There is additional evidence, apparently believed by the trial court, that defendant intended to make a gift of that particular amount of money to plaintiffs. The evidence, though conflicting, likewise justified the conclusion drawn by the trial court that defendant held title to the real property for the benefit of plaintiffs, and that since plaintiff Georgine Helmer paid the purchase price with money that was given to them, a presumption of a resulting trust arose. These two presumptions above referred to are evidence. Smellie v. Southern Pacific Co., 212 Cal. 540, 299 P. 529; Bliss v. Martin, 74 Cal.App.2d 500, 516, 169 P.2d 61. The trial judge did not believe that the testimony of the defendant did overcome these presumptions and outweigh the evidence supporting them.

From the testimony produced, as reflected by the cold record, we might hesitate in making the finding indicated by the trial court. However, we are not the trial judge. Our provinces are separate and distinct. He was the trier of fact and was otherwise impressed. It cannot be said that his finding lacks evidentiary support.

Judgment affirmed.

MUSSELL, J., concurs.

Rehearing denied; BARNARD, P. J., dissenting.

---

87 Cal.App.2d 707

SVETINA v. BURELLI et al.

Civ. No. 13741.

District Court of Appeal, First District,
Division 2, California.

Sept. 27, 1948.

Rehearing Denied Oct. 27, 1948.

Hearing Denied Nov. 22, 1948.

1. Judgment 🔑503

Insufficiency of complaint to state cause of action does not deprive court having jurisdiction of defendant and of subject matter of the power to render judgment in accordance with prayer of complaint, and rendition of such judgment is error for which appeal may be taken by defendant but does not authorize collateral attack or judgment by defendant.

2. Judgment 🔑518

A suit to quiet title to realty is collateral attack on prior judgment foreclosing lien on realty.

3. Judgment 🔑489

A judgment void on its face, as appears from inspection of judgment roll disclosing that court did not have jurisdiction of person of defendant or subject matter, can be collaterally attacked.

4. Judgment 🔑503

A prior judgment foreclosing lien impressed on realty for street work could not be collaterally attacked in action to quiet title to realty, nowithstanding that complaint in prior action may have been insufficient, where judgment in prior action was in accordance with prayer of complaint, and court in prior action had jurisdiction of person of defendant therein and of subject matter, and defendant defaulted and did not appeal from judgment.

5. Husband and wife 🔑267

As respects creation of valid lien on community property, the absence of husband's signature on contract for street work signed by wife and daughter did not make contract void but merely voidable, since husband may have authorized wife and daughter to sign or may have ratified their signing.

6. Judgment 🔑111

Defendant in prior action to foreclose lien on realty for street work waived all defenses to prayer for foreclosure by suffering entry of default, and he would be deemed to have consented to default judgment.

7. Limitation of actions 🔑175

Defendant in action to foreclose lien on realty for street work could waive defense that such action was not timely.

◆

Appeal from Superior Court, San Francisco County; Rob't McWilliams, Judge.

Action to quiet title by Joseph Svetina against Anna Burelli and others. From the judgment, the plaintiff appeals.

Affirmed.

Edward D. Mabson, of San Francisco, for appellant.

Aaron N. Cohen, Sidney Rudy and Karl M. Rodman, all of San Francisco, for respondent Anna Burelli.

NOURSE, Presiding Justice.

Appellant sued to quiet title to real property which had been impressed with a lien for street work in a prior judgment foreclosing the lien. The present action is concededly a collateral attack on the prior judgment.

The contract for the street work was signed by appellant's wife and minor daughter without (so he alleged in this action for the first time) his knowledge or consent. After the work was completed transfers between the husband and wife were made of the improved and of other unimproved lots and a property settlement and separation followed. Thereafter a suit was filed to foreclose the lien. Appellant was made a party defendant, served with summons, and defaulted. A judgment of foreclosure was duly entered and the property was sold to Burelli, the respondent herein.

Following the trial of this action to quiet title the learned judge of the trial court filed an opinion giving his reasons for a judgment denying appellant the relief sought. This opinion fully covers all the issues raised and we adopt it as our reasons for affirmance of the judgment. The opinion follows:

"Plaintiff is in effect, though not in form, suing to remove a cloud that rests on the title to certain property which he claims to own. The cloud grows out of the judgment in the case of Eaton and Smith vs Svetina, et al., and the foreclosure of a lien decreed by the court in that case to exist on the property here claimed by plaintiff.

"Plaintiff contends that the judgment in that action was void and that consequently all the subsequent proceedings taken therein were void. His claim is based on the fact that the street improvement contract sued upon in the foreclosure suit was entered into by plaintiff's wife and minor daughter only, and that the plaintiff was not a party to that contract and that he never authorized nor ratified its execution. However, the prayer in the complaint in that action did ask that a lien be decreed to exist upon the property and that the property be sold in satisfaction of the lien. Plaintiff herein was joined as a defendant and was duly served in the action. The judgment roll shows that he was personally served. But whether he was personally served or was served by publication would not be material in view of the nature of the action. The plaintiff herein defaulted in that action and judgment was rendered decreeing the existence of the lien as prayed and directing the sale of the property.

[1, 2] "It may well be that the complaint in that action was insufficient in that it does not allege that the plaintiff herein ever executed or authorized the execution of the contract sued upon. But the insufficiency of the complaint to state facts sufficient to constitute a cause of action against him can not avail plaintiff in this action. The fact that the complaint in that action was insufficient would not divest the court of power or jurisdiction to render judgment in that action against the plaintiff herein as long as the decree was in accordance with the prayer of the complaint. The action of the court in rendering judgment against the plaintiff herein on an insufficient complaint would be but error for which an appeal could have been taken by defendant. See In re James' Estate, 99 Cal. 374, 376 [33 P. 1122, 37 Am. St.Rep. 60]. It must be remembered the plaintiff herein has not sued in a direct attack to avoid the judgment in the foreclosure suit but by his suit to quiet title has made a collateral attack on that judgment. That a suit to quiet title is a collateral attack on a judgment has long been settled in this state. See Newlove v. Mercantile Trust Co., 156 Cal. 657, 4th head-note [105 P. 971], and Baldwin v. Foster, 157 Cal. 643 [108 P. 714].

[3, 4] "The law is also well settled in this state that a collateral attack on a judgment will not lie against such judgment unless the judgment is void on its face, that is to say, is void as appears from an inspection of the judgment roll. It is not void on its face unless it appears therefrom that the court did no have jurisdiction either of the person or of the subject matter. See Pioneer Land Co. v. Maddux, 109 Cal. 633, 642 [42 P. 295, 50 Am.St.Rep. 67]. It can not be successfully urged here that the court in the foreclosure suit did not have jurisdiction of both the person of the defendant therein and of the subject matter. Hence judgment must go for the defendants in this action."

[5, 6] We may add as further reasons for affirmance of the judgment that though the original contract for the street work may have been insufficient on its face as creating a valid lien on the community property in the absence of the husband's signature, he may nevertheless have authorized his wife and daughter to sign it as his agents or may have ratified their act prior to the institution of the action to foreclose. Another question which might have arisen on the trial of the original action is that of estoppel. These were matters for the trial court to decide in the first action. Hence the absence of the husband's signature on the contract does not make that contract void—but merely voidable. Accordingly the trial court, having had jurisdiction of both the parties and the subject matter, retained jurisdiction to determine whether under all these circumstances the lien became valid and enforceable. But the appellant waived all defenses to the prayer for foreclosure by suffering the entry of default and must be deemed to have consented to that decree.

[7] The attack he now makes on the decree raises nothing more than possible error in the former trial. This applies as well to his present attack that the suit for foreclosure was not brought within the statutory time and was therefore barred. As in the case of his other possible defenses this was one which he might waive. And he is deemed to have waived it by his failure to raise it in that action.

Judgment affirmed.

GOODELL and DOOLING, JJ., concur.

Hearing denied; CARTER, J., dissenting.

87 Cal.App.2d 701

CUNNINGHAM v. TAYLOR et al.

Civ. 7580.

District Court of Appeal, Third District, California.

Sept. 25, 1948.

1. Appeal and error ⇐371

Where notice of appeal was filed by plaintiff and notice to prepare transcript was served and filed, and plaintiff was notified of cost of preparing clerk's transcript but plaintiff made no arrangement for payment of cost, appeal would be dismissed on defendants' motion. Rules on Appeal, rules 5(c), 10(b), 42(a).

2. Appeal and error ⇐805

Where appellant failed to appear and oppose motion to dismiss appeal, appeal would be deemed abandoned. Rules on Appeal, rules 41, 42(a).

3. Appeal and error ⇐607(1)

Under rules on appeal, motion in trial court to terminate proceedings for the preparation of the record on appeal and to dismiss appeal is unauthorized.

◆

Appeal from Superior Court, Stanislaus County.

Action by Chas. I. Cunningham against Gene E. Taylor and others, doing business under the fictitious name of Oakdale Municipal Hospital. From an adverse judgment, plaintiff appeals and defendants move to dismiss appeal.

Appeal dismissed.

Vernon F. Gant, of Modesto, and Carlos J. Badger, of San Francisco, for moving respondents.

No appearance on behalf of appellant.

ADAMS, Presiding Justice.

On August 12, 1948, respondents filed in this court a notice of motion to dismiss this appeal, same being supported by a certificate of the clerk of the trial court in accordance with Rule 42(a) of the Rules on Appeal. Service of the notice was made upon appellant by the mailing to his attorney at Oakdale, California, on August 9, 1948, of a copy of said notice and supporting papers. Pursuant to said notice, hearing was had before this court on September 2, 1948. Appellant failed to appear or to file any opposition to the motion.

The clerk's certificate shows the following facts:

At the conclusion of plaintiff's case the trial court granted defendants' motion for a nonsuit. On November 7, 1947, findings were filed and judgment entered. No notice of intention to move for a new trial was filed. On January 6, 1948, notice of appeal was filed by plaintiff and notice to prepare clerk's transcript was served and filed on January 8, 1948. On May 8th appellant was notified of the cost of preparing such transcript, but no arrangement for paying said cost was made by him.

Rule 5(c) of the Rules on Appeal requires that arrangements for the payment of the cost of preparing a transcript must be made within ten days after notification of the cost thereof. Rule 10(b) of said Rules provides that failure of an appellant to perform any act necessary to procure the filing of a record on appeal justifies dismissal of such appeal where such failure is not the fault of any court officer or other party. Rule 41 provides that failure of an appellant to appear and oppose a motion for dismissal of an appeal, after due service of notice of motion, or to file a written opposition to the motion, may be deemed an abandonment of an appeal, authorizing its dismissal.

[1, 2] From the foregoing it is apparent that this appeal should be dismissed, not only for failure of appellant to arrange with the clerk for payment of the cost of the record, but also because such appeal may be deemed abandoned. See Barry v. Bowdle, 69 Cal.App.2d 721, 160 P.2d 91; Duehr v. Callaway, 80 Cal.App.2d 887, 183 P.2d 380; Whelpton v. Taylor, 81 Cal.App.2d 949, 185 P.2d 391; Heatly v. Heatly, 83 Cal.App.2d 677, 189 P.2d 748; Caldwell v. Harvey, 85 Cal.App.2d 104, 192 P.2d 62; Clyde v. Clyde, 85 Cal.App.2d 249, 193 P.2d 9; Flint v. Board of Medical Examiners, 72 Cal.App.2d 844, 165 P.2d 694.

[3] The clerk's certificate above mentioned also recites that a motion to terminate proceedings for the preparation of the record on appeal and to dismiss the appeal was made in the lower court and granted. Such proceedings have, however, become obsolete under the present Rules on Appeal. See Averill v. Lincoln, 24 Cal.2d 761, 764, 151 P.2d 119; Jarkieh v. Badagliacco, 68 Cal.App.2d 426, 429, 156 P.2d 969.

The appeal is dismissed.

PEEK and THOMPSON, JJ., concur.

87 Cal.App.2d 769

REID v. GILLESPIE et al.

Civ. 7501.

Sac. 5922.

District Court of Appeal, Third District, California.

Oct. 1, 1948.

1. Appeal and error 🔑1008(2)

In action to recover money loaned to purchase an interest in placer mining claims, conflicting evidence as to whether loan was to be repaid from proceeds of sale of garage or proceeds derived from operation of mine was for trial court and appellate court could not interfere with finding supported by substantial evidence that loan was to be repaid from proceeds of sale of garage.

2. Partnership 🔑115

A loan from one partner to another is not a partnership transaction so as to require joinder of all partners as parties to action to recover money loaned, although such money was used to launch the partnership.

3. Appeal and error 🔑187(3)

Defendants, by failing to demur or otherwise object in trial court, waived their right to question propriety of the parties to action, and could not, for first time on appeal, contend that a partnership transaction was involved and that another partner was a necessary party to action. Code Civ.Proc. §§ 430, 434.

4. Appeal and error 🔑301

Where contention that judgment was excessive was not presented to the trial court on motion for new trial, it could not be raised for the first time on appeal.

5. Liens 🔑7

Where purchase price of an interest in placer mining claims transferred to defendants was advanced by plaintiff as a loan to defendants, plaintiff was not entitled to an equitable lien upon defendants' interest in the claims in absence of agreement that plaintiff was to have such a lien.

Appeal from Superior Court, Plumas County; J. O. Moncur, Judge.

Action by Randon Reid against Frank E. Gillespie and another to recover money loaned to purchase an interest in placer mining claims and to impress a lien on such claims to extent of defendants' interest therein. From a judgment in favor of plaintiff, defendants appeal.

Judgment modified in accordance with opinion and as modified, affirmed.

John G. Evans, of San Francisco, and Morris Durrant, of Quincy, for appellants.

Frank H. McAuliffe, Mento & Buchler and C. K. Curtright, all of Sacramento, for respondent.

PEEK, Justice.

By deed dated May 21, 1946, plaintiff and defendants, together with one J. O. Hutton, became the owners of certain placer mining claims located in Plumas county. The purchase price of the property was $12,500, one-fourth thereof being advanced by Hutton and the remainder advanced by plaintiff which, according to his complaint, represented his own purchase of a one-fourth interest in the property, and the balance of $6,250 being a loan by him to defendants for the purchase of their interests, which sum was to be repaid to plaintiff if and when a garage owned by the defendant Frank E. Gillespie was sold. The first count of the complaint is a common count for the money so loaned and the second count is one to impress a lien on the property so purchased to the extent of the defendants' interest therein.

At the conclusion of the hearing the court found in favor of plaintiff and entered judgment against the defendant Frank E. Gillespie in the sum of $6,250, declared a lien against the interest of both defendants in the property and further ordered that their interests be sold and the proceeds applied to the satisfaction of the judgment. From the judgment so entered defendants have appealed.

[1] Defendants first contend that the evidence clearly shows that plaintiff was to be repaid out of the profits from the operation of the mine. In this regard the record discloses that plaintiff alleged and so testified, as did Hutton, that the defendant Frank E. Gillespie was to repay plaintiff from the proceeds of the sale of the garage owned by Gillespie. Said defendant, however, testified, as did his brother J. D. Gillespie and other witnesses, that plaintiff was to be repaid out of the proceeds derived from the operation of the mine. Thus the trial court was presented with a conflict in the evidence, which conflict was resolved in favor of plaintiff, and as such finding is supported by substantial evidence this court may not interfere. Crawford v. Southern Pacific Co., 3 Cal.2d 427, 429, 45 P.2d 183.

[2] Defendants next contend that as this was a partnership transaction the fourth partner (Hutton) was a necessary party, and for the same reason the action was improper without an accounting and dissolution of the partnership. Such contention is likewise without merit. The action is clearly one to recover a debt alleged to be owing from defendants to plaintiff for moneys advanced for the purchase of the property. The action is stated as such, the evidence supports the action on this ground, and the trial court, again on substantial and conflicting evidence, found against the defendants and concluded that the plaintiff lent money to the defendants which they did not repay. Conceding, but only for the purpose of this discussion, that a partnership was established, nevertheless it is settled that a loan from one partner to another is not a partnership transaction, although the funds are used to launch the partnership. Arnheim v. Gordon, 21 Cal. App. 754, 132 P. 840.

[3] As regards the question of non-joinder of the alleged partner Hutton, even though the court had not found as it did on the question of partnership, the defendants by failing to demur or otherwise object in the trial court, waived their right to question the propriety of the parties to the action, Code of Civil Procedure, secs. 430, 434, and they may not raise the question for the first time on appeal. Landon v. Landon, 74 Cal.App.2d 954, 169 P.2d 980.

[4] The further claim of defendants that the judgment is excessive is likewise without merit. The courts of this state have consistently held that where such issue was not presented first to the trial court on a motion for a new trial it cannot be raised on appeal. Phoenix v. Gibson, 51 Cal.App. 148, 196 P. 95.

Defendants' final contention is directed at the portion of the judgment impressing a lien against their interests in the property, ordering the sale thereof, and that the proceeds be applied to a satisfaction of the judgment.

[5] In view of the previously mentioned finding of the trial court that the money advanced to the defendant Frank E. Gillespie by the plaintiff was a loan, and in view of the total lack of any evidence to overcome the presumption that the defendants as joint holders of the legal title held the full beneficial interest of their proportionate interest in the property, that portion of the judgment granting plaintiff a lien on defendants' property is in error. It is the general rule that where a transfer of property is made to one person and the purchase price is advanced by another as a loan to the transferee, the lender is not entitled to an equitable lien upon the property in the absence of an agreement between him and the transferee that he is to have such a lien (Restatement, Trusts, section 445); and the courts of this state have so held. Perry v. Ross, 104 Cal. 15, 37 P. 757, 43 Am.St.Rep. 66. There is no evidence in this case that such an agreement was

entered into between plaintiff and defendants.

For the foregoing reason that portion of the judgment impressing a lien against the interests of the two defendants in said property, ordering a sale thereof, and the application of the proceeds from such sale to the satisfaction of the judgment, is without support, and must be reversed. The remaining portion, to wit: the money judgment against the defendant Frank E. Gillespie in the sum of $6,250 together with interest thereon is supported by substantial evidence and is therefore affirmed.

As modified the judgment is affirmed.

ADAMS, P. J., and THOMPSON, J., concur.

---

87 Cal.App.2d 694

LUNT et al. v. BORIS et al.

Civ. 13709.

District Court of Appeal, First District, Division 2, California.

Sept. 24, 1948.

Rehearing Denied Oct. 23, 1948.

Hearing Denied Nov. 22, 1948.

1. **Judgment ⇨735**

Matters not in issue in a previous action are not res judicata.

2. **Judgment ⇨585(5)**

Where fact, condition, status, right, or title is not fixed and permanent in its nature, an adjudication in an action to quiet title, though conclusive of the situation at time of its rendition, is not conclusive as to what it may be at some subsequent time, in so far as such may be affected by circumstances subsequently occurring or arising.

3. **Judgment ⇨585(5)**

Where mortgagor's grantees acquired title to realty prior to recordation of trust deed, and mortgagees brought action against grantees to recover possession of realty because of mortgagor's default, and, while appeal by grantees from judgment for mortgagees was pending, mortgagees acquired title to realty by enforcing security under power contained in trust deed, and mortgagees brought a subsequent action to quiet title to the realty, judgment in first action was not res judicata in subsequent action.

4. **Appeal and error ⇨437**

Fact that judgment in action by mortgagees against mortgagor's grantees contained declarations respecting mortgagees' obligations to clear off earlier liens if and when mortgage debt was paid did not estop mortgagees from acquiring title by enforcing their security in accordance with trust deed while appeal by mortgagor's grantees was pending, where grantees in no way changed their position.

5. **Appeal and error ⇨442**

Code section providing that the perfecting of an appeal stays proceedings in the court below on judgment or order appealed from did not prevent mortgagees from acquiring title by enforcing their security in accordance with trust deed during pendency of appeal by mortgagor's grantees from judgment requiring mortgagees to clear off earlier liens if and when mortgage debt was paid. Code Civ. Proc. § 949.

6. **Appeal and error ⇨442**

Mortgagees who acquired title to mortgaged realty by enforcing their security in accordance with terms of trust deed were entitled to have their title quieted against grantees of the mortgagor, though at time when title was acquired by mortgagees an appeal was pending by the grantees from a judgment in favor of the mortgagees for possession, and on appeal it was determined that mortgagees should deliver possession to grantees on performance by grantees of all conditions such as payment of mortgage debt, interest, costs, attorneys' fees, etc.

7. **Appeal and error ⇨1204**

Where, during pendency of appeal by defendant from adverse judgment in action to recover possession of realty, title to realty became vested in plaintiffs by their enforcement of their security in accorance with provisions of trust deed, defendants on remittitur were not entitled to an order for enforcement of judgment requiring plaintiffs to deliver immediate possession to defendants on certain conditions.

◆

Appeal from Superior Court, Monterey County; H. G. Jorgensen, Judge.

Action to quiet title by Minor R. Lunt and Nellie T. Lunt against Rose Boris and Gibson Boris. From a judgment in favor of the plaintiffs and from an order made after final judgment in earlier case, the defendants appeal.

Judgment and order affirmed.

Carroll, Davis & Freidenrich and Wm. Steinberg, all of San Francisco, for appellants.

Crist & Beene, of Palo Alto, for respondents.

GOODELL, Justice.

This is an appeal from a decree quieting the title of respondents to a piece of improved real property in Soledad, 160 feet by 290 feet in area, known as the Soledad Auto Court. On the same record there is presented an appeal from an order made after final judgment in an earlier case.

Respondents were the beneficiaries of a deed of trust securing a note for $13,000, standing against the property. At a trustee's sale they bid it in for the face of the note, and after title vested in them they brought this suit.

There was an earlier lawsuit between the same parties which was decided on appeal by this court in Lunt v. Boris, 77 Cal. App.2d 368, 175 P. 2d 20 wherein the antecedent facts are stated.

In their answer herein appellants deny respondents' title and plead that this action is barred by the judgment in the first case; that respondents are seeking to circumvent that judgment; that it "is res judicata of the issue raised in the present action, and that the present action is intended to nullify and vitiate" that judgment.

[1,2] One answer to this position is that "Matters not in issue in the previous action are not res adjudicata" (15 Cal.Jur. pp. 134–5) and "Where the fact, condition, status, right or title is not fixed and permanent in its nature, an adjudication, though conclusive of the situation at the time of its rendition, is not conclusive as to what it may be at some subsequent time, in so far as this may be affected by circumstances subsequently occurring or arising". 15 Cal.Jur. pp. 154–5.

On January 1, 1942 Palo Alto Building Company, the owner of the property, executed a note for $13,000 to respondents, secured by a deed of trust. On July 1, 1942 when appellants acquired title from that Company, the deed of trust had not been recorded (it was recorded on August 24, 1942).

The first action was commenced on June 29, 1943. The note was then in default and the purpose of that action was to obtain possession under a provision in the trust deed entitling the beneficiaries to possession in such event. It was established therein that appellants had acquired their title without consideration and with knowledge of the trust deed. The judgment therein, entered on November 22, 1944, awarded possession to respondents, and an appeal was taken.

Shortly afterward respondents initiated proceedings for the sale of the property under the power contained in the trust deed. At the sale held on February 10, 1945 respondents bid in the property, and a trustee's deed issued the same day. Thus they acquired title by enforcing their security while the appeal was pending, and almost two years before it was decided.

[3] The issues in the two cases are entirely different. The first action dealt with *possession* of the property at a time when appellants admittedly held title, while the present action deals with *title* to the property after appellants' divestiture by the trustee's deed, following proceedings carried on *after* the first judgment. The case comes squarely within the rules quoted above from 15 Cal.Jur., pp. 134–5 and 154–5, and there is no merit whatever to the

contention that the first judgment is res judicata of the issue in this case.

Within the issues of the original case all the court had to find was (1) that a default existed, and (2) that appellants had acquired title with notice. It followed therefrom that respondents were entitled to possession. However, the parties entered into a stipulation as to the respondents' duty in the event of payment of the $13,000 note. Because of this stipulation, and "Notwithstanding the purely possessory character of the action and its narrow issues", as we said in 77 Cal.App.2d at page 371, 175 P.2d at page 22, "the court made a declaration of the rights and duties of the parties," the purport of which was that upon the payment to respondents of the $13,000 plus interest, attorney fees, costs, and other items, respondents should clear off certain liens and encumbrances. In their closing brief in the first appeal appellants conceded "that were the judgment reversed in their favor and a retrial had, the results would be practically the same except that the judgment would be modified to permit appellants to regain possession of the properties after they would have performed. * * * Consequently, appellants are willing to have the judgment affirmed" provided there were certain amplifications. Accordingly we affirmed the judgment, directing that the following be added to the judgment: "* * * if and when the defendants * * * perform all the conditions on their part to be performed as hereinabove set forth, said plaintiffs * * * shall thereupon deliver back to said defendants the possession of the real property * * *." This affirmance and modification spoke as of the entry of the judgment on November 22, 1944 (2 Cal.Jur., p. 806) as if it had been written in by the trial court.

Appellants state the question to be decided, as follows: "Is the final judgment" in the first case "an enforceable judgment and entitled to full faith and credit, or has it been nullified by virtue of the judgment" in this quiet title action?

[4, 5] Appellants claim that because the judgment contained the declarations respecting respondents' obligations to clear off earlier liens if and when the debt was paid, respondents were estopped to sell the property. There certainly was no estoppel, for appellants in no way changed their position. There was no obligation to clear off earlier liens until the debt was paid and this was within the control of appellants or the obligor on the note. Appellants make the unusual claim that the declaratory part of the first judgment "was effectively stayed by the perfecting of the appeal", citing section 949, Code Civ.Proc. That section provides that "the perfecting of an appeal stays proceedings in the court below upon the judgment or order appealed from * * *." Appellants were not aggrieved by what the court below did (for it did nothing), but with what the respondents did, which was to cause the property to be sold without appellant's knowledge while the appeal was pending. They were not the obligors on the note. Neither the trust deed nor the law required notice to them of an intended sale. They knew that the note was in default, and they were chargeable with knowledge of the consequences of such default. They knew, moreover, that respondents had taken possession following the default, a definite step toward ultimate enforcement.

[6] There is nothing in the language of the first judgment which stayed the hand of either side. The existence of the default was established by that judgment. Appellants under the power of sale were entitled to force a sale at any time and such right could not have been impaired by a judgment which awarded possession—an intermediate, cumulative, remedy designed to conserve the security, and one not at all inconsistent with their ultimate remedy of sale, but auxiliary to it. There was nothing in the first judgment to prevent appellants from paying off the debt pending the appeal; the declaratory part of it simply defined the respondents' obligation which would arise if they did so. By appealing the appellants were attempting to upset the adjudication of the default, and had they succeeded the respondents' possession would have suddenly ended, but their appeal was devoid of merit. While it is true that by proceeding with the sale respondents were acting at their peril, still

we know of no way—and counsel have not suggested any—in which the enforcement of respondents' security could have been legally halted or delayed. That right was one of contract, not derived from any decree of foreclosure, but from the power of sale, and it was in no way involved in the first action.

Morrow v. Morrow, 40 Cal.App.2d 474, 105 P.2d 129, cited by appellants is not in point. There the husband stipulated, in Nevada, to pay his wife $75 a month alimony. On the same day the Nevada court incorporated that obligation into a decree of divorce awarded to him. The wife later sued him in California for arrearages and he was held to his obligation, the California courts giving full faith and credit to the Nevada decree, as they had to under the Constitution. Const. U.S. art. 4, § 1. The court held, also, that having stipulated the $75 a month provision into the decree, the husband was estopped to later attack it.

In Wellborn v. Wellborn, Cal.App. 185 P.2d 410, cited by appellants, the Supreme Court granted a hearing and later dismissed the appeal as moot. 32 Cal.2d 221, 195 P.2d 792.

For reasons already given Seidell v. Anglo-California Trust Co., 55 Cal.App.2d 913, 132 P.2d 12, cited by appellants, is not in point.

The Appeal from the Order.

[7] Soon after the remittitur was filed in the first case appellants moved in the trial court for an order "enforcing its judgment as modified * * * and directing that *upon compliance by defendants with the terms of said judgment as modified that plaintiffs deliver immediate possession of the premises* * * * to defendants and further directing that plaintiffs account to defendants for the rents, issues and profits received" by them. (Emphasis added.) The judgment already provided for the very thing sought by the motion in the language which we have emphasized and the application for an accounting for rents, issues and profits is not at all understandable in view of the fact that the judgment which awarded respondents possession had been affirmed and had become final. Moreover no payment had been made or tendered, and, viewed from any angle, appellants would have no standing on their motion without showing payment or tender.

The final answer to the motion is that title at that time had become vested in respondents.

The judgment and the order appealed from are, and each is, affirmed.

NOURSE, P. J., and DOOLING, J., concur.

---

87 Cal.App.2d 645

In re ALEGRIA'S ESTATE.

ALEGRIA et al. v. ALEGRIA.

Civ. 16392.

District Court of Appeal, Second District,
Division 3, California.

Sept. 20, 1948.

Hearing Denied Nov. 18, 1948.

1. Wills 🔑384

On appeal from judgment revoking probate of a will, evidence would be considered in the light most favorable to contestant.

2. Wills 🔑21

Every person of sound mind, over the age of 18 years, may dispose of his property by will. Probate Code, § 20.

3. Wills 🔑52(1)

Presumption is that testator at time of making will was of sound and disposing mind.

4. Wills 🔑52(1)

Contestant had burden to prove affirmatively and by a preponderance of evidence that testatrix was of unsound mind at time of execution of contested will.

5. Wills 🔑386

On appeal from judgment revoking probate of a will evidence would be considered in view of the burden cast upon contestant to prove affirmatively and by a preponderance of evidence that testatrix was of unsound mind at the time of the execution of the will.

6. Wills ⟹1

The will of testatrix was supreme, and in disposing of her property testatrix was not required to consult the wishes or view of her heirs or of juries or courts.

7. Wills ⟹34

Unsoundness of mind which will invalidate a will must be either insanity of such broad character as to establish mental incompetency generally, or some specific and narrower form of insanity, under which testator is the victim of some hallucination or delusion.

8. Wills ⟹38(2)

The possession of an insane delusion which leads a testatrix to dispose of her property otherwise than she would have done had she not possessed the insane delusion, is sufficient to invalidate a will, but testatrix must have been actually possessed of a delusion, and it must have been an insane one.

9. Wills ⟹38(1)

An "insane delusion" is the conception of a disordered mind which imagines facts to exist of which there is no evidence and the belief in which is adhered to against all evidence and argument to the contrary, and which cannot be accounted for on any reasonable hypothesis.

See Words and Phrases, Permanent Edition, for all other definitions of "Insane Delusion".

10. Wills ⟹38(1)

A belief may be illogical or preposterous, but it is not therefore, evidence of insanity.

11. Wills ⟹38(3)

Capricious and arbitrary likes, dislikes and mistrust are not evidence of unsoundness of mind of a testator.

12. Wills ⟹38(1)

Every delusion entertained by a testator is not an insane delusion.

13. Wills ⟹38(3)

The fact that a testator dislikes his relatives, with or without reason, is not necessarily proof of unsoundness of mind.

14. Wills ⟹82

A will cannot legally be set aside upon the mere establishment that it is an unjust, unreasonable, or cruel will.

15. Wills ⟹31

Irritability and bad temper on part of a testatrix are not inconsistent with her testamentary capacity.

16. Wills ⟹38(1)

An insane delusion which would invalidate will if leading testatrix to dispose of her property otherwise than she would have done had she not possessed the delusion must be adhered to by testatrix up to and including the instant of the execution of the will.

17. Wills ⟹82

Court should not permit jury to set aside a will merely upon suspicion, or because will does not conform to ideas of jury of what was just and proper.

18. Wills ⟹55(3)

Evidence afforded some basis for testatrix' belief that her son had attacked her, and her belief was not an insane delusion invalidating will because causing testatrix to dispose of her property by leaving her son a smaller amount than she would otherwise have left him by will.

19. Appeal and error ⟹105

An appeal did not lie from an order denying a motion for a judgment of nonsuit or from an order denying a motion for directed verdict.

◆

Appeal from Superior Court, Santa Barbara County; A. N. Runnels, Judge.

Petition by Joseph M. Alegria for revocation of probate of will of Joaquina Erro Alegria, deceased, contested by John V. Alegria, as executor and devisee and legatee, Lorenzo Alegria and Anastacia Alegria Arbelaitz, devisees and legatees. From judgment revoking probate of will, and from orders denying contestants' motion for judgment of non-suit, denying contestants' motion for a directed verdict, and denying contestants' motion for judgment non obstante veredicto, contestants appeal.

Judgment reversed, order denying motion for judgment non obstante veredicto reversed with directions, and appeals from order denying motion for judgment of non-suit and from order denying motion for directed verdict dismissed.

Robertson, Schramm, Raddue & Parma, Edw. W. Schramm and Alfred W. Robertson, all of Santa Barbara, for appellants.

Clarence C. Ward and J. V. Wood, both of Santa Barbara, for respondent.

VALLÉE, Justice.

Appeal from a judgment revoking probate of the will of Joaquina Erro Alegria entered upon a verdict of a jury finding that she was of unsound mind at the time she executed the instrument. Appellants also appeal from an order denying their motion for a judgment of nonsuit, from an order denying their motion for a directed verdict, and from an order denying their motion for judgment "non-obstante veredicto".

Joaquina Erro Alegria died January 31, 1945. She left surviving her as her sole heirs three sons, John, Joseph (Joe) and Lorenzo, and one daughter, Anastacia. She left an estate valued at about $45,000. On February 26, 1945, an instrument dated April 6, 1942, was admitted to probate as the last will of Mrs. Alegria. The instrument bequeathed $500 to Joe, and bequeathed and devised the residue of her estate to John, Lorenzo and Anastacia. It contained a non-contest clause.

On August 16, 1945, Joe filed a petition seeking revocation of probate of the instrument on three grounds: (1) unsoundness of mind; (2) want of due execution; and (3) undue influence of John, Lorenzo and Anastacia. The contest was tried by the court sitting with a jury. At the conclusion of contestant's case a motion for judgment of nonsuit was granted as to the issue of want of due execution. The jury found for the contestant on the other two issues. Thereafter the court granted a motion for a new trial on the ground that the evidence was insufficient to support the verdict. A retrial, with a jury, was had and at the conclusion of his case contestant dismissed the contest as to the issue of undue influence. The issue of unsoundness of mind was submitted to the jury which returned a verdict that Joaquina Erro Alegria was not of sound mind at the time she signed the instrument theretofore admitted to probate. Judgment followed revoking probate of the instrument. John, as executor, legatee and devisee, and Lorenzo and Anastacia, as legatees and devisees, appealed.

Upon the retrial contestant relied solely upon the ground that the testatrix had an insane delusion that Joe had attacked her and that this delusion caused her to practically disinherit him. There is no contention that Mrs. Alegria was of unsound mind in any general sense. The parties agree that the sole question on appeal is whether there is any substantial evidence to support the implied finding of the jury that Mrs. Alegria had an insane delusion that Joe had attacked her.

Mrs. Alegria was about 80 years of age when she made her will April 6, 1942. She was 82 years of age when she died on January 31, 1945. Her husband, Patricio, had died in October, 1928. From the death of her husband until her death she lived on the home place of 184 acres, Refugio Rancho, in Santa Barbara County. From about 1929, she suffered from diabetes and was required to take insulin hypodermically, was in ill health and could not operate the ranch unaided. After the death of her husband, her son, John, and his wife lived on the ranch with his mother and operated it on a share basis until 1936, when he left to work in the oil fields in Wyoming. After John's departure a man was hired to run the ranch and then it was leased for a short period. In 1937, Joe moved on the ranch under an oral agreement to operate it for his mother on a share basis.

In 1939, some difficulty arose between Joe and his mother, and a written lease, for a term from December 13, 1939, to November 1, 1940, was drafted and executed by Joe and Mrs. Alegria. The lease contained a provision that, during its term, Joe would make every reasonable effort to promote the physical comfort of his mother and keep pleasant relations. This provision was inserted in the lease at the insistence of Mrs. Alegria. Joe held over under the lease after it had run its term and continued to work the ranch under the terms of the lease.

During this time difficulties, concerning improvements on the ranch, developed between Mrs. Alegria and Joe. From 1938, until Joe left the ranch in 1941, they were constantly having trouble. At one time Mrs. Alegria thought that Joe was stealing her electricity and cut the old wires between her house and Joe's house. In the fall of 1939, Joe went into Mrs. Alegria's house one evening and showed his mother a receipt. She asked him for it. He said he would not give it to her. She reached for the receipt. He started out the door. She reached for him and held the back of his trousers and suspenders. Joe twisted around to get loose from her. She fell backwards on the floor, rolled 6 or 7 feet and against the wall. She was picked up by others present. After Joe had twisted his mother loose, he went on out. He did not say anything. He continued right on out. Mrs. Alegria was very excited at the time. She got a bump on the side of her head and "kind of passed out." She was given a glass of water and put to bed. Joe had been drinking at the time but was not drunk.

Early in November, 1941, Mrs. Alegria was building a new house on the ranch. Joe concluded that the contractor was not qualified to do the work. Mrs. Alegria told him to get rid of the contractor. Joe told the contractor to leave. The contractor then talked to Mrs. Alegria and she told him to continue to build the house. Joe became dissatisfied with the way the contractor was laying the flooring. Joe testified: "I went in the kitchen, told her that contractor was chiseling her. She chased me out of the house. Said, 'You ain't got nothing to do with it', and picked up a club and started hitting me with it. It was an old piece of kindling about four feet long and three inches wide, and she started hitting me. I said, 'Mother, are you going crazy?'"; that she hit him on the arm; that his wife came out at that time and told "me not to touch her, leave her alone. I said, 'I am not touching her.' I said, 'I don't know what is the matter with her.'"; that he did not strike his mother at all at that time; that he put his hand on her; that "She had her head down. And I said, 'Mother, are you going crazy?' She let herself down on the knees. She laid herself on the flagstone. Of course, she started rocking herself like that (indicating). She picked herself up and went in her kitchen, and my wife and I stood and looked at her. She went in the kitchen, put an old hat on, and went towards the house; and I don't know from there what happened."; that she attacked him "With a stick, about three feet long and about three inches wide; hit me on the arm. I was trying to protect my face.—Yes, I looked at her. I put—I said, 'Mother, are you going crazy?' Then she laid herself down, like I said before."; that he lifted her head and looked in her eyes; that "She kneeled down, and I stepped out of the way. My wife, she said, 'Joe, don't touch her.' I said, 'I am not going to touch her.'" He also testified that, at the same time, they had a discussion about a tractor, belonging to his mother, which he had leased; that "The house [was] discussed first, and then the tractor; and then we went to the discussion of the house, and she got good and mad. Told me to get out of the kitchen. She walked out of the kitchen, picked up a club out of the kindling wood, started hitting me on the arm, hit me on the arm. I looked at her."; that after he put his hand on her head, "She laid down"; that he stepped back, looked at her and left. Joe weighed 260 pounds. Mrs. Alegria weighed a little over 100 pounds.

Immediately after this incident Mrs. Alegria left the ranch on foot. A Mr. Holden was driving on the road near the ranch. He stopped his car, assisted Mrs. Alegria into the back seat and drove to a ranch where, at the request of Mrs. Alegria, he telephoned her daughter or granddaughter. Mr. Holden asked Mrs. Alegria how she happened to be walking on the road at that time. She told him that she had had trouble with Joe; that she had hit him with a stick; that he had grabbed her by the hair and bumped her head on a stone wall or a pile of wood.

Shortly thereafter Mrs. Alegria went to the home of her granddaughter in Santa Barbara and then to the Office of the District Attorney of Santa Barbara County. She told the District Attorney that Joe had been drunk on the ranch and was making a nuisance of himself; that the night before he had knocked her down to the ground and banged her head on the ground against a rock; that he had been in the habit of doing the same thing in the past. She exhibited bruises on her head to the District Attorney. He asked her if she wished to file a criminal complaint against Joe. She said that she did not but that she wanted him off the premises. The District Attorney wrote a letter to Joe saying he had been advised that Joe had committed a battery against his mother on November 7, 1941, and in order to avoid future difficulty his mother had requested that he (Joe) leave the premises not later than 30 days from that date.

Mrs. Alegria then consulted her own attorney, Mr. Schramm. She asked him what could be done to get Joe off the ranch. She told him that Joe had first come to the ranch under an oral agreement in 1937, on a crop share basis; that in December, 1939, Joe had signed a lease which ran to November 1, 1940, and that he had then stayed on under the same arrangement. She asked Mr. Schramm to file an action to get Joe off the ranch. She said that she had had difficulty with Joe for a period of time; that there was one assault just before the lease was made; that on November 7, 1941, they had had an argument over the leasing of a tractor; that on November 8, 1941, Joe had struck her on the head; that she grabbed a shingle and hit him on the arm; that Joe grabbed her by the arm, threw her to the ground and that his wife came out and took him away; that he was drunk; that Joe had taken after his wife with a gun. Mr. Schramm prepared and filed a complaint, which was verified by Mrs. Alegria, in which it was alleged that notwithstanding the provision of the lease, above referred to, Joe did on November 8, 1941, "by force, violence and with a strong arm, without excuse or justification whatsoever, strike, beat and pummel plaintiff herein, knocked her to the ground, and did then and there menace and threaten her with other and further actions of violence". Joe filed an answer in which he alleged that "on the 8th day of November, 1941, the plaintiff, without any cause therefor, attacked the defendant with a wooden cudgel, and thereupon the defendant, using only such force as was reasonable under the circumstances, defended himself from such attack."

On February 14, 1942, an agreement was entered into between Mrs. Alegria and Joe settling the controversy. The general effect of the agreement was that Joe left the ranch and Mrs. Alegria made a payment to him covering amounts due him for his share of certain crops and in purchase of his interest in certain personal property on the ranch. After the terms of the agreement of settlement had been agreed upon but before the agreement was executed, Mrs. Alegria told Mr. Schramm that she wanted to make a will. Mr. Schramm was about to enter the army. He told Mrs. Alegria that whenever she wanted to have a will prepared she could come back and see one of his associates. About this time Mrs. Alegria told Attorney Alfred W. Robertson, an associate of Mr. Schramm, that Joe had hit her and knocked her down.

In March, 1942, Mrs. Alegria called on Mr. Raddue, an associate of Mr. Schramm, and asked him to prepare a will for her. In a conversation, which lasted about two hours, she told Mr. Raddue that "she wanted to leave all of her property with the exception of a dollar to Anastacia Alegria Arbelaitz, her daughter; John B. Alegria, her son; and Lawrence Alegria, a son; and she wanted to leave the other son, Joe, a dollar." She stated that Joe had treated her badly; that she had had a great deal of trouble with him for a period of years and that she felt that she did not want to leave him a thing except a dollar; that she thought the way to disinherit a person was to leave him a dollar. She told Mr. Raddue that she had been married once, gave him the name of her deceased husband, names of all of her children and their addresses, described her property to him, told him where her deceased husband had been buried in Cal-vary Cemetery, and that she wanted her funeral to be simple and inexpensive. She wanted John to act as executor. She told Mr. Raddue that she was certain Joe would contest her will and asked him what could be done with respect to that. He suggested that she put a non-contest clause in the will. Upon the suggestion of Mr. Raddue, the bequest to Joe was made $500 rather than $1 as a deterrent against Joe contesting the will. Mrs. Alegria left Mr. Raddue's office with the understanding that he would draft a will according to her directions.

Mr. Raddue then drafted a will and advised Mrs. Alegria, by letter, that he had done so. She returned to his office on April 6, 1942. Mrs. Alegria read the entire will. Mr. Raddue spent about an hour and a half going over the will with her, explained each sentence, and asked Mrs. Alegria if it expressed her intention. Mrs. Alegria stated she was completely satisfied with it. He then called in his secretary and Mr. Alfred W. Robertson, who, with Mr. Raddue, acted as witnesses. At this time Mr. Raddue asked Mrs. Alegria if she had read, and was fully familiar with, the will and she said that she was. She signed the will and initialed each page. She changed the month of the date from March to April in her own handwriting She asked Mr. Raddue what his fee was, and said she was going to place the will in her safety deposit box at the bank. Mr. Raddue and each of the witnesses to the will testified that Mrs. Alegria was of sound mind at the time it was executed.

[1] The foregoing is all of the evidence to which we have been referred bearing on the question of whether Mrs. Alegria was, at the time she executed her will, laboring under an insane delusion that Joe had attacked her. A consideration of the evidence in the light most favorable to contestant (Estate of Teel, 25 Cal.2d 520, 526, 154 P.2d 384) has convinced us that contestant produced no evidence which will support the verdict.

[2-6] Every person of sound mind, over the age of 18 years, may dispose of his property by will. Prob.Code, sec. 20. The presumption always is that a person is of sound and disposing mind. Estate of Arnold, 16 Cal.2d 573, 586, 107 P.2d 25; Estate of Perkins, 195 Cal. 699, 703, 235 P. 45. The burden was upon the contestant to prove affirmatively and by a preponderance of evidence that the testatrix was of unsound mind at the time of the execution of the will and the evidence is to be considered in view of this burden which the law casts upon him. Estate of Perkins, supra; Estate of Dolbeer, 149 Cal. 227, 230, 86 P. 695, 9 Ann.Cas. 795. In disposing of her property, Mrs. Alegria was not called upon to consult the wishes or views of her heirs or of juries or courts; her own will was supreme. " 'The right of a testator to dispose of his estate depends neither on the justice of his prejudices nor the soundness of his reasoning. He may do what he will with his own; and if there be no defect of testamentary capacity, and no undue influence or fraud, the law gives effect to his will, though its provisions are unreasonable and unjust.' Jackson v. Jackson, 39 N.Y. [153], 157." In re Spencer, 96 Cal. 448, 452, 31 P. 453, 454.

[7-9] Unsoundness of mind which will invalidate a will "must be an insanity of one of two forms, either insanity of such broad character as to establish mental incompetency generally, or some specific and narrower form of insanity, under which the testator is the victim of some hallucination or delusion." Estate of Chevallier, 159 Cal. 161, 168, 113 P. 130, 133; Estate of Perkins, 195 Cal. 699, 703, 235 P. 45; Estate of Hess, 183 Cal. 589, 596, 192 P. 35. The possession of an insane delusion which leads a testatrix to dispose of her property otherwise than she would have done had she not possessed such insane delusion is sufficient to invalidate a will. But to have such effect the testatrix must have been actually possessed of a delusion, and it must have been an insane one. Estate of Selb, 84 Cal.App.2d 46, 190 P.2d 277. In Estate of Putnam, 1 Cal.2d 162, at page 172, 34 P.2d 148, at page 153 the court said: "An insane delusion has been defined to be the conception of a disordered mind which imagines facts to exist of which there is no evidence and the belief in which is adhered to against all evidence and argument to

the contrary, and which cannot be accounted for on any reasonable hypothesis. 'One cannot be said to act under an insane delusion if his condition of mind results from a belief or inference, however irrational or unfounded, drawn from facts which are shown to exist.' Estate of Scott, 128 Cal. 57, 62, 60 P. 527, 529; Estate of Shay, 196 Cal. 355, 237 P. 1079; Estate of Perkins, 195 Cal. 699, 235 P. 45; Estate of Powell, 113 Cal.App. 670, 299 P. 108." "An insane delusion is not only one which is error, but one in favor of the truth of which there is not only no evidence, but regarding which there is the clearest evidence to the contrary. It is a delusion or conception which springs up spontaneously in the mind of a testator, and is not the result of his belief or knowledge of any fact which would in reason or in probability furnish evidence in its support. The law upon this subject has been very fully and ably set forth in Estate of Scott, 128 Cal. 57, 60 P. 527; Estate of Allen, 177 Cal. 668, 171 P. 686; Estate of Russell, 189 Cal. 759, 210 P. 249; Estate of Perkins [195 Cal. 699], 235 P. 45; Estate of Shay [196 Cal. 355], 237 P. 1079, and cases cited." Estate of Gunther, 199 Cal. 119, 125, 248 P. 514, 516; Estate of Horton, 128 Cal.App. 249, 257, 17 P.2d 184; Estate of Struve, 100 Cal. App. 255, 260, 279 P. 846. It must be such an aberration as indicates an unsound and deranged condition of the mental faculties, as distinguished from a mere belief in the existence or nonexistence of certain supposed facts or phenomena based upon some sort of evidence. Owen v. Crumbaugh, 228 Ill. 380, 81 N.E. 1044, 119 Am.St.Rep. 442, 10 Ann.Cas. 606. "If the belief or opinion has no basis in reason or probability, and is without any evidence in its support, but exists without any process of reasoning, or is the spontaneous offspring of a perverted imagination, and is adhered to against all evidence and argument, the delusion may be truly called insane; but if there is any evidence, however slight or inconclusive, which might have a tendency to create the belief, it cannot be said to be a delusion. * * * 'It must be a delusion of such character that no evidence or argument will have the slightest effect to remove.' Merrill v. Rolston, 5 Redf.Sur. 252. [Citations]." Estate of Scott, 128 Cal. 57, 62, 60 P. 527, 528; Estate of Shay, 196 Cal. 355, 361, 237 P. 1079; Estate of Kendrick, 130 Cal. 360, 364, 62 P. 605; Estate of Horton, 128 Cal.App. 249, 257, 17 P.2d 184; Estate of Clark, 100 Cal.App. 357, 371, 280 P. 204. If there is any evidence, however slight or inconclusive, which might have a tendency to create a belief, such belief is not a delusion. (57 Am.Jur. 92, sec. 82.) An insane delusion does not exist, unless it is one whose fallacy can be demonstrated; for except such demonstration can be made, it cannot be said that no rational person would entertain the belief. Scott v. Scott, 212 Ill. 597, 72 N.E. 708, 710.

[10-15] "Care must be taken to differentiate between mere unreasonable opinions and mental derangements. Testamentary capacity does not depend upon the testatrix' ability to reason logically or upon her freedom from prejudice. A belief may be illogical or preposterous, but it is not therefore evidence of insanity Estate of Scott, 128 Cal. 57, 67, 60 P. 527." Estate of Perkins, 195 Cal. 699, 708, 235 P. 45, 49; Estate of Powell, 113 Cal.App. 670, 675, 299 P. 108; Estate of Struve, 100 Cal.App. 255, 260, 279 P. 846. Capricious and arbitrary likes, dislikes and mistrusts are not evidence of unsoundness of mind. Estate of Perkins, supra; Estate of Hess, 183 Cal. 589, 596, 192 P. 35; In re Spencer, 96 Cal. 448, 452, 31 P. 453. "Prejudices, dislikes, and antipathies, however ill founded, or however strongly entertained, cannot be classed as insane delusions; nor is every delusion an insane delusion." Estate of Kendrick, 130 Cal. 360, 361, 364, 62 P. 605, 607; Estate of Perkins, supra; Estate of Schwartz, 67 Cal.App.2d 512, 519, 155 P.2d 76. The fact that a person dislikes his relatives, with or without reason, is not necessarily proof of unsoundness of mind. (Estate of Perkins, supra.) "People may hate their relatives for bad reasons, and yet not be deprived of testamentary power." Estate of Carpenter, 94 Cal. 406, 419, 29 P. 1101, 1105. A testatrix "has the right to make an unjust or an unreasonable or even a cruel will, and that no will may be legally set aside upon the mere establishment that it is such a will." Estate of Martin, 170 Cal. 657, 663, 151 P. 138, 141; Estate of Hinde, 200 Cal. 710,

714, 254 P. 561. "Irritability and bad temper may result in unnatural actions, but they are not inconsistent with testamentary capacity." Estate of Presho, 196 Cal. 639, 650, 238 P. 944, 948. (See, also, Schouler on Wills, sec. 162; 1 Underhill on Wills, sec. 94; 57 Am.Jur. Wills, sec. 80, et seq.)

[16, 17] The belief or inference must be "adhered to against reason and evidence." Estate of Calef, 139 Cal. 673, 675, 73 P. 539, 540. It must be adhered to by the testatrix "against and contrary to reason, facts, and evidence, up to and including the instant of the execution of the will." Estate of Horton, 128 Cal.App. 249, 257, 17 P.2d 184, 188. To prove that the testatrix was suffering from an insane delusion it must appear that there was no basis for her belief and that attempts were made by reasoning to dispel it. Estate of Kendrick, 130 Cal. 360, 370, 62 P. 605. The court should not permit a jury to set aside a will " 'merely upon suspicion, or because it does not conform to their ideas of what was just and proper.' " Estate of Kilborn, 162 Cal. 4, 13, 120 P. 762, 765.

With similar factual situations before them the courts have invariably held that an insane delusion had not been established. (Estate of Carpenter, 94 Cal. 406, 29 P. 1101, belief of testator that relatives had maltreated or abused him held not an insane delusion where there was no evidence that belief was unfounded; Estate of Scott, 128 Cal. 57, 60 P. 527, belief of testatrix that husband was unfaithful, was attempting to poison her and conspiring to place her in an asylum held not an insane delusion where based on fact husband had ceased having sexual intercourse with her, they occupied separate apartments in the house, and she had seen him with his arm around a family servant; Estate of Kendrick, 130 Cal. 360, 62 P. 605, belief of a testatrix that her sister had been trying to put her out of her house and had tried to kill her held not an insane delusion where sister had the keys to the house and had recorded a deed to the property given her by the testatrix on the understanding it was not to be recorded and had administered two doses of morphine to relieve her from pain; Estate of Shay, 196 Cal. 355, 237 P. 1079, belief of a testator that his daughter was addicted to liquor and squandered her money held not to be an insane delusion; Estate of Presho, 196 Cal. 639, 238 P. 944, belief of testator that his wife was doping and poisoning him held not an insane delusion where based upon statements of a person in whom testator had confidence; Estate of Gunther, 199 Cal. 119, 248 P. 514, belief of testator that contestant had received and not made proper use of properties given him by testator held not an insane delusion where contestant had allowed taxes to go delinquent, properties had been sold for delinquent taxes, and judgment had been obtained against contestant and properties sold on execution; Estate of Struve, 100 Cal.App. 255, 279 P. 846, belief of testatrix that two sons had taken advantage of her by recording two deeds conveying property to them held not an insane delusion where testatrix had signed the deeds and placed them in escrow to remain until her death and sons had recorded the deeds and where, when the testatrix learned that they had done so, she apparently became very angry with them expressing to them and to others that they had violated the agreement that the deeds should remain in escrow until her death; Estate of Selb, 84 Cal.App.2d 46, 190 P.2d 277, 284, belief of testatrix that daughter and grandson had "hounded her about her property" held not an insane delusion where based on their efforts to induce her to sell her home and go elsewhere; In re Johnson's Estate, 308 Mich. 366, 13 N.W.2d 852, belief of testatrix that her nephew was a worthless character and was trying to get her money and property held not an insane delusion where nephew had tried to borrow money from her; Higgins v. Smith, Mo.App., 150 S.W.2d 539, 543, belief of testatrix that her relatives were persecuting her and were mean and unkind to her held not an insane delusion where relatives had objected to her associating with a certain man, to her keeping late hours with him, and to her going to Philadelphia with him; Firestine v. Atkinson, 206 Iowa 151, 218 N.W. 293, belief of a testator that his illegitimate daughter was an immoral woman was not proof of an insane delusion when there was no evidence that the belief was harbored without evidence to support it; Bain v. Cline, 24 Or. 175, 33 P. 542, belief of a testator that certain of his children had wronged him by taking sides with their mother in a divorce suit, had testified falsely against him, did not respect him, and were trying to rob him of his property held not an insane delusion where the children had been witnesses in the divorce suit and testator thought they all sympathized with their mother; In re White's Will, 121 N.Y. 406, 24 N.E. 935, belief of testator that his son, a Mason, was conspiring with testator's neighbors, also Masons, to deprive him of his rights held not an insane delusion where there was a dispute between the testator and his neighbors about the true boundary line between their contiguous properties and his son had combated his views and attempted to show him in error.)

[18] The evidence is without conflict that the testatrix and Joe had frequent quarrels; that at her insistence a clause was put in a lease between them to the effect that Joe would keep pleasant relations; that on one occasion Joe had twisted loose from her causing her to fall and bump the side of her head; that shortly before Joe left the ranch his mother and he had quarreled; that he had his hand on her head; that Joe's wife told him to leave his mother alone, not to touch her; that testatrix had bruises on her head immediately thereafter; that he admitted using force on his mother in defending himself from her attack.

It cannot be said that there was an entire want of foundation for Mrs. Alegria inferring or believing that Joe had attacked her, or that her belief was the offspring of a perverted imagination, or that it sprang up spontaneously in her mind, or that it was the groundless and self-originating belief of a diseased mind, or that she imagined facts to exist of which there was no evidence, or that her belief was without any evidence, however slight or inconclusive, which might have a tendency to create the belief, or that it cannot be accounted for on any reasonable hypothesis, or that her belief was such an aberration as indicates an unsound and deranged condition of her mental faculties, or that it was not based upon evidence, however slight, or that it had no basis in reason or probability, or that her mind was so disordered that she imagined that Joe had attacked her. The circumstances which we have related offered some basis for the testatrix' belief that Joe had attacked her. The fact that there was this basis for the testatrix' belief, however mistaken or erroneous the conclusion drawn therefrom, distinguishes the belief from an insane delusion. Joe's testimony alone completely negates any basis for the implied finding that the testatrix suffered from an insane delusion. The facts related, however falsely Mrs. Alegria may have reasoned from them, if she did reason falsely from them, or however absurd her conclusions, if they were absurd, nevertheless furnished the evidence which inspired her inferences and the ground upon which her belief was founded.

The record is entirely devoid of even the semblance of any evidence raising even a suspicion that the testatrix was laboring under an insane delusion. The evidence entirely refutes a conclusion that the belief in the mind of the testatrix that Joe had attacked her was an insane delusion. The belief "did not originate in a diseased mind, but found color for its support in the matters that have been recited." Estate of Kendrick, 130 Cal. 360, 366, 62 P. 605, 608. It was not a delusion, much less an insane delusion. A belief to be an insane delusion must be adhered to against reason and against argument. It must appear that attempts were made by reasoning to dispel the belief. There is no evidence in the record to indicate that the belief of Mrs. Alegria that Joe had attacked her, even if it was a mistaken belief, was adhered to against reason or argument. There is no evidence that an attempt was made by any one to dispel her belief. Every one to whom she expressed the belief accepted it as a fact.

The evidence does not meet the test prescribed by the law as a foundation for setting aside the solemn testamentary act of the testatrix. There is not a scintilla of evidence to overcome the presumption of soundness of mind or the positive testimony of the sound mental condition of the testatrix at the time the will was executed.

[19] An appeal does not lie from an order denying a motion for a judgment of nonsuit or from an order denying a motion for a directed verdict. McKee v. Lynch, 40 Cal.App.2d 216, 228, 104 P.2d 675; Hollenbaugh v. Wickersheim, 114 Cal.App. 1, 2, 299 P. 90. The attempted appeals from the order denying appellants' motion for a judgment of nonsuit and from the order denying their motion for a directed verdict are, and each is, dismissed.

The judgment is reversed. The order denying appellants' motion for judgment notwithstanding the verdict is reversed with directions to grant the motion.

SHINN, P. J., and WOOD, J., concur.

Hearing denied; CARTER, J., dissenting.

87 Cal.App.2d 620

COLUMBIA PICTURES CORPORATION v. DE TOTH.

Civ. 16219.

District Court of Appeal, Second District, Division 3, California.

Sept. 20, 1948.

Rehearing Denied Oct. 19, 1948.

Hearing Denied Nov. 18, 1948.

1. Appeal and error 🔑931(1), 989

On defendant's appeal from judgment for plaintiff, full force of evidence and every inference favorable to plaintiff which could be drawn therefrom would be accepted, evidence in conflict therewith would be excluded, all conflicts would be resolved in favor of plaintiff, and all reasonable inferences in favor of findings would be indulged.

2. Declaratory judgment 🔑347
Master and servant 🔑6

In action by motion picture producing company for declaratory relief, evidence sustained findings in accordance with plaintiff's allegations that plaintiff and defendant director entered into an oral agreement of employment at a specific salary and options according to plaintiff's standard form of contract for directors, under which each intended to be bound, that plaintiff and defendant agreed to sign a writing at a future time, and that defendant breached the agreement.

3. Contracts 🔑32

Where parties orally agree upon all the terms of an agreement with mutual intention that agreement shall thereupon become binding, fact that a formal written agreement to same effect is to be prepared and signed does not alter binding validity of oral agreement.

4. Contracts 🔑32

Where parties intend that before a contract shall exist between them the terms are to be reduced to writing and signed by them, a binding contract does not arise until a writing evidencing the terms of the agreement has been executed.

5. Appeal and error 🔑1008(1)
Contracts 🔑32

Whether mutual intent of parties who enter into an oral agreement which is to be subsequently reduced to writing is that oral agreement should be binding eo instante, or is not to be binding until agreement is reduced to writing and signed by parties, is to be determined by the surrounding circumstances and is a fact question for trial court.

6. Principal and agent 🔑179(2)

Where motion picture director employed agent to represent director, and director left details to agent, and agent was familiar with standard form of director's contract used by producer and which director orally agreed upon, and agent had terms of form in mind during negotiations, director was chargeable with agent's knowledge of terms of form and was bound, even though knowledge was not communicated to director and was acquired by agent prior to agent's employment. Civ.Code, §§ 2330, 2332.

7. Principal and agent 🔑178(1)

A principal is chargeable with and bound by knowledge of, or notice to, his agent received while agent is acting within scope of his authority and which is with reference to matter over which his authority extends, regardless of whether agent's knowledge is communicated to principal or whether agent was guilty of a breach of duty to principal. Civ.Code, §§ 2330, 2332.

8. Principal and agent ⚷178(1)

The rule that a principal is chargeable with and bound by the knowledge of, or notice to, his agent received while agent is acting within scope of his authority and which is with reference to a matter over which his authority extends, is not a presumption. Civ.Code, §§ 2330, 2332.

9. Principal and agent ⚷179(2)

A principal is charged with knowledge which his agent acquires before the commencement of the relationship when that knowledge can reasonably be said to be present in the mind of the agent while acting for the principal. Civ.Code, §§ 2330, 2332.

10. Corporations ⚷432(12)

Evidence that agent of motion picture producing company with whom defendant director entered into an oral contract of employment was an executive of producing company and that his duties included the finding of new directors and the attempting to develop them so as to render them helpful to producing company, sustained finding that agent had authority to enter into oral contract of employment binding upon motion picture producing company.

11. Frauds, statute of ⚷53

An oral contract of employment for a period of one year immediately next ensuing with rendition of service to commence on the day after the agreement is entered into is not within the statute of frauds. Civ.Code, § 1624, subd. 1; Code Civ.Proc. § 1973, subd. 1.

12. Frauds, statute of ⚷53

Under statute of frauds which requires agreements not to be performed within one year "from the making thereof" to be in writing, the quoted words exclude the day upon which agreement is made, and the year begins with the following day and ends with the close of the anniversary of the day upon which agreement is made. Civ.Code, § 1624, subd. 1; Code Civ.Proc. § 1973, subd. 1.

See Words and Phrases, Permanent Edition, for all other definitions of "From the Making Thereof".

13. Frauds, statute of ⚷49

Under statute of frauds which requires agreements "Not to be performed within one year" from the making thereof to be in writing, an oral agreement is valid if it can be performed within one year. Civ.Code, § 1624, subd. 1; Code Civ.Proc. § 1973, subd. 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Not to be Performed Within One Year".

14. Frauds, statute of ⚷44(3)

Where oral agreement of employment was for less than one year, agreement was valid and not required to be in writing under the statute of frauds, and fact that agreement contained options entitling employer to renew agreement which were exercisable prior to the expiration of the original or any ensuing and current yearly term thereof, or the exercise of one or more of the options, did not affect validity of agreement. Civ.Code, § 1624 subd. 1; Code Civ.Proc., § 1973, subd. 1.

Appeal from Superior Court, Los Angeles County; William J. Palmer, Judge.

Action by Columbia Pictures Corporation, a New York corporation, against Andre DeToth for declaratory relief. From an adverse judgment, defendant appeals.

Judgment affirmed.

Oliver B. Schwab, of Beverly Hills, Robert E. Ford, of Los Angeles, and Arthur Livingston and Edward Rubin, both of Beverly Hills, for appellant.

Mitchell, Silberberg & Knupp and Arthur Groman, all of Los Angeles, for respondent.

VALLÉE, Justice.

Appeal by defendant from a judgment for plaintiff in an action for declaratory relief. The case was before the Supreme Court on an appeal from a judgment dismissing the action after an order sustaining a demurrer to the complaint without leave to amend. The judgment was reversed. Columbia Pictures Corp. v. DeToth, 26 Cal.2d 753, 161 P.2d 217, 162 A.L.R. 747.

Upon return of the cause to the superior court the complaint was amended. So far as pertinent here, the case went to trial on the amended complaint and defendant's answer thereto. By its amended complaint plaintiff-respondent, a producer of motion picture photoplays, sought a judgment declaring that on June 7, 1943, it and defendant-appellant had entered into an oral agreement whereby respondent employed appellant and appellant entered the employ of respondent as a director of motion picture photoplays for a term of one year immediately next ensuing to render services as such director and as respondent might designate from time to time within said term of one year; that respondent agreed to pay appellant, in consideration of said services, the sum of $250 a week for each week that he should actually render services under the contract; that by the agreement respondent should have the right to loan the services of appellant to others, in which event appellant agreed to render his services to such others to the best of his ability; that by the agreement it was agreed that respondent should have the right to place appellant on layoff without compensation for specific periods; that respondent was given the option or privilege of renewing or extending the agreement for a term of one additional year at a compensation of $350 a week, a second additional year at a compensation of $500 a week, a third additional year at a compensation of $750 a week, a fourth additional year at a compensation of $1,000 a week, a fifth additional year at a compensation of $1,250 a week, and a sixth additional year at a compensation of $1,500 a week, and that each and all of the options were to be exercised by the plaintiff before the expiration of the original or any ensuing and current yearly term thereof.

Respondent, Columbia Pictures Corporation, referred to as Columbia, is a producer of motion picture photoplays. In 1943, Arnow was an executive of Columbia. Allenberg was a motion picture agent. In early 1943, appellant DeToth was an unknown quantity in the motion picture industry in this country, with no reputation as a director. On February 19, 1943, Columbia employed DeToth to write the script of a picture, "The Clock Struck Twelve." On April 22, 1943, Columbia, by a writing, employed DeToth to direct "The Clock Struck Twelve." DeToth directed the picture, working for four weeks. His compensation was $350 a week. "The Clock Struck Twelve" was a class B "Lone Wolf" picture, or low budget detective story. About this time DeToth employed one Matone, a motion picture agent, to assist him in obtaining employment as a director. Matone then negotiated with Columbia, seeking a term contract for DeToth. Columbia and other motion picture producers, generally, have two standard forms of contract with directors. A "one picture contract," which is one in which a director is employed to direct one picture, and a "term contract," which is one in which a director is employed for a specific period of time, with or without options in the producer to renew the employment for definite periods in the future. Under a "term contract" the producer may require the director to direct any picture or pictures it wishes.

After completion of "The Clock Struck Twelve" and on June 2, 1943, DeToth had a conversation with Arnow in which Arnow told him that Columbia was considering making a "term contract" with him, with a salary of $250 a week for the first year, and the options alleged in the amended complaint, on the general standard form of contract used by Columbia for directors. DeToth expressed appreciation to Arnow of the fact that he was going to obtain a "term contract." DeToth denied this conversation. He testified that he was not alone with Arnow when salary or options were discussed, they were discussed only when Allenberg was present and that: "He [Arnow] asked me once if I would want to sign a long-term deal, and which I said I would be more than willing to do so, but no terms were discussed. The detailing of the terms came up only in connection with the contract of long-term." After this conversation with Arnow, DeToth immediately cancelled his agency agreement with Matone, and on June 2, 1945, by a writing, employed Allenberg for a period of five years "to use all reasonable efforts to assist me in negotiating for employment whenever my services are or will be available." He did so because he thought Allenberg could better assist him in obtaining a "term contract" with Columbia. DeToth testified: "Later when the deal became 'hot', I approached an agent, Bert Allenberg." DeToth told Allenberg at the time he employed him of his conversation with Arnow, that Columbia was "about to give him an important assignment," that they wanted him to sign a "term contract", and that he had some sort of an agreement with a New York lawyer to act as his agent, which expired July 19, 1943. He did not tell Allenberg that he had entered into a long term contract "because that wouldn't have been the truth." Allenberg advised DeToth that if he signed a term contract with Columbia prior to the expiration of the other agent's contract that he would be obligated to pay the other agent for the full period of the Columbia term contract and that he (Allenberg) thought he could make a satisfactory arrangement with Columbia whereby DeToth could have the term contract but not actually sign until after the agency contract with the other agent had expired. Allenberg then telephoned Arnow and told him that he was now DeToth's agent. On June 7, 1943, Allenberg and DeToth went to see Arnow. Arnow read to them the terms he had previously stated to DeToth as to salary and options and stated that Columbia insisted that DeToth sign a "term contract." Allenberg then told Arnow about DeToth's contract with the New York agent and asked Arnow if he would take his, Allenberg's, word for it that DeToth would sign the term contract as soon as he was legally free from the prior agent. Arnow said that he would. Allenberg then had Arnow repeat the salaries and options to DeToth and turned to DeToth and said "Is that correct? Do you agree?" DeToth said "Yes." The three then shook hands and one of them said "This is a deal." After Arnow had stated the terms Allenberg said to DeToth: "I have given my word that you will sign this agreement. The studio is willing to give you another picture without your signing on the strength of my reputation here. So I want to ask you in front of Arnow, 'Do you agree, and will you sign it when you are free of your other agent?'" DeToth said "Yes." At the time DeToth asked Arnow to delay the signing of the contract until after July 19th.

Columbia has standard contracts that it uses for actors and directors. When a contract is prepared the only information its legal department receives is the name of the party with whom the contract is to be made, salary and length of time of the contract. Allenberg was familiar with the Columbia standard form of contract for directors. He understood that that was the type of contract they were discussing. Arnow told DeToth that he was going to make one picture between June 7 and July 20. DeToth then left the meeting. Allenberg remained with Arnow and sought to get him to increase the salary previously agreed upon. Arnow would not increase it. It was then agreed between Allenberg and Arnow that DeToth would immediately commence direction of "Nine Girls," and a written agreement, dated June 7, 1943, was signed by Columbia and DeToth, covering its direction. Allenberg persuaded Arnow to increase DeToth's salary for directing "Nine Girls" from $250 a week to $350 a week, on the argument that DeToth had been paid $350 a week for directing "The Clock Struck Twelve" and his salary should not be reduced. "Nine Girls" was DeToth's first picture under his "term contract." Arnow would not have entered into the one-picture contract for "Nine Girls" in the absence of an understanding on his part that Columbia had a long term contract with DeToth. If it had not had a long term contract it would have insisted on an option in the "Nine Girls" contract. A short time later another picture, "None Shall Escape," was substituted for "Nine Girls" by agreement between Columbia and DeToth. "None Shall Escape" was a AA picture. It cost $520,000. Either on or immediately following July 19, 1943, Arnow called Allenberg to have DeToth sign the term contract. Allenberg told Arnow that they should delay signing until after DeToth had completed "None Shall Escape." Arnow, after consultation with others at Columbia, agreed. At that time Allenberg told Arnow that as soon as DeToth finished "None Shall Escape" he would sign the term contract.

On September 20, 1943, a memorandum was sent by an executive assistant at Columbia, whose duty it was to review all contracts, to its legal department to prepare a long term contract with DeToth as a director specifying salary, options and time. A written contract was prepared containing the salaries and options discussed by Arnow, DeToth and Allenberg on June 7, 1943, and the provisions of Columbia's standard term contract for directors and sent to Allenberg. The term contract which was prepared is practically identical with the one-picture contract that DeToth had signed for direction of "The Clock Struck Twelve" except for length of time, options, a loan out arrangement, and layoff provisions in the term contract. Allenberg persuaded Columbia to agree to several changes in the written form, all favorable to DeTroth. The contract as prepared contained a 15-day notice to the director of the exercise of an option and the right in Columbia to terminate the contract in the event of illness of the director for one consecutive week or two weeks in the aggregate during the term. Upon DeToth's request to Allenberg, and Allenberg's persuasion, Columbia agreed to a 30-day notice to DeToth of the exercise of an option and to a right to terminate in the event of his illness for two consecutive weeks or four weeks in the aggregate during the term. As prepared the contract called for a 32 weeks term from October 27, 1943, instead of 52 weeks. This was done because if it was made for 52 weeks DeToth would have a salary of $250 a week for 52 weeks from October 26, and a change to a higher compensation would have been delayed that much longer. This was done at the request of DeToth. Allenberg went to Kahane and Cohen, executive vice-president and president, respectively, of Columbia, in an effort to increase the salary specified in the contract. Columbia agreed to a bonus of $100 a week payable if DeToth fully performed the contract and his services were satisfactory to Columbia. The form of contract submitted with the changes made at Allenberg's suggestion contained his understanding of the oral agreement entered into June 7, 1943, in Arnow's office. Allenberg testified that an oral agreement was made June 7, 1943, and that DeToth agreed to the options.

After completion of shooting of "None Shall Escape" on October 25, 1943, until December 24, 1943, DeToth worked at Columbia every day for six or eight hours, with the exception of a two-week period. He made the director's first cut of "None Shall Escape." At the request of Columbia he read about nine scripts for the purpose of finding suitable material for a picture for him to direct. He worked on an Army short at Columbia. During the excepted two-week period he was loaned by Columbia to Selznick, another motion picture producer, to direct a sequence of a picture Selznick was producing. Late in November, 1943, DeToth told Allenberg that he was going to work for Selznick. Allenberg told DeToth that "he could not do that, that he was under contract to Columbia and he had no right to make any deals with anybody; and that if he wanted to do this thing for Selznick he should tell Columbia and let Columbia make a loan-out deal." Allenberg immediately called up Selznick and told him the facts and had DeToth talk to Selznick. DeToth told Selznick that he was not in a position to make the deal, that he was under contract with Columbia, and that if he (Selznick) wanted him, he would have to borrow him from Columbia. Arnow then told DeToth to report to Selznick and he reported. Selznick paid Columbia $1,000, or $500 a week, for DeToth's services. After he finished at Selznick he returned and worked at Columbia. The records of Columbia show DeToth assigned to the shooting of a picture until October 19, 1943; after that date until the end of the week of December 22, 1943, he was carried on the list of directors as "unassigned" to a picture. If a director is on a one-picture contract, Columbia does not carry him on its list of directors or marked "unassigned" after he finishes that picture. It only so carries directors under a term contract.

About December 1, 1943, DeToth talked to Kahane, executive vice-president of Columbia. He told Kahane that he did not like being tied up for seven years. Kahane explained the producer's reasons for requiring options, after which DeToth said he was going into Arnow's office and sign the contract. DeToth talked to Kahane and to Cohen, president of Columbia, on December 24, 1943. He told them that he was not convinced he should sign for seven years; that he did not mind being signed up for a reasonable number of years, but that he shuddered at being tied up for seven years. Cohen said, "[b]ut you agreed to 7 years; you ought to adhere to your agreement." DeToth said, "[a]ll right, I will sign a contract."

DeToth was fully paid to October 26, 1943. Columbia issued checks payable to him for his compensation at $250 a week from October 26, 1943, through February 19, 1944. This action was begun March 2, 1944. About October 26, 1943, Allenberg, with the approval of DeToth, asked Columbia not to pay any salary to DeToth while they were discussing an increase. Allenberg's idea was that if the salary of $250 was paid the Wage Stabilization Board would not consent to an increase. Columbia would have paid DeToth $250 a week if it had not been for Allenberg's request. DeToth testified that he told Arnow and Kahane that he had offers of $1,200 and $1,500 and that if they would only come up to $850 he would stay. DeToth ceased working at Columbia December 20, 1943. He then went to work for Stromberg at $1,000 a week. He did not, at any time, sign the contract. At the time of the trial DeToth was receiving $3,077 a week as a director.

[1, 2] The foregoing recital is made from the evidence by accepting its full force and every inference favorable to the respondent which may be drawn therefrom, by excluding all evidence in conflict therewith, by resolving all conflicts in favor of respondent and indulging in all reasonable inferences in favor of the findings. Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689.

The court found that on June 7, 1943, Columbia and DeToth entered into an oral agreement as set forth in the conversations had between Arnow, DeToth and Allenberg on June 7, 1943, as recited above, with salaries and options as alleged by Columbia, and according to Columbia's standard form of contract for directors; that it was the intention of each party to be bound by the oral agreement from June 7, 1943, forward; that the parties anticipated that the oral agreement would, at some future time, be reduced to writing, but that reduction to writing was not a condition precedent to the existence of the binding oral agreement. A copy of the contract, found to have been entered into, is made a part of the findings. Judgment followed accordingly. DeToth appealed.

[3-5] Appellant first contends that the evidence is insufficient to support the findings. There is no merit in the contention. The evidence recited is amply sufficient to support the findings that the parties entered into the oral agreement at the salaries and with the options specified and according to Columbia's standard form of contract for directors, that they agreed to sign a writing at a future time, and that appellant breached the agreement. It is true, as appellant says, that there is much other evidence in the record from which the court could have drawn contrary inferences and concluded that no oral agreement was made. We may not concern ourselves with that question. The cases are legion to the effect that when the respective parties orally agree upon all of the terms and conditions of an agreement with the mutual intention that it shall thereupon become binding, the mere fact that a formal written agreement to the same effect is to be prepared and signed does not alter the binding validity of the oral agreement. Johnston v. 20th Century-Fox Film Corp., 82 Cal.App.2d 796, 187 P.2d 474; Kreling v. Walsh, 77 Cal.App.2d 821, 834, 176 P.2d 965; Gibson v. De La Salle Institute, 66 Cal.App.2d 609, 630, 152 P.2d 774; Thompson v. Schurman, 65 Cal.App.2d 432, 440, 150 P.2d 509; Annotations: 122 A.L.R. 1217, 165 A.L.R. 756. It is, of course, likewise the law that if it is the intention of the parties that before a contract shall exist between them, the terms

of the contract are to be reduced to writing and signed by them, a complete or binding contract does not arise until a writing evidencing the terms of the agreement has been executed. Dexter v. Ankiewicz, 26 Cal.App.2d 326, 333, 79 P.2d 400; Plummer v. Ehlers, 50 Cal.App.2d 352, 122 P.2d 939; Annotations: 122 A.L.R. 1217, 165 A.L.R. 756. The distinction between the two lines of cases is pointed out in O'Donnell v. Lutter, 68 Cal.App.2d 376, 382, 156 P.2d 958. Whether it was the mutual intention of the parties that the oral agreement should be binding eo instante is to be determined by the surrounding facts and circumstances of a particular case and is a question of fact for the trial court. Thompson v. Schurman, supra; Johnston v. 20th Century-Fox Film Corp., supra; Annotation: 122 A.L.R. 1233. The findings as to the terms and conditions of the oral agreement and that it became effective June 7, 1943, are supported by substantial evidence.

[6-9] Appellant argues in this connection that he did not know on June 7, 1943, what Arnow meant when he said the contract would be "the standard form contract that we use for young directors," and that he did not know the detailed and elaborate provisions of such contract. Appellant was represented in the making of the contract by Allenberg. Allenberg was hired by appellant for the express purpose of representing him in the matter of his employment by respondent. Allenberg was an experienced motion picture agent. He was familiar with the standard form of director's contract used by Columbia. Appellant left the details to Allenberg. The written form of contract submitted by Columbia was in accord with Allenberg's understanding of the terms agreed upon at the meeting of June 7, 1943, at which time appellant accepted Columbia's offer of the term contract. Civil Code, section 2330, provides: "An agent represents his principal for all purposes within the scope of his actual or ostensible authority, and all the rights and liabilities which would accrue to the agent from transactions within such limit, if they had been entered into on his own account, accrue to the principal." Civil Code, section 2332, provides: "As against a principal, both principal and agent are deemed to have notice of whatever either has notice of, and ought, in good faith and the exercise of ordinary care and diligence, to communicate to the other." A principal is chargeable with and is bound by the knowledge of, or notice to, his agent received while the agent is acting within the scope of his authority and which is with reference to a matter over which his authority extends. Vanciel v. Kumle, 26 Cal.2d 732, 734, 160 P.2d 802; Bogart v. George K. Porter Co., 193 Cal. 197, 209, 210, 223 P. 959, 31 A.L.R. 1045; Wittenbrock v. Parker, 102 Cal. 93, 101, 36 P. 374, 24 L.R.A. 197, 41 Am.St.Rep. 172; 2 Am.Jur. 286, sec. 368; 3 C.J.S., Agency, § 262, page 194; Annotations: 4 A.L.R. 1592; 38 A.L.R. 820. The fact that the knowledge acquired by the agent was not actually communicated to the principal, as contended by appellant, does not prevent operation of the rule. The knowledge is, in law, imputed to the principal. The agent may have been guilty of a breach of duty to his principal, yet the knowledge has the same effect as to third persons as though his duty had been faithfully performed. The agent acting within the scope of his authority, is, as to the matters existing therein during the course of the agency, the principal himself. Wittenbrock v. Parker, 102 Cal. 93, 101, 102, 36 P. 374, 24 L.R.A. 197, 41 Am.St. Rep. 172; Watson v. Sutro, 86 Cal. 500, 516, 24 P. 172, 25 P. 64; New England Trust Co. v. Bright, 274 Mass. 407, 174 N.E. 469, 73 A.L.R. 416, 418; Farnsworth v. Hazelett, 197 Iowa 1367, 199 N.W. 410, 38 A.L.R. 814, 817; Rest., Agency, secs. 272, 275; Annotations: 4 A.L.R. 1592, 38 A.L.R. 821, 76 A.L.R. 90. An agency's knowledge of the content of a contract is imputed to his principal. Blair v. Wessinger, 39 Cal.App. 269, 273, 178 P. 545; Preleski v. Farganiasz, 97 Conn. 345, 116 A. 593, 595; Baruch v. Buckley, 167 App.Div. 113, 151 N.Y.S. 853, 855; Shrader v. Porter, 210 Ky. 429, 276 S.W. 115; Harding v. Home Inv. & Sav. Co., 49 Idaho 64, 286 P. 920, 922, 297 P. 1101; Klundt v. Sande, 54 S.D. 421, 223 N.W. 338. This rule of law is not a rebuttable presumption. It is not a presumption at all. It is a rule which charges the principal with the knowledge possessed by his agent. (2 Am.Jur. 289, sec. 369; Annotations: 4 A.L.R. 1592, 38 A.L.R. 821.) The fact that Allenberg acquired his knowledge of the terms of Columbia's standard form of contract for directors prior to his agency does not affect application of the rule. The principal is charged with knowledge which his agent acquires before the commencement of the relationship when that knowledge can reasonably be said to be present in the mind of the agent while acting for the principal. Schiffman v. Richfield Oil Co., 8 Cal.2d 211, 220, 64 P.2d 1081; Bogart v. George K. Porter Co., supra, 193 Cal. 197, 210, 223 P. 959, 31 A.L.R. 1045; Wittenbrock v. Parker, supra, 102 Cal. 93, 103, 36 P. 374, 24 L.R.A. 197, 41 Am.St.Rep. 172; Hanlon v. Western Loan & Bldg. Co., 46 Cal.App.2d 580, 596, 116 P.2d 465; Atkinson v. Foote, 44 Cal.App. 149, 165, 186 P. 831; Farnsworth v. Hazelett, supra, 197 Iowa 1367, 199 N.W. 410, 38 A.L.R. 818; Rest., Agency, sec. 276; 2 Am.Jur. 294, sec. 376, 3 C.J.S., Agency, § 274, page 206; Annotations: 4 A.L.R. 1614, 38 A.L.R. 823. During the course of, and within the scope of his employment, Allenberg knew and had in mind the terms of the standard form of director's contract used by Columbia. Appellant is chargeable with knowledge of the terms and provisions of the contract.

[10] Appellant's second contention is that Arnow, as Columbia's agent, was not shown to have authority to enter into an oral agreement binding Columbia. The court found that Arnow, an executive of Columbia, was particularly charged with the duty of employing actors and directors of minor stature for Columbia. The evidence is to the effect that appellant was, on June 7, 1943, a director of minor stature; that Arnow was an executive of Columbia; that it was his "job to try and find not only new actors and actresses, but also directors and sort of look after those and try to develop them so that they will become important personalities and be of help to Columbia." This evidence, with the inferences which may reasonably be drawn therefrom is sufficient to support the finding in this respect.

Appellant's third contention is that the trial court erred in concluding that the oral agreement was not subject to the defense of the statute of frauds. Appellant first argues that the oral agreement was made on June 2, 1943, with the original term to expire June 6, 1944, and, therefore, that it was within the statute of frauds. (Civil Code, sec. 1624, subd. 1; Code Civ.Proc., sec. 1973, subd. 1.) As stated above, the court found that the oral agreement was made on June 7, 1943, and this finding is amply supported by the evidence. The oral agreement, as found by the court, contains the following: "24. In consideration of the execution of this Agreement by the Producer, the Director hereby gives and grants to the Producer the following options: (a) To extend the term of the employment of the Director for an additional period of one (1) year from and after the expiration of the term hereinabove specified upon the same terms and conditions as those herein contained, except that the rate of compensation to be paid the Director for this extended period shall be Three Hundred Fifty Dollars ($350.00) a week for each and every week during said term that the Director actually renders his services hereunder; and except that the Producer shall have the right of placing the Director on layoff, without compensation, for a period or aggregate of periods equal to the period in excess of forty (40) weeks during the term." It contains similar provisions, with the increased salaries agreed to, for five succeeding years. It also contains the following provision: "25. Each of the options provided for in Article 24 may be exercised at any time at least thirty (30) days prior to the expiration of the respective next preceding period of employment. The exercise of any option or options granted herein shall be accomplished only by the service upon the Director by the Producer, or his authorized agent, of a written notice of election to exercise said option." Appellant argues that it was error to declare the entire oral agreement with the six yearly options to be valid under the statute of frauds. He says that: "Each option had to be exercised by Columbia no later than thirty days prior to the expiration of the year preceding the 'option year.' When exercised each option gives rise to an unconditional agreement of employment to commence at least thirty days after the exercise of the option and to continue for one year after its commencement. Such an agreement of employment for a period of one year to commence in futuro is invalid under the Statute of Frauds."

[11-13] The point was decided adversely to appellant's contention by the Supreme Court on the prior appeal. Columbia Pictures Corp. v. DeToth, 26 Cal.2d 753, 161 P.2d 217, 162 A.L.R. 747. The court there said, 26 Cal.2d at page 758, 161 P.2d at page 219: "An oral contract of employment for a period of one year 'immediately next ensuing,' with rendition of service to commence on the day after the agreement is entered into is not within the statute of frauds. In applying that provision of the statute, Civ.Code, § 1624, subd. 1, requiring an agreement to be in writing which by its terms is not to be performed 'within a year from the making thereof,' the words 'from the making thereof' are now uniformly construed to exclude the day upon which the agreement is made; that is, the year is considered to begin with the following day and to end at the close of the anniversary of the day on which the agreement is made. Nickerson v. President and Fellows of Harvard College, 298 Mass. 484, 11 N.E. 2d 444, 114 A.L.R. 414, note, p. 416; 49 Am.Jur. § 24, p. 385, § 54, p. 411; Rest., Contracts (vol. 1) § 198, comment d. A contingency which may extend the period of employment for more than one year, such as that created by the option provisions here alleged, does not bring a contract within the operation of the statute. Swift v. Swift, 46 Cal. 266; Hollywood Motion Picture Equipment Co. v. Furer, 16 Cal.2d 184, 105 P.2d 299, 12 Cal.Jur. § 5, p. 858; 49 Am.Jur. § 25, p. 387; 111 A.L.R., note p. 1105."

The original complaint which was before the Supreme Court contained the following allegations: "that further by the terms and provisions of said agreement plaintiff was given and granted the option or privilege of renewing or extending said contract for a term of one additional year at a price or compensation of $350.00 per week, a second additional year at a price or compensation of $500.00 per week, a third additional year at a price or compensation of $750.00 per week, a fourth additional year at a price or compensation of $1,000 per week, a fifth additional year at a price or compensation of $1250.00 per week, and a sixth additional year at a price or compensation of $1500.00 per week, each and all of said options to be exercised by plaintiff before the expiration of the original or any ensuing and current yearly term thereof." The allegations of the amended complaint were the same.

[14] Appellant says that the Supreme Court did not pass on the question now presented because the original complaint did not allege, what now appears from the evidence, that each option must be exercised at least thirty-days "prior to the expiration of the respective next preceding period of employment." Under the allegations of the original complaint and under the evidence an option had to be exercised before the beginning of an additional period of one year. The result is the same in either case. Appellant misconceives the effect of the statute of frauds. The oral agreement was for less than one year. Its term began June 8, 1943, one day after its date, and ended June 7, 1944. It was a valid oral agreement not affected by the statute. The fact that the agreement contained options exercisable prior to "the expiration of the original or any ensuing and current yearly term thereof" did not affect its validity. The possibility of the exercise of the options was a contingency which might never happen. Neither does the exercise of one or more of the options affect the validity of the oral agreement. This is true even though an option is exercised more than thirty days before a term of one year is to begin, thus becoming a binding obligation on the part of both parties for more than one year. If the agreement can be performed within one year it is valid. It is only when it cannot be fully performed within one year that it is invalid. The statute says "by its terms is not to be performed within a year." (Civ.

Code, sec. 1624, subd. 1; Code Civ.Proc., sec. 1973, subd. 1.) In Swift v. Swift, 46 Cal. 266, at page 268, cited in Columbia Pictures Corp. v. DeToth, supra, 26 Cal. 2d 758, 161 P.2d 217, it is said that the agreement is not within the statute "[w]hen the time for the performance of the contract is made to depend upon some contingency which may or may not happen within one year." The oral agreement, if valid in its inception, is valid throughout. The fact that performance may have extended over a greater period than one year does not bring the agreement within the statute. In McKeany v. Black, 117 Cal. 587, 592, 49 P. 710, it is said: "If the contract, by its terms, is not to be performed within a year, it is void; but if it may, 'by its terms,' be performed within a year, it is not, even though it may not be performed, or is not likely to be performed, within that time." The principle is stated in American Jurisprudence as follows: "Similarly, where the period for the duration of the contract in the first instance is within a year, the fact that the time of performance may be enlarged on the happening of some contingency beyond a year does not bring it within the statute, for it is nevertheless a contract which may be performed within a year from the time of its inception." (49 Am. Jur. 387, sec. 25, p. 387, and cases there cited.) Williston states the rule this way: "An oral contract which is capable of performance within a year is not invalidated by the fact that a later contract between the parties made in furtherance of the first cannot be performed within that time." (2 Williston on Contracts, sec. 495, p. 1448.) The Restatement says: "The words 'cannot be fully performed' must be taken literally. The fact that performance within a year is highly improbable or not expected by the parties does not bring a contract within the Statute." (Rest., Contracts (vol. 1), sec. 198, comment b.) (To the same effect: Hollywood Motion Picture Equipment Co. v. Furer, 16 Cal.2d 184, 187, 105 P.2d 299; Raynor v. Drew, 72 Cal. 307, 309, 13 P. 866; Osment v. McElrath, 68 Cal. 466, 469, 9 P. 731, 58 Am.Rep. 17; Dougherty v. Rosenberg, 62 Cal. 32, 37; Banta v. Rosasco, 12 Cal.App.2d 420, 423, 55 P.2d 601; Kressly v. District Bond Co., 138 Cal.App. 565, 32 P.2d 1112; Dutton Dredge Co. v. United States Fidelity & Guaranty Co., 136 Cal.App. 574, 579, 29 P.2d 316; Stewart v. Smith, 6 Cal.App. 152, 158, 91 P. 667; Hewins, Inc., v. Marlboro Cotton Mills, 242 Mass. 282, 136 N.E. 159, 23 A.L.R. 449, 451; Carlin v. Bacon, 322 Mo. 435, 16 S.W.2d 46, 69 A.L.R. 1; Woodall v. Davis-Creswell Mfg. Co., 9 Colo.App. 198, 48 P. 670; 37 C.J.S., Frauds, Statute of, §§ 51, 53, page 560; Annotations: 129 A.L.R. 534, 536; 15 L.R.A.,N.S., 321, 326; Ann.Cas.1916E, 1137, et seq.; 138 Am.St.Rep. 599, et seq.) The fact that option provisions, which, if exercised, enlarged the time of performance beyond a year, were included in the oral agreement did not invalidate it under the statute of frauds, "for it is nevertheless a contract which may be performed within a year from the time of its inception." (49 Am.Jur. 387, sec. 25.)

Judgment affirmed.

SHINN, P. J., and WOOD, J., concur.

PEOPLE v. KLOR.

Cr. 4802.

Supreme Court of California, in Bank.

Sept. 28, 1948.

Rehearing Denied Oct. 25, 1948.

1. Homicide ⚷274

In prosecution for assault with a deadly weapon with intent to commit murder whether defendant fired the shots in belief that he was apprehending a thief or did so from disappointment that a prospective sale had been frustrated by the victim was a question for jury.

2. Criminal law ⚷814(8)

In prosecution for assault with a deadly weapon with intent to commit murder, evidence did not entitle defendant to an instruction that an act performed under a mistake of fact which if true would not have amounted to a crime, is not a crime.

3. Criminal law ⚷824(4)

Defendant could not complain of failure of court to instruct respecting an act performed under a mistake of fact where he did not request an instruction thereon.

4. Criminal law ⚷824(1)

With respect to specific points developed at trial unless instructions thereon are requested by parties desiring them, the court need not give them of its own motion, where the jury is otherwise fully and fairly instructed on the general principles of law involved.

5. Criminal law ⚷706

If prosecution desires to use husband or wife of defendant as a witness, proper procedure is to offer the spouse as a witness subject to claim of privilege by defendant. Code Civ.Proc. § 1881, Pen.Code, § 1322.

6. Criminal law ⚷706, 721½(1), 730(3, 11)

Where prosecution was aware that it had not issued a subpoena for defendant's wife to appear in a criminal prosecution against him, calling out of her name during course of prosecution's case, with no evident intention of making her a prosecution witness, coupled with later references in argument as to her failure to testify was improper, but did not require a reversal in view of court's admonition to the jury, and evidence clearly indicating defendant's guilt. Pen.Code, § 1322.

CARTER and SCHAUER, JJ., dissenting.

* * *

Appeal from Superior Court, Los Angeles County; William R. McKay, Judge.

David Klor was convicted of assault with a deadly weapon and he appeals.

Affirmed.

For prior opinion see 190 P.2d 643.

Morris Lavine, of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., and Henry A. Dietz, Deputy Atty. Gen., for respondent.

SHENK, Justice.

The defendant was charged with the crime of assault with a deadly weapon with intent to commit murder. He pleaded not guilty and after trial by jury was convicted of assault with a deadly weapon. He appeals from the judgment and from an order denying his motion for a new trial.

As grounds of appeal it is urged that the evidence is not sufficient to support the verdict; that the trial court erred in failing to instruct the jury on a specific point; and that the district attorney was guilty of prejudicial misconduct in referring to the fact that defendant's wife did not testify at the trial.

The evidence relating to the first ground was as follows: The defendant was the proprietor of a jewelry store on West Fifth Street in Los Angeles located a short distance around the corner from a branch shoe shop. In the forenoon of June 12, 1946, a young lady employee of the shoe shop entered the jewelry store and began to look at watches. Shortly thereafter Kenneth Temple, the manager of the shoe shop, also came to the jewelry store and after a few words with the young lady left the store with her. At this time defendant's wife and a salesman named

Goldman were in the store. One Sogg was trimming the window and defendant was outside sweeping the sidewalk. Goldman testified that immediately after the young lady and her companion left the premises defendant came into the store and asked him what had happened. He told the defendant that the young lady was on the point of buying a watch from him when he looked up and saw Temple and heard him say to her, "Is that the watch you are buying?"; that Temple began to examine the watch the young lady was interested in, compared it with his own, and "more or less threw it back" toward Goldman; and that he then said to the young lady, "Come with me", and taking her by the arm walked out of the store with her. Goldman also testified that he told Temple the young lady had been a satisfied customer and that she had previously bought a watch or clock. He also stated that when the defendant finished his questioning he obtained from his wife the telephone number of the shoe company and held a brief conversation with someone at the main store. A few minutes later he secured from his wife the telephone number of the branch shoe shop nearby and asking for the manager held a short conversation with Temple. Goldman stated that after these conversations the defendant became very excited and secured a revolver from one of the show cases; that both he and the defendant's wife told the defendant not to get excited but that the defendant began waving the revolver around and aimed it at the door. A short time later Temple appeared in the doorway and the defendant waved the gun around again and pointed it at the door. Temple then turned and ran out, proceeding down the street in the direction of the shoe shop. The defendant ran after him, firing four or five shots as he ran. He was finally disarmed by a traffic officer who stated that the defendant told him that Temple had stolen a watch from him. One of the bullets fired by the defendant passed through Temple's lung and the others pierced his arms.

The defendant had not known Temple prior to these occurrences. He testified that he was working on watches behind the counter when he saw Temple approach and "swing at him"; that he then heard Temple say, "I will take this watch for nothing"; and observed him running toward the door. According to the defendant's testimony, Temple also said, "What are you going to do about it?", whereupon he secured the gun and ran from the store in pursuit of Temple. He stated that as he ran he shouted "Stop Thief", and fired a shot into the air to frighten Temple; that Temple continued to run, holding the watch in his hand and that he (defendant) continued to shoot at him. It should here be noted that at the preliminary hearing the employee Goldman confirmed the defendant's statement that he heard someone say, "I will take this watch for nothing", and stated that thereafter he saw defendant secure the gun and follow Temple out of the store. At the trial Goldman admitted that he had so testified at the preliminary hearing but declared that the circumstances leading up to the shooting had been as he testified at the trial (as previously referred to herein). Temple's testimony confirmed that given by Goldman at the trial. Sogg testified that he saw Temple running down the street with the defendant in pursuit and that he heard the latter say, "Stop that man. That man is a thief and a robber." Although the defendant stated that Temple had entered the store and stolen a watch immediately before he armed himself with the gun he admitted having had the conversation with Goldman as to "what had happened" when the young lady and Temple were in the store a few minutes earlier. He also admitted having held the telephone conversation with the main shoe store and with Temple. He stated that when he talked to Temple on the telephone he told him it was unfair and unethical to drag customers out of his store; and that Temple started to use vile names against him whereupon he hung up. Despite the defendant's testimony that Temple had stolen the watch that the young lady had looked at and had it in his hand as he was running down the street the evidence otherwise was that the watch had not been taken from the store but remained there at all times. Later on the day of the shooting the watch was turned over to a police officer who called at the jewelry store.

[1] In view of the conflict in the evidence it was, of course, for the jury to say whether the defendant fired the shots in the belief that he was apprehending a thief as he claimed, or whether, under the version given by the other witnesses, he did so from anger and disappointment that a prospective sale had been frustrated by Temple. In view of the falsity of his statement that Temple had stolen the watch and had it in his hand as he ran down the street the jury could properly find as it did that his asserted defense was baseless and that he shot Temple because of his interference with the anticipated sale of the watch. It follows that the claim of insufficiency of the evidence is without merit.

[2–4] As to the second point, the defendant contends that at most he acted under a mistake of fact in shooting Temple, i. e., that he mistakenly believed Temple had taken the watch; hence that he was entitled to have the jury instructed that an act performed under a mistake of fact which if true would not have amounted to a crime, is not a crime. The defendant's assertion that he acted under a mistake of fact is not only refuted by the testimony of the other witnesses to the effect that Temple did not steal the watch but by the physical facts demonstrating that the watch was not stolen. Moreover the defendant did not request an instruction on the point under discussion. It is true that in a criminal case a jury should be given instructions on the general principles of law applicable to the case and even if not requested by the parties such instruction should be given by the court of its own motion. But this is not the rule as to specific points developed at the trial. Unless instructions thereon are requested by the parties desiring them it is not incumbent on the court to give them of its own motion where the jury is otherwise fully and fairly instructed on the general principles of law involved in the case. People v. Benden, 27 Cal.2d 164, 175, 163 P.2d 8; People v. Warren, 16 Cal.2d 103, 116, 117, 104 P.2d 1024.

[5, 6] As to the claim of misconduct on the part of the prosecuting attorney it appears that in putting on the prosecution's case the deputy district attorney called out the name of defendant's wife as a witness. Some colloquy followed between counsel and the court as to whether the wife had been subpoenaed as a witness. Defense counsel stated she had not, and asked whether section 1881 of the Code of Civil Procedure had been abolished. The deputy district attorney then remarked that the privilege of a defendant to refuse to allow his wife to testify against him must be claimed. Nothing further was then said on the subject and the examination of witnesses proceeded. During the course of the argument to the jury the deputy district attorney named the persons present when the events took place in the jewelry store and included the name of the defendant's wife. He then said, "* * * everything that the defendant told us in regard to his belief that Mr. Temple was a thief and a robber transpired in the presence of his wife." Later on he also stated, "The wife did not testify, so we only have Mr. Goldman's testimony and the defendant's testimony. * * *" Again he stated, "* * * I think it is fair to say that we are entitled to know why the only other witness who is in this state did not come to tell us what * * *" Defense counsel interrupted: "I assign that as misconduct. The process of this court is available to the prosecution. If there is any witness that they claim there was a burden on us to produce, it is a misstatement of the law and contrary to law. We are not called upon to produce any witness." The record then shows: "[The Court]: I know that, and neither is the State, and the Court will so instruct the jury later. Now, ladies and gentlemen of the jury, remember—again let me admonish you what counsel says with respect to this case is simply their own viewpoint. And let us stay to the record, just comment on what the record in this case shows. That is for both sides. Just stay right within the record. [Deputy district attor-

ney]: Now, that person did not testify. Now, as his Honor has just said, all I have done is tell you how I view the evidence * * * and pointed out what I consider is very essential, and that is that Mrs. Klor did not choose to testify. [Defense counsel]: I assign that statement as misconduct and ask you to instruct the jury, your Honor, that that remark was grossly improper. The Court: Well, the Court has instructed the jury, and I want both counsel on both sides to confine themselves to the record in this case * * * I want no further comment on that matter."

It is the law that neither husband nor wife is a competent witness for or against the other in a criminal action or proceeding to which one or both are parties, except with the consent of both (Penal Code, section 1322).

In the case of People v. Terramorse, 30 Cal.App. 267, 157 P. 1134, it was held that a defendant's refusal to permit his wife to be a witness for the prosecution must not be used against him. Later, in People v. Moore, 111 Cal.App. 632, 295 P. 1039, it was said that although it was unfair for the prosecution to ask a defendant in the presence of the jury whether she would object to having her husband called as a witness for the prosecution, yet there was nothing in the statute which required that such an inquiry prior to calling the witness should be secret or outside the presence of the jury. Recent authority is to the effect that if the prosecution desires to use the husband or wife of the defendant as a witness the proper procedure is to offer the spouse as a witness, subject to the claim of privilege by the defendant. People v. Briggs, 20 Cal.2d 42, 47, 123 P.2d 433. To the same effect are: People v. Singh, 182 Cal. 457, 188 P. 987; People v. Moore, supra, 111 Cal.App. 632, 295 P. 1039; and Fricke, Cal.Crim.Evid., p. 383. As urged by the defendant, it is true that when the remarks here objected to were made the prosecution was aware that it had not issued a subpoena for the defendant's wife to appear. In these circumstances, the calling out of her name during the course of the prosecution's case, with no evident intention of making her a prosecution witness, coupled with the later references in the argument to the jury as to her failure to testify, was improper and unwarranted. However, the trial court gave the following instruction offered by the prosecution, that "* * * neither the prosecution nor the defense is required to call as its own witnesses all persons who are shown to be present, or who may appear to have some knowledge of the matters here on trial." In view of this admonition to the jury and the evidence indicating that the crime of which defendant was convicted was clearly established, it may not rightly be held that the claimed misconduct was so improper as to require a reversal.

The judgment and order appealed from are therefore affirmed.

GIBSON, C. J., and EDMONDS, TRAYNOR, and SPENCE, JJ., concur.

CARTER, Justice.

I dissent.

In my opinion the remarks of the deputy district attorney with respect to the failure of defendant to call his wife as a witness constituted misconduct so reprehensible and so designedly planned that prejudice to defendant inevitably followed.

It is conceded by the majority opinion, as the authorities hold, that the prosecution cannot comment upon or make a point of the failure of a defendant in a criminal case to call his wife as a witness. The matter is discussed in People v. Terramorse, 30 Cal.App. 267, 273, 157 P. 1134, 1137, where the Court said: "In declining to consent that she [defendant's wife] should be a witness against him the defendant was standing as strictly upon his legal rights as he would have been had he declined to be a witness himself, and he was equally entitled to the application of the rule that his declination to permit his wife to be a witness should not in any manner prejudice him or be used against him on the trial. People v. Heacock, 10 Cal.App. [450] 456, 102 P. 543. In making the foregoing comment the prosecuting officer was guilty of prejudicial misconduct, which counsel for the defendant immediately called to the attention of the court, and requested that the jury be instructed to disregard it. The court did not give such an instruction as the defendant asked and was entitled to have given."

In the instant case the prosecuting attorney commenced, what to all appearances was a preconceived plan, to discredit and prejudice the defendant for failing to call his wife as a witness. At the start of the trial the prosecution made inquiry to ascertain whether several witnesses were present, not mentioning defendant's wife. After several witnesses had been called and examined the court directed the prosecuting attorney to call the next witness. Whereupon the prosecuting attorney called for defendant's wife, although he knew that she had not been subpoenaed and he must have known she was not present. He thus left the impression with the jury that defendant was keeping his wife from court for the purpose of suppressing evidence. To consummate this obvious plan the prosecution argued to the jury that there were only five persons who knew what transpired at the scene of the alleged offense, and among them was defendant's wife; that all the defendant testified to occurred in his wife's presence; that "The wife did not testify, so we only have Mr. Goldman's testimony and the defendant's testimony"; that "defendant immediately goes to the back of the store where his wife is and there is some confusion, and who does he tell us?"; that "I think it is fair to say that we are entitled to know why the only other witness [referring to defendant's wife] who is in this State did not come to tell us what—[interruption in which defendant's counsel claimed misconduct and the court admonished the jury; but the prosecution continued to insist] * * * Now, that person did not testify. Now, as his Honor has just said, all I have done is tell you how I view the evidence. I haven't tried to tell you what the evidence is, but I have given you my honest interpretation of the facts and pointed out what I consider is very essential, and that is that Mrs. Klor did not choose to testify." Then followed a similar interruption, but the prosecuting attorney persisted, going on to state from where he had been interrupted: "And from all of the facts that we have in this case, the only facts that corroborate any one of the two witnesses who did testify, the only independant facts that corroborate either one of those two witnesses are the facts pertaining to the phone conversation, which corroborates Mr. Goldman's version of what happened, and not the defendant's."

This apparently deliberate and persistent misconduct cannot be condoned. It clearly implied that if defendant's wife had testified, her testimony would have been very damaging to defendant. It is impossible to say that defendant was not prejudiced.

Reference is made in the majority opinion to admonitions given to the jury when misconduct was charged by the defense, but they were wholly insufficient to cure the error. They merely told the jury that they were the judges of the evidence and not to take counsel's statements as evidence. That did not at all meet the error in implying that the failure to call the wife could be held against the defendant. That had nothing to do with evidence. It had to do with the failure to call a witness. The instruction to the jury at the close of the evidence was equally ineffective. It was general, not specific, and was given after the impression had become fixed in the jurors' minds.

In my opinion it is too obvious for any one to attempt to deny, that the misconduct of the prosecuting attorney in this case was wilful and deliberate, and was designed to and did prejudice the defendant to such an extent that it could not be cured by any admonition the court might have given, and the defendant is therefore entitled to a new trial.

For the foregoing reasons, I would reverse the judgment.

SCHAUER, J., concurs.

Rehearing denied; CARTER and SCHAUER, JJ., dissenting.

32 Cal.2d 666

TYRA v. BOARD OF POLICE AND FIRE PENSION COM'RS OF CITY OF LONG BEACH et al.

L. A. 20603.

Supreme Court of California, in Bank.

Sept. 29, 1948.

1. Estoppel 🔑62(5)

City fire pension commissioners' failure to plead disabled fireman's waiver of city charter pension benefits by accepting workmen's compensation benefits as defense in mandamus proceeding for his retirement on pension did not absolve commissioners from effect of advising petitioner that compensation benefits were in lieu of pension benefits, thereby persuading him to delay pension application, so that commissioners were equitably estopped from interposing defense of limitations. Code Civ.Proc. § 338, subd. 1; St.1931, pp. 2785, 2787, 2790, §§ 187(1, 3), 188.

2. Limitation of actions 🔑61

Long Beach city charter provisions, requiring fire pension commission to direct retirement of disabled fire department members on pensions, fix no particular time or event, such as happening of injury, as starting statutory time for bringing mandamus proceeding for such retirement, as right to pension does not depend on applicant's illness or injury, but on resulting disability, and is not created until commission determines results of injury, applicant's condition, and necessity for retirement. Code Civ.Proc. § 338, subd. 1; St. 1931, pp. 2785, 2787, § 187(1, 3).

3. Limitation of actions 🔑61

Filing of physicians' certificates of injured city fireman's disability with city fire pension commission, as required by Long Beach city charter before granting of retirement pension, does not commence limitation period for bringing mandamus proceeding to compel commission to order fireman's retirement on pension, but such certificates are merely necessary evidentiary justification for action by commission. Code Civ.Proc. § 338, subd. 1; St.1931, p. 2787, § 187(1, 3).

4. Municipal corporations 🔑187, 200

Statutory pension provisions, such as provisions of Long Beach city charter for retirement of city policemen and firemen on pensions, are liberally construed and applied. St.1931, p. 2787, § 187(3).

5. Municipal corporations 🔑200

Where evidence showed unquestionably that injured city fireman became totally incapacitated some time after performance of unsuccessful operation on him in 1939, rejection of his application in 1941 for retirement pension by city of Long Beach fire pension commission was erroneous as unsupported by evidentiary facts. St.1931, p. 2787, § 187(1, 3).

◆

Appeal from Superior Court, Los Angeles County; Leslie E. Still, Judge.

Proceeding by Joseph W. Tyra for a writ of mandate directing the Board of Police and Fire Pension Commissioners of the City of Long Beach and the members thereof to order petitioner's retirement from service as a city fireman on a pension. From a judgment denying the application, petitioner appeals.

Reversed.

For prior opinion, see Cal.App., 189 P.2d 754.

Kenneth Sperry, of Long Beach, for appellant.

Irving M. Smith, City Atty., Nowland M. Reid, Asst. City Atty. and Clifford E. Hayes, Deputy City Atty., all of Long Beach, for respondents.

SHENK, Justice.

The plaintiff sought the writ of mandate directing the defendants Police and Fire Pension Commissioners of the City of Long Beach to order his retirement on a pension pursuant to section 187(3) of the City Charter. (Stats. 1931, p. 2780.) The trial court concluded that the proceeding was barred by the provisions of section 338, subdivision (1), of the Code of Civil Procedure. The plaintiff appealed from the judgment denying his application.

The plaintiff became a member of the fire department of the City of Long Beach on September 1, 1929, and was assigned to duty as a fireman. On February 8, 1937, in the course of his employment, he was precipitated in a sitting position from a collapsing step-ladder, sustaining injuries to his spine and left hip which necessitated his absence from his duties as fireman. On November 30, 1937, he filed an application with the Industrial Accident Commission for an award based on total permanent disability. On March 4, 1942, he was granted workmen's compensation benefits and lifelong medical care based on 100 per cent permanent disability. On December 30, 1941, and again on April 11, 1942, he applied to the defendants for a pension, but the applications were denied. He filed the petition for the writ of mandate in the superior court on August 26, 1942.

Section 187(1) of the Charter of the City of Long Beach in effect during the period here involved created the Board of Police and Fire Pension Commissioners to administer the pension provisions of that section. Subdivision (3) provided that whenever a member of the Police or Fire Department should become so physically disabled by reason of bodily injuries received in the discharge of duties "as to render necessary his retirement from active service, the commission shall order and direct that such person be retired from further service" and be paid from the pension fund in monthly installments an amount equal to one-half of his salary. It was also provided that no person should be retired unless there had been filed with the commission, prior to the granting of the pension, certificates of disability from three regularly licensed practicing physicians of the city, including the police surgeon, a physician selected by the commission, and a physician selected by the person applying for the pension.

Section 188 of the charter provided that the provisions of section 187 were to be in lieu of the provisions of the Workmen's Compensation Act and that a person applying for a pension should be deemed to have waived the benefits under that act; but that if the Supreme Court of the state should decide that the provisions of the compensation act could not be waived, then the payments under the pension provisions should be credited on the amounts allowed under the Workmen's Compensation Act.

This is the second appeal in this proceeding. The first appeal was from a judgment of dismissal entered on an order sustaining the defendants' objection to the introduction of evidence on the ground that the petition showed that the alleged cause was barred by the provisions of section 338, subdivision 1, of the Code of Civil Procedure; also on the ground that the plaintiff, having accepted the benefits of the Workmen's Compensation Act, was not entitled to a pension under the provisions of the city charter. On that appeal it was held that neither the allegations of the petition nor the finding and order of the Industrial Accident Commission showed that the disability was permanent so as to necessitate retirement prior to February 1940. On the authority of Larson v. Board of Police & Fire Pension Commissioners, 1945, 71 Cal. App.2d 60, 162 P.2d 33 (see also Johnson v. Board of Police, etc., Pen.Com'rs., 1946, 74 Cal.App.2d 919, 170 P.2d 48), it was concluded that by accepting benefits under the Workmen's Compensation Act the plaintiff did not waive his right to a pension. Tyra v. Board of Police and Fire Pension Commissioners, 71 Cal.App.2d 50, 162 P.2d 35.

The plaintiff then filed an amended and supplemental complaint. The defendants answered. At the trial there was testimony of the plaintiff and of several physicians, some of whom were produced by the city of Long Beach, that at first his disability was temporary and he would be able to resume his duties; that the disability was not determined to be permanent until an operation on his spine, suggested by the city and performed in October 1939, failed of its purpose to restore greater mobility; that before the operation he was able to move about to a limited extent; but that as a result of the operation he was unconscious from a condition of complete paralysis for a period of twenty-eight days and that he was not advised until about February 1, 1940, by his attending physicians that he would never be able to walk again. The trial court found and determined that November 30, 1937, was the date when the plaintiff was so totally and permanently disabled as to render necessary his retirement from active service in the Fire Department, and that since more than three years had elapsed the proceeding was barred by the provisions of subsection 1 of section 338 of the Code of Civil Procedure.

It is the plaintiff's contention that the evidence does not support the finding and conclusion. The plaintiff's application of November 30, 1937, to the Industrial Accident Commission sought Workmen's Compensation benefits on the basis of total permanent disability. It is not contended by the defendants that there was any determination that the disability was total and permanent until the award of the Industrial Accident Commission dated March 2, 1942. The trial court was apparently of the opinion that the application of the plaintiff for compensation benefits alleging total permanent disability created a conflict in the evidence and that those allegations in the compensation matter were binding and conclusive on the plaintiff in the pension matter. On the other hand, the plaintiff's possible limited capacity to perform certain duties in the fire department indicated an absence of necessity for his retirement from all service. The city charter, in section 187(3), vested discretion in the defendants and the city to retain in or restore to employment a member having only partial disability even though he had been granted a pension. The plaintiff was not removed from employment for disability pursuant to civil service regulations, but was retained as on sick leave. It is unnecessary to determine whether the trial court erred in receiving the evidence of the inconsistent allegations in the collateral matter either as an admission against interest or for impeachment purposes because of our determination in respect to other contentions next to be considered.

[1] In his amended and supplemental petition the plaintiff pleaded the elements of estoppel on the part of the defendants to interpose the bar of the statute of limitations. Although it was denied by the answer, it is now conceded that the defendants and the attorneys representing them advised the plaintiff that so long as he was receiving workmen's compensation benefits he was not entitled to a pension. He was advised that he could not have both, and that benefits under the compensation act were "in lieu of and in place of the benefits provided in section 187 of the Charter." This position of the defendants amounted to a departmental rule of action at least until the decision in the cases of Tyra v. Board of Police, etc., Com'rs and Larson v. Board of Police, etc., Com'rs, supra. In the latter decision (71 Cal.App.2d at page 63, 162 P.2d at page 34) it was pointed out that there was no such provision in the charter, the provision of section 188 being that the acceptance of the pension benefits under the charter would be deemed a waiver of benefits under the provisions of the compensation act. Responsive to those decisions the defendants did not include the defense of waiver in their answer to the amended and supplemental petition. But the failure of the defendants now to insist upon waiver on the part of the plaintiff does not absolve them from the effect of their conduct as a rule of the department by which the plaintiff was persuaded not to apply for a pension until some time in 1941. The delay charged to the plaintiff was induced by the erroneous position and advice of the defendants and their attorneys. They may not therefore now properly interpose the defense as a bar to the plaintiff's delayed course of action. The doctrine of equitable estoppel declared and applied in such cases as Farrell v. County of Placer, 23 Cal.2d 624, cases cited at page 628, 145 P.2d 570, at page 572, 153 A.L.R. 323, and Benner v. Industrial Acc. Comm., 26 Cal.2d 346, cases cited at page 349, 159 P.2d 24, at page 26, is applicable under the circumstances here presented.

[2, 3] Moreover, the provisions of the city charter should not be construed as necessarily fixing any particular point of time or event when the operation of the statute of limitations would commence in cases where the commission's determination of the effects of the injury was essential to the creation of the right. The duty of the defendants to grant the pension may not always attach automatically upon the happening of an accident as where the

right to a widow's pension accrues upon the death of the employee. Dryden v. Board of Pension Commissioners, 6 Cal. 2d 575, 59 P.2d 104; Dillon v. Board of Pension Commissioners, 18 Cal.2d 427, 116 P.2d 37, 136 A.L.R. 800. Here something more than the happening of the injury was intended by a provision requiring the commission to order payment of pension whenever a member of the department should become so physically or mentally disabled as a result of the injury as to render necessary his retirement from active service. As said in Brooks v. Pension Board, 30 Cal. App.2d 118, 123, 85 P.2d 956, it is not the illness or injury but the resulting inability to perform the work that is the controlling factor in establishing the right to a pension. The duty of the defendant did not attach nor was the right created until that further point of time was reached. It could not be fixed without a determination of the results of the injury, the condition of the employee and the necessity for the retirement. These matters were left to the determination of the commission which had the power and duty to direct the payment of the pension. There was no charter provision limiting the time with relation to any specified event within which a member of the department must make his request to the commission. The required certificates did not have the effect of commencing any limitation period. They were merely the necessary evidentiary justification for action by the commission. Holt v. Board of Police etc. Com'rs, 86 Cal.App.2d 714, 196 P.2d 94; Metcalf v. McAdoo, Police Com'r, 48 Misc. 420, 95 N.Y.S. 511.

[4] The defendants' reliance on Dillon v. Board of Pension Commissioners, supra, 18 Cal.2d 427, 116 P.2d 37, 136 A.L.R. 800, is unavailing because of the difference in the factual situation and the charter provisions. The statement in the Dillon case that the action to determine the existence of the right necessarily precedes any right to recover pension installments, does not foreclose a determination that the right has not come into existence until the commission has concluded that the condition of disability renders retirement necessary or has arbitrarily refused to do so. No other conclusion is tenable in view of the policy of liberal construction and application of pension provisions. Dillard v. City of Los Angeles, 20 Cal.2d 599, 602, 127 P.2d 917, 128 P.2d 537; Gibson v. City of San Diego, 25 Cal.2d 930, 934, 156 P.2d 737; Dierkes v. City of Los Angeles, 25 Cal.2d 938, 942, 156 P.2d 741; England v. City of Long Beach, 27 Cal.2d 343, 346, 347, 163 P.2d 865; Larson v. Board of Police etc. Com'rs, supra, 71 Cal.App.2d at page 63, 162 P.2d 33.

[5] Since unquestionably the plaintiff became totally incapacitated at some point of time subsequent to the operation performed during the latter part of 1939, it must be concluded that the defendants' rejection of the first pension application of the plaintiff made in 1941 was unsupported by the evidentiary facts.

The judgment is reversed.

GIBSON, C. J., and EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

WEST KEY NUMBER SYSTEM

32 Cal.2d 791

BREWER et al. v. SECOND BAPTIST CHURCH OF LOS ANGELES et al.

L. A. 20585.

Supreme Court of California, in Bank.
Oct. 1, 1948.

1. Libel and slander 🔑9(4)

Charges designed to injure plaintiffs' reputation in church of which plaintiffs were members, and to cause plaintiffs to be shunned or avoided, which presented to church members that plaintiffs had revealed themselves as unworthy of continued confidence, respect, and fellowship of church, and described plaintiffs as willing to lie to injure church, and charging one plaintiff with a vile spirit, and associating both plaintiffs with another person who was stated to be one of Satan's choicest tools while acting under the role of a minister, were libelous. Civ.Code, § 45.

2. Libel and slander 🔑123(7)

In libel action, falsity of charges against plaintiff church members brought before church membership by pastor and deacons which were designed to injure plaintiffs' reputations in the church and to cause them to be shunned and avoided was for the jury. Civ.Code, § 45.

3. Libel and slander 🔑45(3)

Ordinarily the common interest of members of a church in church matters is sufficient to give rise to a qualified privilege as to communications between members of subjects relating to the church's interest. Civ.Code, §§ 45, 47, subd. 3.

4. Libel and slander 🔑50½, 51(1)

Under statute defining a privileged defamatory publication, the privilege is lost if the publication is motivated by hatred or ill will toward plaintiff, or by any cause other than the desire to protect the interest for which the privilege is given. Civ. Code, §§ 45, 47, subd. 3.

5. Libel and slander 🔑50

Ordinarily a privilege to publish a defamatory statement is lost if publisher has no reasonable grounds to believe his statements to be true. Civ.Code, §§ 45, 47, subd. 3.

6. Libel and slander 🔑112(2)

In libel action, evidence established that charges made by minister of a church, which were designed to injure plaintiffs' reputations in the church and to cause them to be shunned and avoided, were made with a malicious motive so as to justify an award of damages. Civ.Code, §§ 45, 47, subd. 3.

7. Libel and slander 🔑101(4)

Malice destroying a privilege may not be inferred from the fact alone of the communication of the defamatory statement. Civ.Code, §§ 45, 47, subd. 3, 48.

8. Libel and slander 🔑51(1)

The tenor of a communicated defamatory statement may be evidence of malice destroying a privilege. Civ.Code, §§ 45, 47, subd. 3, 48.

9. Libel and slander 🔑120(1), 123(10)

A plaintiff is never entitled as a matter of right to exemplary damages for a defamation, and, where malice in fact is shown, whether exemplary damages are to be awarded is exclusive province of jury.

10. Trial 🔑253(3)

In libel action, instruction stating plaintiffs to be entitled to exemplary damages if libel was published wantonly, recklessly, or with an utter disregard to its truth, was error as withdrawing from jury its exclusive right to determine whether exemplary damages should be awarded.

11. Appeal and error 🔑1004(3)

The question of excessiveness of a jury verdict for damages is addressed primarily to the discretion of trial court, and an award that stands approved by trial court will not be disturbed on appeal, unless it appears that jury was influenced by passion or prejudice.

12. Appeal and error 🔑1004(1)

In libel action, record did not authorize reversal of judgment awarding $2,000 general damages in favor of the two plaintiffs against the three defendants, on ground that the jury was influenced by passion or prejudice.

13. Appeal and error 🔑1178(6)

Appellate courts can order a retrial on a limited issue, if that issue can be separately tried without such confusion as would amount to a denial of a fair trial.

14. Appeal and error 🔑1178(6)

Whether a limited issue can be separately tried without such confusion or uncertainty as would amount to a denial of a fair trial, so as to authorize an appellate court to order a retrial on the issue, depends upon the circumstances.

15. Damages 🔑87(1, 2)

"Exemplary damages" are assessed to punish the defendant and not to compensate for any loss suffered by the plaintiff, and cannot be imposed unless the plaintiff has suffered actual damages.

See Words and Phrases, Permanent Edition, for all other definitions of "Exemplary Damages".

16. Damages 🔑91(1)

A defendant must have committed a tortious act before exemplary damages can be assessed.

17. Damages 🔑94

Exemplary damages must bear a reasonable relation to actual damages.

18. Appeal and error 🔑1178(6)

Where instruction in libel action improperly withdrew from jury its exclusive right to determine whether exemplary damages should be awarded, and required an award of exemplary damages if libel was published wantonly, recklessly, or with utter disregard to its truth, and award of general damages was properly determined, judgment would be reversed insofar as decreeing recovery of exemplary damages as against one of three defendants, and trial court would be directed to retry issue of exemplary damages as against defendant against whom exemplary damages were awarded.

Appeal from Superior Court, Los Angeles County; Alfred L. Bartlett, Judge.

Libel action by the Reverend A. L. Brewer and E. W. Fisher against Second Baptist Church of Los Angeles, a religious corporation, Reverend J. Raymond Henderson, John H. Hilton, and R. A. Hudson. From an adverse judgment, defendants Henderson, Hilton, and Hudson appeal.

Judgment affirmed in part and reversed in part with directions.

Prior opinion 189 P.2d 75.

Jerry Giesler, Meyer M. Willner, and Thomas L. Griffith, Jr., all of Los Angeles, for appellants.

A. Brigham Rose, of Los Angeles, for respondents.

TRAYNOR, Justice.

In an action for libel, judgment was entered in favor of plaintiffs for a total of $14,000. Both plaintiffs were members of the Second Baptist Church of Los Angeles. Defendant Henderson was the pastor of the church; defendants Hilton and Hudson were chairman and secretary, respectively, of the board of deacons. Exemplary damages were sought against defendant Henderson only. The jury returned verdicts in favor of each plaintiff for $2,000 general damages against the three defendants and $5,000 exemplary damages against defendant Henderson.

The publication of the defamatory statements followed a controversy in the church over the validity of certain elections to the board of trustees and the board of deacons. Reverend Venerable, a member of the church who had been recently expelled, brought an action to have these elections declared void. His complaint alleged that the church officials were taking steps to withdraw funds of the church and use them against the will of the members who had been wrongfully excluded from the management of the affairs of the church. His attorney joined plaintiffs Brewer and Fisher as co-plaintiffs in that action. A demurrer was sustained to Reverend Venerable's amended complaint, and his suit was dismissed. Thereafter, the board of deacons held a meeting, which Reverend Henderson attended. They decided to recommend to the church membership that plaintiffs Brewer and Fisher be expelled from the church because of their action in joining with Reverend Venerable in his suit. Defendants Hilton and Hudson were delegated by the board to draw up charges for presentation to the church. The text of the charges was left to their discretion. Letters were then sent to plaintiffs informing them that charges would be filed against them at the next meeting of the church, and requesting them to be present. A copy of the charges was enclosed with each letter. Defendant Henderson testified that he read and approved the charges and their transmission to plaintiffs.

Neither plaintiff appeared at the next meeting of the church, when the charges were read to the membership, which then voted to withdraw "the hand of fellowship" from plaintiffs and expel them from the church.

These charges read as follows:

"October 12, 1945. To the membership of the Second Baptist Church, Los Angeles, California, we, the Deacon Board of the above church, at our regular monthly meeting took under serious consideration the recent attempt on the part of two members of our church, aided by a third, recently dismissed from the church, to bring our church into court. One of these men was the Rev. W. A. Venerable, who, because of a recent vile attack upon the deacons and minister, was dismissed from our fellowship. The other was Rev. A. L. Brewer, a non-contributing member, and the other Mr. Eugene Fisher, former trustee, who was put out of office because of his vile spirit and utter disrespect for leadership. We can bring no action against the Rev. Venerable, who under the role of a minister of Jesus, is one of Satan's choicest tools, because he is not a member of our church. If the case had gone to trial this fact would have been brought to light. We do hold the other two, Brewer and Fisher responsible, and do charge them before the church as follows:

"We charge that they both complained to the civil authorities that our elections of 1942 of both deacons and trustees when we enlarged our board were illegal. The judge ruled their complaint false and would not permit trial.

"We charge that they complained that the officers of the church were planning to withdraw church funds from the Liberty Savings Loan Company and the Security-First National Bank and misuse them, and that the judge ruled their complaint false.

"We charge that they amended their complaint to the effect that in our business meetings we failed to send written notice to each and every member. The judge ruled that they were again in error, due to the fact that the church has a constitution, which provides, not for a written notice, but for the notice of said meetings 'Twice on Sunday, morning and evening prior to said meeting,' Article 13 section C.

"We charge that they both in reality admitted their own error by reason of the fact that they could not find another ground on which to amend their complaint. On the other hand, through their lawyer, they offered not to even try to amend their complaint, if we, the Second Baptist Church would allow them to drop the matter, and we the church pay $175 court cost which they would have to pay if they lost. We refused to let them drop the case.

"We charge that on September 20th, when they had their final opportunity to attempt to amend their complaint and try to get us into court trial, not one of the complainants appeared in court. This was an open acknowledgement of failure and a clear vindication of the correctness with which the business affairs of Second Baptist Church are conducted. In consequence of their failure, the attempted effort to embarrass the officers, minister, and church was automatically dropped, and the judge signed the order compelling them to pay to the court the $175 which had already been paid by our church. This money will be refunded to Second Baptist Church by the complaining parties.

"We further charge that the action of both of these men in attempting to bring us before civil authority on grounds of proven falsity has hurt the prestige and good name of the church, its officers, and minister, because of the widespread newspaper publicity given to it.

"We charge that this attempt to bring the church into court has caused us to spend considerable and unnecessary funds of the church for attorneys fees which we might have used for our church work.

"We finally charge that both of these men have by their unwarranted actions and downright falsehood revealed themselves as totally unworthy of the continued confidence, respect, and fellowship of a great church which they have so grievously wronged.

"We do therefore unanimously recommend that the hand of fellowship be withdrawn from them and they both be excluded from the church.

"The Deacon Board of Second Baptist Church, John H. Hilton, Chairman, R. A. Hudson, Secretary."

A press release reporting the action of the church was given to the local press, and an article that substantially followed the local release appeared in the newspaper, the National Baptist Voice, a paper of nationwide circulation devoted to the affairs of the Baptist Church. This article reported the ouster of plaintiffs Brewer and Fisher and stated that their charges against the church had been found false by the judge.

[1] Section 45 of the Civil Code defines libel as "a false and unprivileged publica-

tion by writing, * * * which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation." The charges in this case, if false and unprivileged, were libelous. Because of their alleged falsehoods plaintiffs were charged with having "revealed themselves as totally unworthy of the continued confidence, respect, and fellowship of a great church." They were described as persons willing to lie in order to injure their church. Plaintiff Fisher was charged with a vile spirit, and both plaintiffs were associated with one who, "under the role of a minister of Jesus, is one of Satan's choicest tools." The charges were designed to injure plaintiffs' reputations in the church and to cause them to be shunned and avoided. The language was aptly chosen for this purpose.

[2] The evidence was sufficient to warrant the jury's concluding that the charges were false. There was a conflict in the evidence as to whether Reverend Venerable's allegations were in fact false, and the judge in the Venerable action never ruled that they were. The jury could find that neither plaintiff authorized his joinder or understood the significance of the appearance of his name on the complaint and that neither was deliberately bringing false charges against his church.

[3-5] Defendants contend, however, that the publication of the charges was privileged within the meaning of section 47(3) of the Civil Code. Section 47 provides: "A privileged publication or broadcast is one made * * * 3. In a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or (3) who is requested by the person interested to give the information." Ordinarily, the common interest of the members of a church in church matters is sufficient to give rise to a qualified privilege to communications between members on subjects relating to the church's interest. Slocinski v. Radwan, 83 N.H. 501, 144 A. 787, 63 A.L.R. 643; Prosser, Torts, 838; and see cases collected in Note, 63 A.L.R. 649. A privilege would exist in this case if the publication had been made without malice and the occasion had not been abused. Recently in Emde v. San Joaquin County, etc., Council, 23 Cal.2d 146, 154, 143 P.2d 20, 25, 150 A.L.R. 916, this court had occasion to consider the scope of the privilege granted by section 47(3) of the Civil Code. It was there said: "Even greater protection is accorded one who makes a statement, in a reasonable manner and for a proper purpose, to persons having a common interest with him in the subject matter of the communication, when the publication is of a kind reasonably calculated to protect or further it. Civ.Code, § 47, subd. 3; 3 Rest., Torts, sec. 596; Prosser on Torts, sec. 94, p. 837; see also 3 Rest., Torts, secs. 594, 595. For this conditional privilege extends to false statements of fact, although the occasion may be abused and the protection of the privilege lost, by the publisher's lack of belief, or of reasonable grounds for belief, in the truth of the defamatory matter, by excessive publication, by a publication of defamatory matter for an improper purpose, or if the defamation goes beyond the group interest." Thus the privilege is lost if the publication is motivated by hatred or ill will toward plaintiff (Davis v. Hearst, 160 Cal. 143, 164, 116 P. 530; Snively v. Record Publishing Co., 185 Cal. 565, 577, 198 P. 1; Siemon v. Finkle, 190 Cal. 611, 618, 213 P. 954), or by any cause other than the desire to protect the interest for the protection of which the privilege is given. See Davis v. Hearst, supra, 160 Cal. 164, 116 P. 530; Prosser, Torts, 850; Restatement, Torts, § 603. Although there are situations where the protection of the interest involved may make it reasonable to report rumors or statements that the publisher may even know are false (see Prosser, Torts, 851; Restatement, Torts, § 602), ordinarily the privilege is lost if defendant has no reasonable grounds for believing his statements to be true. Miles v. Rosenthal, 90 Cal.App. 390, 407, 266 P. 320; see Emde v. San Joaquin, etc., Council, supra; Prosser, Torts, 851; Restatement, Torts, § 601. The wisdom of limitations on qualified

privileges is well demonstrated by the facts here involved. As a result of the publication of the charges both plaintiffs were expelled from their church. Plaintiff Fisher had been a member of the board of trustees for 25 years. Plaintiff Brewer was an ordained minister of the Baptist Church. His expulsion resulted in the loss of his membership in the Baptist Ministers Union, and the jury could have concluded that he also lost opportunities to preach in other churches.

The question then is whether the evidence is sufficient to support the implied finding of the jury that defendants were motivated by a malicious or other improper motive or published their charges without reasonable grounds for believing them. There is ample evidence in the record to support the inference that Reverend Henderson was motivated either by ill will toward plaintiffs or by a desire to oust any members from the church who would dare to question his administration. While plaintiff Fisher was still a trustee, he served on a committee to select furnishings for the new rectory. Instead of accepting Reverend Henderson's suggestion as to where the furniture should be purchased, he insisted that the committee make an investigation of the furniture market. This led defendant Henderson to remark: "I see I have got to get rid of you, I can't work with you." By the time of the annual meeting of the church in January 1945, the rift between Reverend Henderson and plaintiff Fisher had widened. At that meeting Reverend Henderson addressed the church as follows: "Now, E. W. Fisher has given me headaches ever since I have been here, and if you want me to put this program over you have to give me men I can work with." Plaintiff Fisher assigned as the reason for the rift his refusal to be a mere "yes man" on the board of trustees. At this same meeting a member of the church raised the question whether there were improperly present any nonmembers of the church. After some discussion plaintiff Brewer arose and said: "Brother Moderator, I would like to give the Baptist Church position on that." Reverend Henderson responded: "Nobody asked you anything about the Baptist Church. I have been told you run around here with Hiscox Directory and Roberts Rules of Order under your arm, the watchdog of the church." Reverend Venerable was expelled from the church because he had circulated a pamphlet criticizing Reverend Henderson's administration. At the meeting where Reverend Venerable was expelled, Reverend Henderson refused to allow plaintiff Brewer to speak in Reverend Venerable's defense on the ground that Reverend Brewer was not a member of the church because he had not made a regular pledge. At the meeting at which plaintiffs were expelled, Reverend Henderson refused to allow Reverend Brewer's son to speak in his father's defense on the same ground. He admitted on cross-examination that he had examined the financial list of the church before the meeting in anticipation of the possibility that Reverend Brewer's son might want to speak in his father's behalf. Reverend Henderson's attitude toward members who sued the church is reflected in his statement in the church bulletin for May 12, 1946: "Any and all members who dare to sue the church will be turned out. They will be kept out as unworthy of our fellowship. Those who have been excluded need not attempt to come back. The peace of the Church must not be again disturbed by them. Read 1 Cor. 6: 1. 'Dare any of you, having a matter against another, go to law before the unjust, and not before the saints.'"

[6] The jury could conclude that Reverend Henderson had developed a strong dislike for plaintiffs. They could also conclude that Reverend Henderson wished to free himself of any criticism by expelling his opponents from the church. These facts considered with the language of the opening paragraph of the charges read to the church are clearly sufficient to support a finding of a malicious or improper motive for the publication on the part of Reverend Henderson.

[7, 8] In the case of defendants Hilton and Hudson evidence of an abuse of privilege may be found on the face of the charges themselves. Although malice may not be inferred from the fact alone of the communication of a defamatory statement,

Civil Code, § 48, the tenor of the statement may be evidence of malice. Davis v. Hearst, supra, 160 Cal. 166, 116 P. 530; Siemon v. Finkle, supra, 190 Cal. 618, 213 P. 954; Locke v. Mitchell, 7 Cal.2d 599, 603, 61 P.2d 922. "On the subject of actual malice it is important to note further that while one may, on a privileged occasion and without malice, publish to the interested persons what may be false, if he honestly believes it to be true, he is not by this rule given a license to overdraw, exaggerate, or to color the facts in his communication. The manner of statement is material upon the question of malice, and if the facts believed to be true are exaggerated, overdrawn, or colored to the detriment of plaintiff, or are not stated fully and fairly with respect to the plaintiff, the court or jury may properly consider these circumstances as evidence tending to prove actual malice, and they may be sufficient for that purpose without other evidence on the subject." Snively v. Record Publishing Co., supra, 185 Cal. 578, 198 P. 6.

An examination of the charges read to the church shows that they contained most if not all of the vices condemned in the Snively case. The jury could reasonably conclude that in stating that plaintiff Fisher was removed from the board of trustees because of his vile spirit and disrespect for leadership, defendants exaggerated the cause for his dismissal. The description of plaintiff Brewer as a noncontributing member was misleading. Although he made no regular pledge to the church, he gave $55 on one occasion and on another pledged $150 to the building fund. Furthermore, the charges associated plaintiffs with one of Satan's choicest tools.

There is evidence also from which the jury could have inferred that defendants lacked reasonable grounds for believing the charges. This limitation upon qualified privilege is particularly appropriate when, as in this case, a privilege is claimed on the ground that defendants were carrying out their duty of investigating misconduct and reporting the results with their recommendations to the church. Defendant Hilton admitted that he did not interpret the termination of the Venerable action as "a judicial establishment that the charges set forth in the complaint were downright falsehoods." The jury could have found that no investigation was made by the deacons into the question of the validity of the elections, that no attempt was made to learn whether plaintiffs were acting in good faith, and that in drafting their charges defendants Hilton and Hudson were carelessly repeating statements previously made to the congregation by Reverend Henderson. We cannot say, therefore, that the evidence was not sufficient to support the verdict against defendants Hilton and Hudson.

Defendant Henderson contends that the following instruction on the question of exemplary damages was prejudicially erroneous:

"You are instructed that, if you should find that the article in question was published wantonly, recklessly, and with an utter disregard as to whether it was true or false, then the plaintiffs are entitled to recover exemplary or punitive damages as well as compensatory damages."

[9, 10] This instruction was clearly erroneous, for a plaintiff is never entitled as a matter of right to exemplary damages. Schomberg v. Walker, 132 Cal. 224, 230, 64 P. 290; Davis v. Hearst, supra, 160 Cal. 173, 116 P. 530; Lewis v. Hayes, 165 Cal. 527, 533, 132 P. 1022, Ann.Cas. 1914D, 148; see Clark v. McClurg, 215 Cal. 279, 282, 9 P.2d 505, 81 A.L.R. 908. As this court stated in Davis v. Hearst and reiterated in Lewis v. Hayes [165 Cal. 527, 533, 132 P. 1024], in speaking of an instruction nearly identical with the one in question, "'The vice of this instruction is that it tells the jury that, upon finding malice in fact, the plaintiff is *entitled,* as of right, to an award of punitive damages. A plaintiff, upon establishing his case, is always entitled of right to compensatory damages. But even after establishing a case where punitive damages are permissible, he is never entitled to them. The granting or withholding of the award of punitive damages is wholly within the control of the jury, and may not legally be influenced by any direction of the court that in any case a plaintiff is entitled to them. Upon the clearest proof of malice in fact, it is still the exclusive

province of the jury to say whether or not punitive damages shall be awarded. A plaintiff is entitled to such damages only after the jury, in the exercise of its untrammeled discretion, has made the award.'" Reverend Henderson was entitled to the free exercise of the jury's discretion. This right he was denied.

[11, 12] Defendants contend finally that the general damages were excessive. A motion for a new trial on this ground, among others, was denied. The question of excessiveness is addressed primarily to the discretion of the trial court, and an award that stands approved by that court will not be disturbed on appeal unless it appears that the jury was influenced by passion or prejudice. Scott v. Times-Mirror Co., 181 Cal. 345, 366, 184 P. 672, 12 A.L.R. 1007. Upon the record before us we cannot say that the jury was so influenced.

[13, 14] The appellate courts have power to order a retrial on a limited issue, if that issue can be separately tried without such confusion or uncertainty as would amount to a denial of a fair trial. Gasoline Products Co. v. Champlin Refining Co., 283 U.S. 494, 499, 51 S.Ct. 513, 75 L.Ed. 1188; see Robinson v. Muir, 151 Cal. 118, 125, 90 P. 521. Whether it can or not depends upon the circumstances of each case.

[15, 16] The issue of exemplary damages is separate and distinct from that of actual damages, for they are assessed to punish the defendant and not to compensate for any loss suffered by the plaintiff. The rule that exemplary damages cannot be imposed unless the plaintiff has suffered actual damages (Clark v. McClurg, 215 Cal. 279, 9 P.2d 505, 81 A.L.R. 908; Haydel v. Morton, 8 Cal.App.2d 730, 48 P.2d 709) is based on the principle that the defendant must have committed a tortious act before exemplary damages can be assessed. See McCormick on Damages, 293. "Such damages are mere incidents to the cause of action and can never constitute the basis thereof." Clark v. McClurg, supra, 215 Cal. at page 282, 9 P.2d at page 506. In view of the jury's verdict and the award of general damages in this case the commission of a tortious act by defendants is established. There is therefore no reason for having a second jury determine that issue.

[17] The rule that exemplary damages must bear a reasonable relation to actual damages (Wilkinson v. Singh, 93 Cal.App. 337, 345, 269 P. 705; Plotnik v. Rosenberg, 55 Cal.App. 408, 411, 203 P. 438) is designed solely to guard against excessive punitive damages. McCormick on Damages, supra, 298. Upon a retrial of the issue of exemplary damages the jury can maintain that reasonable relation between general and exemplary damages without having to determine for itself the amount of general damages. The amount of general damages has been properly determined by the first jury. Upon a retrial of the issue of exemplary damages it is only necessary for the second jury to be advised of the amount of general damages already awarded in order that it may maintain a reasonable relation between such damages and the exemplary damages, if any, that it awards. If it fails to do so and awards excessive exemplary damages, there is an adequate remedy by way of an appropriate motion before the trial court or by appeal.

The jury returned a verdict in favor of each plaintiff for $2,000 general damages against the three defendants and $5,000 exemplary damages against defendant Henderson. All defendants are jointly and severally liable on the judgment for general damages. Since there can be no apportionment of the judgment for general damages, a retrial of the issue of general damages as to defendant Henderson would require a retrial of that issue as to defendants Hilton and Hudson, for otherwise Hilton and Hudson would remain jointly and severally liable for general damages, but defendant Henderson would have the benefit of a retrial of that issue. To retry the issue of damages as to all defendants, however, would nullify the judgment for general damages as to defendants Hilton and Hudson, although the judgment has been properly entered against them.

[18] The judgment is reversed insofar as it decrees the recovery of the separate sums of $5,000 from Reverend J. R. Hen-

derson, and the trial court is directed to retry the issue of exemplary damages against him only. In all other respects the judgment is affirmed. Respondents Fisher and Brewer are to recover their costs on the appeal of defendants Hilton and Hudson. Each side is to bear its own costs on this appeal of defendant Henderson.

GIBSON, C. J., and CARTER, SCHAUER, and SPENCE, JJ., concur.

---

32 Cal.2d 688

BARLOW v. CITY COUNCIL OF CITY OF INGLEWOOD et al.

L. A. 20016.

Supreme Court of California, in Bank.
Oct. 1, 1948.

1. Judgment 🔑304

Court had no power to vacate its own judgment in order to correct an alleged judicial, as distinguished from a clerical, error.

2. Limitation of actions 🔑43

A statute of limitations runs from the time a cause of action accrues, and the cause of action accrues when there is a remedy available.

3. Limitation of actions 🔑61

Where unpaid assessments allegedly fell due in 1926 to 1936, and bonds issued by city under Improvement Bond Act of 1915, matured on or prior to January 2, 1935, and mandamus proceeding by holders of bonds to compel city officials to transfer out of city's unencumbered current surplus and into a bond redemption fund, sufficient moneys for payment of bondholders' bonds, was not commenced until February, 1946, and delay was not excused, mandamus was barred by four years limitations even though registration of bonds allegedly prevented an action on the bonds from being barred by limitations. Streets & Highways Code, § 8701, 8804; Code Civ.Proc. §§ 337, 338, 343.

4. Mandamus 🔑113

A city may be compelled by mandamus to make limited tax levy for purpose of meeting original purchase price of lands sold to city for delinquent assessments.

5. Limitation of actions 🔑61
Mandamus 🔑143(1)

A mandamus proceeding is barred if not commenced within period prescribed by limitation statutes, and limitation begins to run when right first accrues. Code Civ. Proc. §§ 337, 343, 363, 1109.

EDMONDS, J., dissenting in part.

◆

Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

Mandamus proceeding by Robert Barlow against the city council of the city of Inglewood, a municipal corporation, and others, to compel transfer out of city's alleged unencumbered current surplus and into a bond redemption fund, sufficient moneys for payment of outstanding principal and interest allegedly due on certain improvement bonds owned by the petitioner. From an order setting aside judgment for respondents and granting petitioner leave to file a second proposed amended petition, respondents appeal, and from the judgment for respondents, the petitioner cross-appeals.

Order reversed and judgment affirmed.

For prior opinion see 190 P.2d 226.

Ernest A. Oswald, of Los Angeles, for petitioner and appellant.

Clyde Woodworth, of Inglewood, and John F. Bender, of Los Angeles, for defendants and appellants.

SCHAUER, Justice.

In this mandamus proceeding, brought against the members of the council, the clerk and the treasurer of the city of Inglewood, petitioner seeks to compel such officials to transfer out of the city's alleged "unencumbered current surplus" and into a bond redemption fund, sufficient moneys for the payment of outstanding principal and interest alleged to be due and owing on certain improvement bonds owned by petitioner. As statutory authority supporting his demands on the city officials (hereinafter termed respondents) petitioner relies upon section 12 of the Improvement Bond Act of 1915 (Stats.1915, ch. 733, as amended by Stats.1933, ch. 932; 1937 Deering's Gen.Laws, Act 8209, quoted, post, in material parts), now found in sections 8800 through 8807 of the Streets and Highways Code. Following proceedings in the trial court which are hereinafter more fully related, respondents' demurrer to the mandamus petition was sustained without leave to amend, and judgment was entered in favor of respondents. Thereafter, on motion of petitioner which was accompanied by a proposed first amended petition, for which a "second proposed amended petition" was later substituted, the court made an order setting aside the judgment and granting leave to file the second proposed amended petition. Respondents appeal from the order so made, and petitioner cross-appeals from the judgment as first entered. We have concluded, for the reasons hereinafter stated, that the order from which respondents appeal must be reversed and that the judgment first entered should be affirmed.

The petition for the writ was filed February 4, 1946; it is framed in two separate causes of action. In the first cause petitioner alleges that on May 3, 1926, the City of Inglewood, acting pursuant to the Improvement Bond Act of 1915, issued Street Improvement Bonds to defray the cost of improving certain streets in the city; that petitioner owns three of such bonds, termed "Series No. 880" bonds. Attached to the complaint as an exhibit is a description of petitioner's bonds, together with statements of the principal amount of each, of interest which had accrued to July 2, 1945, at 7% per annum, of the "payments heretofore made upon the matured interest and the unpaid principal and interest due upon said bonds," and of the "Balance Due" upon each bond. The exhibit shows that the principal of each bond is $1000 and that such principal sums matured, respectively, January 2, 1934, January 2, 1935, and January 2, 1936. It is further alleged that "interest has accrued and will continue to accrue upon the principal of said bonds at the rate of 7% per annum from and after July 2, 1945, until paid"; that "all the Improvement Bonds of said several Series are now due and unpaid together with interest"; that "if there is insufficient money" in the Bond Redemption Fund to pay the "matured interest and principal" of any bonds issued pursuant to the Improvement Bond Act of 1915, then section 12 of such act makes it "the duty of the duly authorized officials" of the city "to transfer all surplus moneys in the General Fund of the City to the said Bond Redemption Fund." The petition sets forth "the amount of the unpaid assessments due in the assessment district encumbered by" petitioner's bonds "and the years in which the same fell due," which are averred to be 1926 to 1936, and alleges further that "pursuant to section 3758 of the Political Code and Section 4103 of the Revenue and Taxation Code" such unpaid assessments bear certain interest and penalties; that "all of said assessments together with interest and penalties thereon are now wholly unpaid"; that a "true and accurate" auditor's report filed on October 9, 1945, in the office of the City Clerk of Inglewood discloses that on June 30, 1945, the city "had an unencumbered current surplus in the amount of $301,581.57"; that on the date the petition for mandate was filed "there is an unencumbered current surplus in excess of $250,000.00 in the surplus fund of said City" which "is money in excess of all charges due or to become due in the fiscal year 1945–1946"; that such unencumbered current surplus constitutes "available funds" within the meaning of certain provisions of section 12 of the Improvement Bond Act of 1915 which are now found in section 8804 of the Streets and Highways Code.

The second cause of action follows the allegations of the first, except that it is based upon four "Series No. 905" bonds issued by the city on August 26, 1926, to defray the cost of improving streets other than those specified in the first cause of action. The principal sum of each of these bonds, in the amount of $1000, is alleged to have become due on January 2, 1935, and, as in count number one, the unpaid assessments are averred to have fallen due during 1926 to 1936.

On February 21, 1946, respondents filed their demurrer to the petition, specifying two grounds: (1) That neither count states facts sufficient to constitute a cause of action against respondents or "for the issuance of a Writ of Mandate"; (2) That both causes of action "are barred by the Provisions of Sections 337, 338 and 343 of the Code of Civil Procedure * * * and * * * of Section 8701 of the Streets and Highways Code, formerly Section 11, Subdivision A, of the Improvement Bond Act of 1915."

On March 8, 1946, the demurrer was overruled, and respondents given time to answer. On March 27 respondents filed their answer and on June 28, 1946, the matter was called for trial. Counsel for the respective parties made opening statements to the court; respondents then, upon the same grounds as set forth hereinabove, renewed their demurrer and objected to the introduction of any evidence; that court thereupon sustained the demurrer as to both causes of action, without leave to amend, and on July 2, 1946, filed judgment to the effect that petitioner "take nothing by his Petition"; such judgment was formally entered on July 5.

On July 17, 1946, there was filed petitioner's "Notice of Motion to Set Aside Ruling on Demurrer and for Leave to File Amended Petition for Writ of Mandate." A proposed amended petition was also filed. On July 24, 1946, the motion was argued, and denied by the court "without prejudice." On August 8, 1946, petitioner filed a "Notice of Motion to Set Aside Judgment, to Set Aside Ruling on Demurrer and for Leave to File Amended Petition for Writ of Mandate," in which it was stated that the motion would be "based upon the records and files of the above entitled action and on the points and authorities hereinafter set forth." No ground for the motion was stated. The points and authorities were addressed to the question of the running of the statute of limitations on petitioner's alleged causes of action, and also referred to those provisions of section 473 of the Code of Civil Procedure which state that the "court may, in furtherance of justice * * * allow a party to amend any pleading * * *." A "Second Proposed Amended Petition for Writ of Mandate" accompanied the notice of motion. On August 22, 1946, the court granted petitioner's motion. These appeals followed.

Respondents contend:

1. That the trial court had no power to vacate the judgment which had been entered on July 5, 1946, and grant leave to petitioner to file his amended petition.

2. That the purported causes of action set forth in both the original and the amended petitions were barred by the provisions of sections 337 and 338 of the Code of Civil Procedure and section 8701 of the Streets and Highways Code.

3. That the demurrer to the original petition was properly sustained for failure to state a cause of action, and that the proposed amended petitions filed by petitioner contain the same defects.

We conclude as follows:

[1] 1. *The Trial Court Was Without Authority, Under the Circumstances of this Case, to Vacate the Judgment Entered July 5, 1946.* In support of their first contention, respondents point to the fact that petitioner makes no claim that the judgment was entered through his "mistake, inadvertence, surprise or excusable neglect" (Code Civ.Proc., § 473), or that it does not reflect the true judgment of the court. Petitioner's sole argument is that his original petition for mandate did sufficiently state causes of action against respondents and that such causes were not barred by any limitations statute. It thus appears that petitioner does not dispute that in vacating the judgment the court was attempting to correct a judicial, as distinguished from a clerical, error. That it was at least error for the court to so vacate its own judgment is established by an abundance of authority. (See In re Estate of Burnett (1938), 11 Cal.2d 259, 262, 79 P.2d 89; McMahan v. Baringer (1942), 49 Cal. App.2d 431, 432, 122 P.2d 63, and cases there cited; 14 Cal.Jur. 991-994, 999, § 74; 7 Cal.Jur. 10 Yr.Supp. 305, § 74, and cases there cited.)

It follows that the order vacating the original judgment must be reversed.

[2] 2. *Petitioner's Asserted Causes of Action for Mandamus Appear to be Barred by Limitations Statutes.* As stated hereinabove, the petition for the writ was filed February 4, 1946. The three bonds described in petitioner's first cause of action matured, respectively, on January 2, 1934, January 2, 1935, and January 2, 1936. Those upon which his second cause of action is based matured January 2, 1935. It would thus appear, prima facie, that action upon all of the bonds was barred by section 337 of the Code of Civil Procedure, which prescribes four years as the period allowed for the commencement of "An action upon any contract, obligation or liability founded upon an instrument in writing * * *" The amended pleadings which petitioner sought to file in connection wtih his motions to vacate the judgment entered after demurrer to the original petition was sustained without leave to amend (and which petitioner asks us to take cognizance of even though they were not before the trial court at the time it ruled on the demurrer), contain added allegations which petitioner urges would establish that the bonds were "registered" within certain provisions (see Streets and Highways Code, § 8775) of the Improvement Bond Act of 1915 and within the provisions of the Bond and Coupon Registration Law of 1935 (Deering's Gen. Laws, Act 881g); and he contends that thereby and therefore the limitations statutes were waived and tolled and, hence, it was prejudicial error to sustain the demurrer without leave to amend. In support of his position on this point petitioner relies upon certain language in Irvine v. Bossen (1944), 25 Cal.2d 652, 658, 661, 155 P.2d 9, but in our view such language, when read in its full context, falls short of the effect invoked. Indeed, supporting respondents rather than petitioner, it is pointed out in the Irvine case that (page 658 of 25 Cal.2d, page 13 of 155 P.2d) "It is a fundamental principle in determining when the statute of limitation commences to run, that it runs from the time a cause of action accrues and it invariably accrues when there is a remedy available. (16 Cal.Jur. 488–490.)"

[3] In his application to this court for a hearing after decision of the District Court of Appeal (190 P.2d 226), petitioner asserts "There is now, and for some time has been, the sum of $2,236.48 in the bond redemption funds here involved. Said sum is solely applicable to petitioner's bonds; in fact, petitioner owns the only bonds outstanding * * * Yet if the decision of the District Court of Appeal [affirming the judgment for respondents] is correct he is forever barred from collecting the same." It does not appear to us that petitioner's above quoted conclusion is necessarily correct; rather does it appear that petitioner is confusing the nature of this proceeding. It will be remembered that we are dealing here not with an action on the bonds to recover money *from* the bond redemption fund, but with a petition for mandamus whereby it is sought to compel the respondents to transfer "unencumbered current surplus" monies *into* the bond redemption fund. It may well be that petitioner cannot maintain this proceeding unless his pleading shows that he has a right, not barred by limitation, to recover on the bonds, because otherwise he would fail to show that he possesses a substantial interest which mandamus would protect; but a showing that action on the bonds is not barred is not the equivalent of a showing that the right, if any, to mandamus is not barred. It is with that latter right that we are here directly concerned. As mentioned previously, the unpaid assessments are alleged to have fallen due in the years 1926 to 1936 and the bonds are shown to have matured on or prior to January 2, 1936, although this proceeding was not commenced until February, 1946. The petition itself alleges that "it is the duty * * * of the municipality which issued said bonds to transfer all surplus moneys in the General Fund of the City to the said Bond Redemption Fund" and that "In the event of there being no available funds in the treasury * * * the tax collector shall delay the entry of the certificate of sale until such funds are available, making demand in the meantime upon the City Council that a suitable amount be included in the next tax levy for the purpose of providing funds with which to make such payment," and, furthermore, that "In the event of such purchase [of land subject to an unpaid as-

sessment] being made by the city and of any succeeding installment of such assessment or of such interest not being paid in any future year * * * The city shall * * * unless a resale has been made by it, from time to time when due pay and transfer into said redemption fund the amount of any such future delinquent assessment and interest pending redemption, and no redemption shall be made until any such subsequent payments, with interest and penalties, shall also be paid." No fact is averred which shows that petitioner's right to mandamus to compel the performance of official duty is any more complete now than it was during all of the years after the assessments fell due and the bonds matured. We agree with the respondents, therefore, that regardless of whether the ability to plead registration of the bonds in an amended petition would adequately meet the issue of the limitations statutes so far as concerns suit to enforce payment of the bonds from any monies which might actually be in the bond redemption funds, petitioner has failed to allege facts which would excuse the delay of some ten years after the last unpaid assessment fell due and after the bonds matured (and some twenty years after the first unpaid assessment-installment was due) before he sought to compel the city to observe statutory provisions for paying into the redemption funds the amounts of the delinquent assessments. For aught that is alleged the now sought remedy of mandamus was at all times concerned available to petitioner, yet, as at least prima facie appears, he neglected for from ten to twenty years to pursue it.

For the purposes of this opinion we assume in petitioner's favor that upon the original delinquency each parcel of land subject to an unpaid assessment was sold to the city pursuant to the provisions of section 12 of the Improvement Act (see Streets and Highways Code, §§ 8800, 8803; Hammond v. City of Burbank (1936), 6 Cal.2d 646, 654, 59 P.2d 495; Wulff-Hansen & Co. v. Silvers (1942), 21 Cal.2d 253, 260–261, 131 P.2d 373), although the petition for mandamus does not expressly so allege. Under section 12 of the act, after such a sale the city "shall pay and transfer into the redemption fund the amount of the delinquent assessment and of the delinquent interest for which the property is sold" (Streets and Highways Code, § 8802). "If there are no available funds in the treasury with which to * * * payment * * * the amount of the delinquent assessment and interest for which the property was sold" then it becomes the duty of the city to levy a tax of not exceeding ten cents on each one hundred dollars of assessable property "for the purpose of providing funds with which to make such payment." Thereafter "the city shall, unless a resale has been made by it, from time to time when due pay and transfer into the redemption fund the amount of any future delinquent installments of the assessment and interest thereon pending redemption." (See sections 12, 16 of the Act; Streets and Highways Code, §§ 8804, 8806, 8809; American Co. v. City of Lakeport (1934), 220 Cal. 548, 562–565, 32 P.2d 622; Hammond v. City of Burbank (1936), supra, 6 Cal.2d 646, 657, 59 P.2d 495.) "Available funds" from which the city may make the payments of the purchase price and of subsequent unpaid assessments of land sold to the city have been defined as surplus monies remaining in the city's general fund "over and above the governmental liabilities incurred" in a particular fiscal year. (See Hammond v. City of Burbank (1936), supra, 6 Cal.2d 646, 662, 59 P.2d 495, 503; Kerr Glass Mfg. Corporation v. City of San Buenaventura (1936), 7 Cal.2d 701, 707, 62 P.2d 583.)

[4] The law is settled that the city may be compelled by mandamus to make the limited tax levy for the purpose of meeting the original purchase price of lands sold to it for delinquent assessments. (See Kerr Glass Mfg. Corporation v. City of San Buenaventura (1936), supra, 7 Cal.2d 701, 706, 62 P.2d 583, and cases there cited.) And, as noted in Hammond v. City of Burbank (1936), supra, 6 Cal.2d 646, 661, 59 P.2d 495, it was intimated in the Lakeport case (supra, 220 Cal. 548, 565, 32 P.2d 622) that the city may "be compelled to transfer surpluses to the bond redemption fund for the purposes of carrying out the city's obligations under section 12." Assuming, therefore, for the purposes of

this opinion without deciding, that "in any year if there is a surplus * * * the bondholders can compel by mandamus a transfer of that surplus to the bond redemption funds for the purposes specified in section 12" (cf. Hammond v. City of Burbank (1936), supra, 6 Cal.2d 646, 662, 663, 59 P.2d 495, 502; Kerr Glass Mfg. Corporation v. City of San Buenaventura (1936), supra, 7 Cal.2d 701, 707, 62 P.2d 583), nevertheless petitioner has not in any of his proposed petitions set forth facts which would excuse his long delay in seeking to compel the city to act. He nowhere avers, nor does he claim that he is able to aver, that surpluses sufficient to meet his bond requirements were not available from year to year for more than four years after maturity of such bonds and before this proceeding was commenced. Indeed, from petitioner's statements in his petition to this court for a hearing it appears inferentially that he is not in a position to claim that he could amend to show that at no earlier time was mandamus available to him. As previously mentioned, he asserts that there "is now, and for some time has been, the sum of $2,236.48 in the bond redemption funds here involved" and that "petitioner owns the only bonds outstanding." As it appears from the petition that other bonds were originally issued it is a reasonable inference since they are no longer outstanding, that funds were from time to time available to pay them and that they have been paid. There is no allegation of facts to show that funds to pay petitioner's bonds were not earlier available or that the now sought remedy of mandamus was not as fully available more than four years before this proceeding was commenced as it was on the date of filing.

[5] It is established in this state that a mandamus proceeding is barred if not commenced within the period prescribed by the limitations statutes and that the limitation begins to run when the right first accrues. (See Code Civ.Proc. §§ 1109, 363, 337, 343; W. R. Grace & Co. v. California Employment Comm. (1944), 24 Cal.2d 720, 728–729, 151 P.2d 215; Dillon v. Board of Pension Commrs. (1941), 18 Cal.2d 427, 429–430, 116 P.2d 37, 136 A.L.R. 800; Hermanson v. Board of Pension Commrs. (1933), 219 Cal. 622, 625, 28 P.2d 21.) In this proceeding to compel the city to perform its asserted duty to transfer surplus monies to the bond redemption funds the applicable period is, at most, four years. (Irvine v. Bossen (1944), supra, 25 Cal.2d 652, 663, 155 P.2d 9; Barnes v. Glide (1897), 117 Cal. 1, 7, 48 P. 804, 59 Am.St.Rep. 153.) As noted hereinabove, the allegedly delinquent assessments fell due from ten to twenty years prior to the filing of the petition herein and the bonds themselves matured more than ten years before the proceeding was commenced. And as also previously stated, petitioner has in neither his original petition nor either of his proposed amended petitions alleged facts excusing the delay in seeking to compel the city to pay the delinquent amounts into the bond redemption funds or otherwise tolling the statute. It follows that petitioner has not established the abuse of discretion which he charges the trial court committed in originally sustaining the demurrer to his petition without leave to amend (see Code Civ. Proc., § 472c), and in entering the judgment of dismissal. Therefore the judgment must be affirmed. By reason of our conclusion on this point, it becomes unnecessary to discuss the other contentions of the respective parties.

The order from which respondents appeal is reversed and the judgment from which petitioner appeals is affirmed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, and SPENCE, JJ., concur.

EDMONDS, Justice (concurring and dissenting).

I concur in the conclusion that the trial court had no authority to vacate the judgment entered upon an order sustaining the respondents' demurrer without leave to amend. But I do not join in the determination that the judgment should be affirmed because the "petitioner's asserted cause of action for mandamus appears to be barred by limitations statutes".

The grounds of demurrer were that the petition does not state sufficient facts to constitute a cause of action and that the cause of action, if any, is barred by the statute of limitations. Although the trial court in sustaining the demurrer did not announce the basis of its decision, all of the authorities cited and the amendments to the petition presented in the subsequent attempt to have the judgment vacated were directed solely to the issue of the statute of limitations.

The majority opinion states the two issues regarding the application of the statute as being: (1) whether it constitutes a bar to petitioner's claim on the bonds and thereby prevents him from having such interest as entitles him to maintain a proceeding in mandate; and, (2) whether the statute directly bars the right to the remedy of mandate, regardless of its effect upon an action on the bonds. The parties directed their briefs primarily to the first proposition. The basic issue presented in that regard is whether certain endorsements made on the bonds are sufficient to constitute such "registration" of them as to toll the statute. The position of the petitioner upon this issue is not fairly met by the majority opinion. No discussion is given to the statutes involved nor to the arguments presented by the petitioner, and the point is disposed of by stating: "In support of his position * * * petitioner relies upon certain language in Irvine v. Bossen * * *, but in our view such language, when read in its full context, falls short of the effect invoked." This certainly is not a holding that the petitioner could not have amended his petition to show registration of the bonds. If, as the opinion states, the petition shows "prima facie, that the action upon the bonds was barred", that conclusion concerns only the question of whether the demurrer should have been sustained, and does not determine whether it could properly have been sustained *without leave to amend.* Upon this latter point there is no decision.

Otherwise stated, the majority opinion holds that because the petition does not show, as against a demurrer that the petitioner may maintain an action upon the bonds, the mandate proceeding may not be maintained because the statute of limitations is a bar to a recovery of the indebtedness. This conclusion is correct only if it is based upon a determination that the petitioner could not amend his petition to state a cause of action upon his bonds, and the court leaves that question undecided.

In considering the second issue concerning the statute of limitations, the opinion declares: "It may well be that petitioner cannot maintain this proceeding unless his pleading shows that he has a right, not barred by limitation, to recover on the bonds, because otherwise he would fail to show that he possesses a substantial interest which mandamus would protect; but a showing that action on the bonds is not barred is not the equivalent of a showing that the right, if any, to mandamus is not barred. *It is with that latter right that we are here directly concerned.*" (Emphasis added.) And again: "We agree with the respondents, therefore, that *regardless* of whether the ability to plead registration of the bonds in an amended petition would adequately meet the issue of the limitations statutes so far as concerns suit to enforce payment of the bonds from any monies which might actually be in the bond redemption funds, petitioner has failed to allege facts which would excuse the delay" (emphasis added) in bringing mandate. The sole ground of the decision, therefore, is that, even if the petition could have been amended to state a cause of action upon the bonds, the statute of limitations bars the right to require the transfer to the bond redemption fund of an amount sufficient to meet the unpaid principal and interest.

The opinion notes that "petitioner has *failed to allege* facts which would excuse the delay" (emphasis added); "[f]or aught that is alleged the now sought remedy of mandamus was at all times concerned available"; and "[h]e nowhere avers, nor does he claim that he is able to aver" such facts. These statements assume that there is an affirmative duty upon the petitioner to negative the statute of limitations. To the contrary, the statute is a matter of defense normally to be raised by answer, and only available upon demurrer when the pleader has alleged facts from which it affirmatively appears that the action has not been commenced within the time fixed by statute.

"A demurrer reaches only matters appearing upon the face of the pleading to which it is directed, and it must be determined upon the allegations of such pleading without speculation on what might have happened or what might not have occurred. * * * Accordingly, the defense of the statute of limitations cannot be urged by demurrer, unless it clearly appears from the complaint that the plaintiff's cause of action is barred." (21 Cal.Jur. [Pleading, sec. 61] 94–95.)

For all that appears in the petition, there has not been "unencumbered current surplus" monies in the city treasury at any time prior to 1945. I, therefore, see no basis for barring the petitioner's right to demand a transfer of such money to the bond redemption fund in the absence of allegation of facts by the petitioner showing that the statute of limitations is applicable.

32 Cal.2d 700

GREGORY v. STATE.

L. A. 20294.

Supreme Court of California, in Bank.

Oct. 1, 1948.

Dissenting Opinion Oct. 5, 1948.

1. Taxation ⚷543(8)

Where claimant paid gift tax under protest, and while action to recover overpayment was pending statute was amended so as to require allowance of interest on amount of overpayment, plaintiff was entitled on rendition of judgment for overpayment, to interest from date amendment went into effect and such payment was not the giving of a retroactive effect to a prospective amendment. Stats.1943, c. 658; Revenue and Taxation Code, § 16271.

2 States ⚷171

There is no implied contract that state will pay interest on its indebtedness but state is liable for interest only when statute so provides.

3. States ⚷119

Where plaintiff paid gift tax under protest and while action was pending to recover overpayment, statute was amended so as to require allowance of interest on amount of overpayment, payment of interest to plaintiff from date amendment went into effect was not unconstitutional as a gift of public money for private purpose. Stats.1943, c. 658; Revenue and Taxation Code, § 16271; Const. art. 4, § 31.

EDMONDS, J., dissenting.

Appeal from Superior Court, San Bernardino County; Santley Mussell, Judge.

Action by A. Gregory, against State of California, to recover the amount plaintiff paid under protest, as a gift tax. From an adverse judgment defendant appeals.

Judgment affirmed.

For prior opinion, see 190 P.2d 639.

James W. Hickey, Inheritance Tax Atty., and J. Gould, Asst. Tax Atty., both of Sacramento, for appellant.

Surr & Hellyer, of San Bernardino, for respondent.

CARTER, Justice.

In 1943 plaintiff filed a gift tax return and the state controller issued a Notice of Determination of Tax. Plaintiff paid the tax to defendant State under protest. In this action to recover the tax so paid, plaintiff recovered judgment for the amount of the tax, and, after appeal (Gregory v. State of California, 77 Cal.App.2d 26, 28, 174 P.2d 863, 175 P.2d 542), pursuant to stipulation, judgment was entered in favor of plaintiff for a portion of the tax, it being conceded that the only issue was whether interest should be allowed on the amount overpaid on the tax. In the judgment the trial court allowed interest on the amount of the overpayment from and after May 18, 1945, which was the effective date of the 1945 amendment to the gift tax statute.

Prior to the time the tax was paid under protest and the action was commenced to recover it, the gift tax statute authorized an action to recover taxes where they were paid under protest, but it was provided that no interest be allowed on any refund (Stats. 1943, ch. 658). In 1945, effective May 18th, the statute was amended to provide that interest shall be allowed on any overpayment of any tax at the rate of 6% per annum from the date of the overpayment. (Stats.1945, ch. 380; Rev. & Tax.Code, sec. 16271.)

It is defendant's contention that the 1945 amendment has been improperly given a retroactive effect by the trial court, for the judgment allowed interest on the amount of the overpayment from the effective date of the amendment; and that to give it such an effect is a gift of public money contrary to the constitution (Cal. Const., Art. IV, sec. 31.)

[1] It has been held that where a statute provides that an obligation bear interest, and such obligation existed prior to the effective date of the statute, and would not bear interest except for a statute, a holding that interest be computed from the effective date of the statute, is not giving retroactive effect to such statute. Dunne v. Mastick, 50 Cal. 244. Prior to the adoption of the Civil Code no interest was allowed on legacies. That code provided that legacies bear interest. In the Dunne case, supra, the legacies there involved became vested before the adoption of the code. The Court said 50 Cal. at page 247: "The sections of the Civil Code went into effect on the first day of January, 1873. When interest is not specified in a contract, but is annexed as an incident by statute, it is allowed as damages for the refusal to pay the debt. Fake v. Eddy, 15 Wend, N. Y., 76, 80. The legacies were due when the Civil Code went into operation. The Legislature had power to impose on all debtors interest from the date of the adoption of the Code, by way of compensation for the delay in the payment of money already due. Such a statute is not retrospective, since it operates only on the future rights of the parties. A fresh demand and refusal would be a new assertion of a right, and would impose a new liability. So in legal effect was a neglect without a demand. Bullock v. Boyd, 1 Hoff.Ch., N.Y., 294; White v. Lyons, 42 Cal. 279, 284. We think, therefore, that interest at the statutory rate should have been allowed from the first day of January, 1873." See to the same effect, White v. Lyons, 42 Cal. 279; Cummings v. Howard, 63 Cal. 503. There is nothing in Aetna Casualty & Surety Co. v. Ind. Acc. Comm., 30 Cal.2d 388, 182 P.2d 159 contrary to the holding in those cases. There the compensation payable for past injuries was increased by an amendment to the statute—there being nothing new occurring after the effective date of the act which would make the statute operate prospectively. Here the state continues to withhold from the taxpayer an overpayment to which he is entitled after the effective date of the act, and the statute operates on that future condition or action by the State.

[2] Defendant asserts, however, that the rule of the Dunne case is not applicable for there the statute concerned interest as between private parties rather than between the State and an individual. We fail to see how that can affect the essential question of whether the act is or is not being applied retroactively. Assuming as asserted by defendant that the State is not liable for interest on its obligations unless it so provides by statute, that the payment of interest by it is a matter of grace, and that the interest accruing after maturity is an implied part of the basic contract, we still have no reason to not apply the rule in the Dunne case. In support of the last mentioned contention, defendant cites Irvine v. Reclamation Dist. No. 108, 24 Cal.2d 468, 150 P.2d 428, but that case involved a contract with a political subdivision of the State which provided for interest and the issue was whether it continued after maturity. In the instant case we have no element of contract. The provision for interest is purely statutory and the only issue is whether the statute was applied retroactively. If we speak of the matter in terms of an implied in law contract, then, like in the Dunne case, the statute declares a contract that for future withholding of money, it will pay interest thereon. Moreover, it should be noted that whatever the law may be elsewhere it has

always been the rule in California that there is no implied contract of any kind that the State will pay interest on its indebtedness for it is liable only when made so by statute. (See, 23 Cal.Jur. 588.) Thus all we have is a statutory liability and the sole question is whether the statute is applied retroactively. It is clearly not applied retroactively here because the State is being charged interest whether we call it damages or otherwise for the withholding of an individual's money in the future. It has by statute authorized such a charge. With reference to the claim that no interest is allowable against the State except by statute, the same was true as between individuals in the Dunne case and the statute here like the one there authorizes interest.

[3] Speaking to the contention of an unlawful gift of public money, defendant relies upon Molineux v. State of California, 109 Cal. 378, 42 P. 34, 50 Am.St.Rep. 49, and Davis v. State, 121 Cal. 210, 53 P. 555. In the Molineux case the issue was whether a statute authorized payment of interest by the State on interest coupons of Indian war bonds. The decision was based upon two grounds but the first and main ground is that the statute properly construed did not authorize interest. The second ground, gift of public moneys, is more or less of an after-thought. The Davis case merely reaffirmed the holding of the Molineux case on the first ground. In any event it does not appear in the Molineux case whether the court was dealing with the running of interest on the debt after the effective date of the alleged interest statute or before. Naturally if the interest was on the debt before the operative date of the statute we would have the problem of a gift of public funds. But where, as here, the interest runs after the effective date of the amendment, the State receives a substantial benefit for the payment of interest, namely, the retention and use thereafter of the taxpayer's money, which continues only as long as that benefit is conferred. The latest authority on the subject supports that reasoning. County of Los Angeles v. Southern Cal. Tel. Co., 32 Cal.2d 378, 196 P.2d 773; see, also, Patrick v. Riley, 209 Cal. 350, 287 P. 455; Yosemite Stage etc. Co. v. Dunn, 83 Cal. 264, 23 P. 369.

The judgment is affirmed.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

EDMONDS, Justice (dissenting).

In considering the amendment to the Gift Tax Act (Stats.1945, Chap. 380, p. 838), which previously had provided that no interest should be allowed on a refund of taxes, the first question which arises is whether the legislature intended that it should apply to a judgment rendered after its effective date in an action previously commenced to recover the amount of an overpayment of taxes. A cardinal rule of construction in this regard is that statutes are presumed to be intended to operate prospectively and should never be construed as having a retrospective effect unless their terms clearly show a legislative intention that they should so operate. Aetna Casualty & Surety Co. v. Ind. Acc. Comm., 30 Cal.2d 388, 182 P.2d 159; In re Estate of Childs, 18 Cal.2d 237, 115 P.2d 432, 136 A.L.R. 333; Jones v. Union Oil Co., 218 Cal. 775, 25 P.2d 5; In re Cate, 207 Cal. 443, 279 P. 131; In re Estate of Frees, 187 Cal. 150, 201 P. 112; O'Dea v. Cook, 176 Cal. 659, 169 P. 366; Bank of America Nat. Trust & Savings Ass'n v. Dennison, 8 Cal.App.2d 173, 47 P.2d 296; Anderson v. Ott, 127 Cal.App. 122, 15 P.2d 526. The provision of Civil Code section 3 that "No part of it is retroactive, unless expressly so declared" states this fundamental principle. In re Cate, supra; In re Estate of Frees, supra; In re Estate of Richards, 133 Cal. 524, 65 P. 1034.

The allowance of interest against the government is not chargeable because of delay or default. Reclamation Dist. No. 1500 v. Reclamation Board, 197 Cal. 482, 503, 241 P. 552, in holding that section 1915 of the Civil Code has no application to the State, cites with approval the following statement from Ruling Case Law: "The theory upon which the rule is based is that whenever interest is allowed either by statute or by common law, except in cases where there has been a contract to pay interest, it is allowed for delay or default of the debtor. But delay or default cannot be attributed to the government. It is presumed to be always ready to pay what it owes." (15 R.C.L. sec. 14, p. 17.) The same text is also quoted with approval in Engebretson v. City of San Diego, 185 Cal. 475, 479, 197 P. 651; and see United States v. Sherman, 98 U.S. 565, 567, 568, 25 L.Ed. 235.

Generally speaking, interest is of two kinds—it "is compensation allowed by law or fixed by the parties for the use or detention of money, or allowed by law as additional damages for loss of use of the money due as damages, during the lapse of time since the accrual of the claim." (McCormick on Damages, sec. 50, p. 205.)

Some distinctions between the cases in which conventional or promised interest (as McCormick terms it) is allowed, and those in which interest is recoverable only by way of indemnification is made clear in an early Wisconsin case. The court there said: "On a contract which stipulates for interest, interest at the agreed rate, or, in the absence of an agreed rate, at the rate prescribed by the law at the date of the contract, will be the rate recoverable until the repayment of the principal sum. Spencer v. Maxfield, 16 Wis. 178. A change of the legal rate would not effect the rate of interest recoverable upon such a contract. But where the contract is silent upon the subject of interest, and in many cases of torts, a different rule obtains. There damages, rather than interest, are to be admeasured. In awarding damages, the law aims at indemnity. The purpose is to indemnify the plaintiff for the loss which he has suffered by reason of the defendant's failure to pay the money when it became due. The law assumes, for want of a more certain datum, that interest at the legal rate, during the period through which the money has been withheld, is a fair measure of such loss; for, if the money had come to hand, it is fair to presume it would have produced that rate. But when a change of the legal rate of interest has been made during the period of the default, it is manifest that neither the rate in force at the time of the happening of the default nor the new rate in force at the time of judgment would be a fair measure for the whole period; but a fairer measure, for all cases, is the rate in force during the period, as varied by legislation, and this is the rule found to be established by nearly or quite all the decided cases. Wilson v. Cobb, 31 N.J.Eq. 91; Jersey City v. O'Callaghan, 41 N.J.L. 339 [sec. 349]; Reese v. Rutherfurd, 90 N.Y. 644; Sanders v. [Lake Shore & M. S.] Railway Co., 94 N.Y. 641; O'Brien v. Young, 95 N.Y. 428 [47 Am.Rep. 64]; White v. Lyons, 42 Cal. 279; Stark v. Olney, 3 Or. 88. In Reese v. Rutherfurd, supra, it is said, in effect, that the right to recover as damages interest at the rate in force at the time of the default down to the time when the legal rate is changed is in the nature of a vested right, of which the plaintiff cannot be deprived by retroactive legislation. * * *" State v. Guenther, 87 Wis. 673, 58 N.W. 1105, 1106.

The California cases involving changes in the legal rate of interest, recognize the same distinctions. In Aguirre v. Packard, 14 Cal. 171, at page 172, 73 Am.Dec. 645, an attempt to apply the increased rate specified by a new law was rejected, the court saying "Interest follows the contract according to the law in existence at the time and place of the contract, or of the performance of it. But a subsequent change of the legal rate of interest does not affect the contract."

The rule in this type of situation is bottomed on the premise that "where there has been a change in the rate of legal interest as declared by statute it is well settled that such a change cannot be retroactive, and that the rate which was legal at the time the obligation was incurred will hold when the obligation matures, notwithstanding changes in the statute in the interim". (15 R.C.L. 19; see also annotation, 87 A.L.R. 462, 464).

In considering the applicability of the statute as amended to Gregory's cause of action, it is necessary to determine the nature of the obligation upon which interest is claimed. The right to a tax refund is in the nature of an action in assumpsit for money had and received, that is, an action upon a contract implied in law, or quasi-contract, made at the time of the overpayment, that the State will refund the excess payment. Welsbach Co. v. State of California, 206 Cal. 556, 275 P. 436; Aalwyn's Law Inst. v. San Francisco, 39 Cal.App. 414, 179 P. 220; see 24 Cal. Jur. 306, 307. The same is true under Federal law, where it is said that an action to recover taxes erroneously paid "is the lineal successor of the common count in indebitatus assumpsit for money had and received. Originally an action for the recovery of debt, favored because more convenient and flexible than the common law action of debt, it has been gradually expanded as a medium for recovery upon every form of quasi-contractual obligation in which the duty to pay money is imposed by law, independently of contract, express or implied in fact." Stone v. White, 301 U.S. 532, 534, 57 S.Ct. 851, 852, 81 L.Ed. 1265. It is true that the right and remedy are founded upon a statute; but that does not change the nature of the underlying transaction, which is quasi-contract, or contract implied in law. It is upon this theory that the rule is applied in both state and Federal cases to recover upon rights equitable in nature to avoid unjust enrichment. Stone v. White, supra; Lewis v. Reynolds, 284 U.S. 281, 52 S.Ct. 145, 76 L.Ed. 293; George Moore Ice Cream Co. v. Rose, 289 U.S. 373, 53 S.Ct. 620, 77 L.Ed. 1265; United States v. Jefferson Electric Mfg. Co., 291 U.S. 386, 54 S.Ct. 443, 78 L.Ed. 859; Pacific Fruit Express Co. v. McColgan, 67 Cal.App.2d 93, 153 P.2d 607.

The obligation of the state to repay Gregory was an implied promise and the decision by the trial court that an amount in excess of the tax due had been exacted included, as a conclusion of law, the determination that the promise had existed from the time of the collection of the overpayment. The implied in law contract created at the time of the overpayment then included the provision that "no interest shall be allowed on any refund" (sec. 74, Gift Tax Act of 1939, St.1939, p. 2079, supra). The suit for refund was brought immediately and it is axiomatic that a plaintiff suing upon a contract, express or implied, may recover only upon the cause of action existing at the time the suit is brought.

Before amendments were made to the Tax Law of New York, Consol.Laws, c. 60, it had provided, by section 296, that overpayments should be refunded together with interest thereon from the date of payment. The word "interest" had been determined to mean interest at the legal rate. In 1939, a statute was enacted which provided as to interest on judgments and accrued claims that the "rate of interest * * * shall not exceed four per centum per annum". General Municipal Law, Consol.Laws, c. 24, § 3-a. As to a claim arising prior to, but reduced to judgment after, the effective date of the amendment, it was held that the claim should bear interest at 6% from the date of the overpayment to July 1, 1939, and 4% thereafter. People v. Sexton, 259 App.Div. 566, 20 N.Y.S.2d 41, affirmed 284 N.Y. 57, 29 N.E. 2d 469; People v. Miller, 173 Misc. 397, 17 N.Y.S.2d 202; see In re Bronx River Parkway, 259 App.Div. 552, 20 N.Y.S.2d 53, for same rule applied as to condemnation award. The court in the Sexton case said, "We are of the view that the contract implied herein was one to repay interest at such rate or rates as might be prescribed by law from time to time until the repayment had been made. Therefore, the promise of the City will be discharged by paying interest at the rate of six per centum per annum during the period in which that rate was fixed as the legal rate of interest, and by paying a rate not to exceed four per centum per annum during the period when that rate was fixed as the maximum amount of interest to be paid, after the proper rate is fixed by the court." Supra, 20 N.Y.S.2d at page 49.

In the course of reaching this result, the court distinguished the situation here presented by saying: "Were the promise implied herein to repay a specific rate of interest, a subsequent statute could not change the right to receive that rate of interest." Supra, 20 N.Y.S.2d at page 49. The same reasoning is applicable to an obligation of the State to refund an overpayment which arose when the taxing statute provided that "no interest shall be allowed on any refund granted under this act * * *." Sec. 74, Gift Tax Act of 1939, supra.

The trial court's allowance of interest from the effective date of the amendment is a retrospective application of the statute because one of the terms of the obligation which is the basis of the judgment was that no interest should be recovered. Aetna Cas. & Surety Co. v. Ind. Acc. Comm., 30 Cal.2d 388, 394, 182 P.2d 159. The majority opinion, in reaching the contrary conclusion, impliedly overrules the Aetna case. A frequently quoted statement of Justice Story defines a retroactive or retrospective law, as follows: "Upon principle, every statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective." Society for the Propagation of the Gospel v. Wheeler, Fed.Cas. No. 13,156, 2 Gall. 105, 139.

The amendatory act provides that "inasmuch as [the act] provides for a tax levy for the usual current expenses of the State, [it] shall, * * * take effect immediately". This does not manifest an intention that the change shall apply retroactively to overpayments made prior to its effective date, but merely that it shall take effect immediately and apply to all overpayments made thereafter. There is nothing in the statute to warrant a holding that the legislature intended to have the interest rate applied retroactively to overpayments made prior to its enactment, and in the absence of such an expressed intention, the statute should be applied prospectively only.

Cases such as County of Los Angeles v. Southern Cal. Tel. Co., 32 Cal.2d 378, 196 P.2d 773, are not authority, in my judgment, for the position that the allowance of interest, where none was theretofore required, is not a gift of public money. The majority has said that no contract is here involved, but then hold that there is no gift of public money, because "the State receives a substantial benefit for the payment of interest, namely, the retention and use thereafter of the taxpayer's money, which continues only as long as that benefit is conferred." Consideration is an element of contract, and if the allowance of interest is based upon the theory of contract, certainly it may not be said that the terms of the statute as in effect at the time of payment by Gregory, "have no element of contract".

Where rights are purely statutory, the majority opinion states, no element of contract is present. But the Southern Cal. Tel. Co. case, relied upon for the conclusion that there is consideration, held that the statute there involved "is a continuing offer extended to telephone and telegraph companies to use the highways, which offer when accepted by the construction and maintenance of lines constitutes a binding contract based on adequate consideration, and that the vested right established thereby cannot be impaired by subsequent acts of the Legislature." Supra, 32 Cal.2d at page 384, 196 P.2d at page 778. And this court has decided that pension rights which have been acquired by public employees are vested rights which cannot be abrogated by the public body without impairing its obligation of contract. Kern v. City of Long Beach, 29 Cal.2d 848, 179 P.2d 799. Certainly the State, as well as an individual, may acquire a vested right by the operation of a statute. In re Estate of Potter, 188 Cal. 55, 60, 204 P. 826; Trippet v. State, 149 Cal. 521, 526, 86 P. 1084, 8 L.R.A.,N.S., 1210; In re Estate of Stanford, 126 Cal. 112, 119, 54 P. 259, 58 P. 462, 45 L.R.A. 788.

Upon the overpayment of the tax here involved, the statute provided that the taxpayer could recover the amount that was in excess, from the State. To that extent the taxpayer had a vested right in the excess. The State, on the other hand, had an obligation to refund the amount which was judicially found to be in excess of the sum due. The nature and extent of the obligation is ascertained from the language of the statute at the time the obligation was established. Kern v. City of Long Beach, supra, 29 Cal.2d at page 850, 179 P.2d 799. And a subsequent statute, which has the effect of reducing the amount the State is to receive, or of increasing an obligation of the State, already existing, makes a gift of the property of the State to the extent of the reduction or increase, contrary to section 31, Article IV, of the Constitution. In re

Estate of Potter, supra; In re Estate of Rossi, 169 Cal. 148, 149, 146 P. 430; In re Estate of Kennedy, 157 Cal. 517, 527, 108 P. 280, 29 L.R.A.,N.S., 428; In re Estate of Martin, 153 Cal. 225, 227, 94 P. 1053; In re Estate of Woodard, 153 Cal. 39, 94 P. 242; Trippet v. State, supra; In re Estate of Stanford, supra. No suggestion is made that the payment here is for a "public purpose" so that the benefit to the State is in the nature of consideration. County of Alameda v. Janssen, 16 Cal.2d 276, 281, 106 P.2d 11, 130 A.L.R. 1141. Such an enlargement of the existing obligation, in my opinion, is but a gratuitous transfer of the property of the State, made voluntarily and without consideration. Yosemite Stage & Turnpike Co. v. Dunn, 83 Cal. 264, 23 P. 369.

For these reasons, I believe that the judgment should be reversed.

32 Cal.2d 803

PEOPLE v. WALLIN.

Cr. 4876.

Supreme Court of California.

Oct. 1, 1948.

Dissenting Opinion Oct. 8, 1948.

Rehearing Denied Oct. 28, 1948.

1. Criminal law 🔑59(5)

A person who is not capable of committing a specified crime can, by aiding, advising, or encouraging another to commit the crime, be made liable to prosecution as a principal under statute making principals of all persons concerned in the commission of a crime. Pen.Code, § 31.

2. Criminal law 🔑507(1)

Where murderer encouraged defendant's act of assisting murderer in concealing the crime to avoid arrest and punishment, for which act defendant was charged under statute with being an accessory to murder, under statute making principals of persons concerned in commission of a crime, murderer became chargeable with the "identical offense" charged against defendant, within statute defining an "accomplice" to be one liable to prosecution for the "identical offense" charged against defendant and precluding conviction upon the uncorroborated testimony of an accomplice. Pen.Code, §§ 31, 32, 972, 1111.

See Words and Phrases, Permanent Edition, for all other definitions of "Accomplice" and "Identical Offense".

3. Criminal law 🔑507(1)

Under statute precluding conviction upon uncorroborated testimony of an accomplice and defining an accomplice to be one who is "liable to prosecution" for the identical offense charged against defendant, test whether an alleged accomplice is within the quoted words is, not whether alleged accomplice was subject to trial and conviction at the time he testifies, but whether he was subject to trial and conviction when the acts were committed and as a result of those acts he became liable to prosecution. Pen.Code, § 1111.

See Words and Phrases, Permanent Edition, for all other definitions of "Liable to Prosecution".

4. Criminal law 🔑510

The corroboration required by statute for conviction upon testimony of an accomplice is based primarily upon fact that experience has shown that evidence of an accomplice should be viewed with suspicion. Pen.Code, § 1111.

5. Criminal law 🔑780(1), 1173(2)

Where convicted defendant was entitled to an instruction that testimony of accomplice required corroboration, refusal to give instruction was prejudicial although there was evidence which, if believed, was corroborative of testimony of accomplice, since jury in considering credibility of witnesses may have rejected corroborative evidence leaving testimony of accomplice stand alone. Pen.Code, § 1111.

EDMONDS, J., dissenting.

◆

Appeal from Superior Court, San Joaquin County; M. G. Woodward, Judge.

Norton Wallin was convicted of being an accessory to murder and he appeals.

Reversed.

Prior opinion 188 P.2d 64.

Goldstein, Barceloux & Goldstein and J. Oscar Goldstein, all of Chico, and Jack J. Miller and Miller & Kroloff, all of Stockton, for appellant.

Fred N. Howser, Atty. Gen., Leonard M. Friedman, Deputy Atty. Gen., and Chester E. Watson, Dist. Atty., of Stockton, for respondent.

GIBSON, Chief Justice.

Defendant appeals from a judgment of conviction, under section 32 of the Penal Code, of the crime of being an accessory to murder, and from an order denying his motion for a new trial.

The evidence consisted largely of the testimony of Mrs. Jeanette Paz, the confessed murderer, whom defendant is charged with having aided in disposing of the body of the victim, the four year old spastic daughter of Mrs. Paz. Instructions that Mrs. Paz was an accomplice of defendant and that her testimony required corroboration were requested and denied, and the primary contention on appeal is that this constituted prejudicial error.

Mrs. Paz testified that she had thought for several years that the child "would be better off dead" because of its infirmity and on many occasions had talked, with "anyone that would listen," about the advisability of doing away with it. She became acquainted with defendant about August 21, 1946, when she obtained a position as clerk in a hotel operated by him. According to her testimony she talked to defendant about the child a number of times, and he agreed that she was right in thinking it would be better off dead. They discussed killing the child by poisoning and drowning, and disposing of the body by cremation and burial. Early in September, 1946, Mrs. Paz attempted to get someone to take care of the child who was then living with her relatives, but defendant discouraged her saying "our way is best." On the evening of September 11, Mrs. Paz strangled the child in her room in the hotel. She testified that she then called defendant at a cafe where he was dining, told what she had done, and asked him to come to the hotel. He said that he would, but he did not come until she telephoned him a second time. Mrs. Paz was crying when he arrived at the hotel, and she asked him to help her. They discussed plans for disposing of the body and arranged that she should take it to an appointed place near the hotel. According to the plan he met her there and drove to an isolated place where together they dug a grave and buried the body.

The telephone operator at the hotel testified that on the evening of September 11 she overheard the following portions of a conversation between Mrs. Paz and defendant. Mrs. Paz said, "I don't know why you don't come over. I need you. You can imagine how I feel, Morton." Defendant said, "I think you are foolish to start anything now," to which she replied, "It is too late now, it is already done." Defendant then said, "What are you going to do now? Are you going to do what you [or we] planned?" (The witness was not sure whether defendant said "you" or "we.") Mrs. Paz said, "No, I have something better than that; I will tell you when you get here."

A laboratory test showed that the earth surrounding the grave was similar to that found on tools in defendant's automobile, and there was also evidence that large foot and hand prints were discovered at the grave, although none was identified as being that of defendant. Shortly after the crime was discovered, defendant stated that it was his custom to wash his car two or three times a week, and that he had washed it, including the interior, on the day after the murder. He also stated that he had lent the car to Mrs. Paz on the night of the crime to be used for a purpose unknown to him. This statement conforms to declarations made by Mrs. Paz at the time of her arrest and on several occasions thereafter, in which she asserted that she had borrowed defendant's car and had used it to dispose of the child's body.

Section 1111 of the Penal Code provides that "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated" and defines an accomplice as "one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." The question is whether Mrs. Paz, by aiding and encouraging defendant to assist her in disposing of the child's body, became liable to prosecution for the identical offense charged against him.

Section 32 of the Penal Code under which defendant is charged provides: "Every person who, after a felony has been committed, harbors, conceals or aids a principal in such felony, with the intent that said principal may avoid or escape from arrest, trial, conviction or punishment, having knowledge that said principal has committed such felony or has been charged with such felony or convicted thereof, is an accessory to such felony." Section 31 provides: "All persons concerned in the commission of a crime * * * whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission * * * are principals in any crime so committed." Section 32 is supplemented by section 31, and any person who has advised or encouraged another to aid a felon is guilty of the crime of being an accessory.

[1] Respondent argues, however, that Mrs. Paz could not be an accessory after the fact to her crime and that therefore she was incapable of committing the offense with which defendant stands charged. It may be that a murderer who acts alone in concealing her crime cannot be separately charged as an accessory, but it does not follow that she cannot become liable as such if she encourages another to aid her in avoiding arrest and punishment. There are many instances in the law where a person is held to be criminally responsible for cooperating in an offense which he is incapable of committing alone. See Adkins v. Commonwealth, 175 Va. 590, 9 S.E.2d 349, 131 A.L.R. 1322. For example, in People v. Young, 132 Cal.App. 770, 23 P.2d 524, it was held that a woman could be lawfully convicted of pimping although the statute, Stats.1911, p. 10, restricted the offense to a *male person* who derived his support in whole or part from the earnings of a prostitute. It is obvious that a woman could not by herself violate the act, but the court held that she was chargeable by reason of section 31 of the Penal Code if she assisted in the commission of the offense. It has also been held that a woman who aids a rapist may be charged with rape (People v. Bartol, 24 Cal.App. 659, 142 P. 510), and that a husband who assists another to commit the act may be charged with the rape of his wife. In re Kantrowitz, 24 Cal.App. 203, 140 P. 1078. Thus it is clear that a person who is not independently capable of committing an offense can, by aiding, abetting, advising or encouraging another to commit the crime, be made liable to prosecution as a principal in such offense by reason of section 31.

[2] The murder was completed as soon as the child was killed, and no subsequent acts on the part of Mrs. Paz or any other person were required to be shown in order to establish the elements of that offense. Defendant's crime of being an accessory under section 32 was separate and distinct (see Pen.Code § 972), although it, of course, depended on the previous commission of the murder. He became chargeable under section 32 when he aided Mrs. Paz to conceal her crime, and she became liable to prosecution for the identical offense by reason of section 31 when she encouraged him to assist her in avoiding arrest and punishment.

An analogous situation was presented in People v. Lima, 25 Cal.2d 573, 154 P.2d 698, where the defendant Lima was charged with receiving stolen property, and the thieves testified that there was a prearranged plan that they should steal the goods and that Lima should receive them. It was recognized that a thief and a receiver are generally said to be guilty of different offenses, but since the testimony of the thieves in that case showed that they aided and abetted Lima in receiving the stolen goods, it was held that the thieves also were liable to prosecution for that offense by reason of section 31 of the Penal Code, and that they were therefore accomplices. There is an added similarity between the two cases in that the testimony of Mrs. Paz showed that she and defendant discussed plans for disposing of the body before the murder was committed. People v. Clapp, 24 Cal.2d 835, 151 P.2d 237, relied on by respondent, is distinguished in the Lima case (25 Cal.2d at page 579, 154 P.2d at page 701), and the distinction there made is equally applicable here.

[3] The legal character of the relationship of Mrs. Paz to defendant and the latter's crime, with respect to the requirement of corroboration, is not affected by the fact that she had been convicted of murder before she testified. The test is not whether she was subject to trial and conviction *at the time she testified,* but whether, *at the time the acts were committed,* and as a result of those acts, she became "liable to prosecution for the identical offense charged against the defendant." If this were not true, then a witness who had previously been convicted, either of the same or of an included offense, could never be considered an accomplice in a subsequent trial arising out of the same transaction. Of course it is unlikely that a prosecutor would choose to charge a killer with the lesser offense of aiding another to conceal the murder, but the fact that this would rarely, if ever, occur is not determinative of our question and is immaterial insofar as the accomplice rule is concerned. In this connection we must keep in mind the reasons for the enactment of section 1111 of the Penal Code requiring corroboration of accomplices and the purpose of the 1915 amendment to that section restricting the application of the rule to persons who are liable to prosecution for the identical offense.

[4] The statutory requirement of corroboration is based primarily upon the fact that experience has shown that the evidence of an accomplice should be viewed with care, caution and suspicion because it comes from a tainted source and is often given in the hope or expectation of leniency or immunity. People v. Coffey, 161 Cal. 433, 438, 119 P. 901, 39 L.R.A.,N.S., 704. Before 1915 there was no statutory definition of an accomplice in this state, and it was held that anyone "who knowingly and voluntarily co-operates with or aids or assists or advises or encourages another in the commission of a crime is an accomplice, without regard to the degree of his guilt." People v. Coffey, 161 Cal. 433, 439, 440, 119 P. 901, 903, 39 L.R.A.,N.S., 704. The courts experienced some difficulty in the application of this definition, and they began to make arbitrary exceptions of participants who might be characterized as victims, such as women kept in houses of prostitution or transported in violation of the Mann Act, 18 U.S.C.A. §§ 397–404. This led in some states to the adoption of a rule similar to that set forth in the 1915 amendment restricting accomplices to those liable to prosecution for the identical offense charged against defendant. State v. Coffey, 157 Or. 457, 72 P.2d 35, 38, 39. When the reasons for the requirement of corroboration are considered together with the purpose of the restricted definition of accomplices, it is clear that we should not refuse to treat one who has committed a murder as an accomplice of one who aided her in concealing the crime merely because it is unlikely that a murderer would ever be charged as an accessory.

[5] Mrs. Paz became liable to prosecution for the separate offense of being an accessory as the result of her additional acts in encouraging and aiding defendant to commit the offense charged against him. She was therefore his accomplice, and the court erred in refusing to instruct the jury that her testimony required corroboration. Although there was evidence which, if believed, was corroborative of the testimony of Mrs. Paz, defendant was clearly prejudiced by the refusal to give the requested instructions, since the jury in considering the credibility of witnesses may have rejected the corroborative evidence leaving the testimony of the accomplice to stand alone. 23 C.J.S., Criminal Law, § 1228, p. 792.

The judgment and the order denying a new trial are reversed.

SHENK, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

EDMONDS, Justice (dissenting).

I disagree with the reasoning of the majority opinion which is based upon what I believe to be an incorrect interpretation of section 1111 of the Penal Code, as amended in 1915. That section defines an accomplice as "one who *is* liable to prosecution for the identical offense charged against the defendant on trial *in the cause in which the testimony of the accomplice is given.*" (Emphasis added.) This language is clear and unequivocal. Section 7 of the same code declares: "Words used in this code in the present tense include the future as well as the present." In view of these statutes, the decisive question presented for decision is: At the time she testified, or at any time after the grand jury indicted Wallin, was Mrs. Paz liable to prosecution for the identical offense charged against him.

Contrary to the clear language of the statute, the majority opinion states: "The test is not whether she was subject to trial and conviction *at the time she testified,* but whether, *at the time the acts were committed,* and as a result of those acts, she became 'liable to prosecution for the identical offense charged against the defendant.'" It will be noted that in arriving at this "test" the majority opinion quotes from section 1111 immediately after, and to the exclusion of, the word "is," and does not include the phrase "in the cause in which the testimony of the accomplice is given." The statute with these omissions is not the legislative enactment which this court is required to apply.

No authority is cited for the "test" stated in the majority opinion. All that is said is that "[i]f this were not true, then a witness who had previously been convicted, either of the same or of an included offense, could never be considered an accomplice in a subsequent trial arising out of the same transaction." This statement can only mean that, under the facts of this case, as a matter of law, Mrs. Paz was an accomplice of Wallin, a conclusion which is not compelled by the statute. Since the 1915 amendment of it, 223 cases have been decided by the appellate courts in which its application has been considered. In only two of them, People v. Norris, 133 Cal.App. 606, 24 P.2d 561, and People v. Linde, 131 Cal.App. 12, 20 P.2d 704, had a person charged with being an accomplice been convicted at the time the action was commenced. In each of these cases, as there was substantial corroborative evidence, the People conceded that the witness was an accomplice and the court was not called upon to decide the question of his status.

The other cases may be factually classified into two major groups. The first and largest group of them concern the usual situation in which the evidence shows a crime committed by two persons, only one of whom is prosecuted, the other offender testifying for the State. Normally, at that time, by his own testimony the witness is subject to prosecution for the same crime which he describes. See, for example, People v. Lima, 25 Cal.2d 573, 154 P.2d 698; People v. Menne, 4 Cal.App.2d 91, 41 P.2d 383. The second major group of cases concern an action commenced against several persons with a later dismissal as to one of them (see People v. Dail, 22 Cal.2d 642, 140 P.2d 828; People v. Earl, 10 Cal.App.2d 163, 51 P.2d 147; People v. Hobson, 7 Cal.App.2d 392, 46 P.2d 278), or where one defendant pleads guilty and is placed on probation or the time of sentence is deferred. See People v. Lisenba, 14 Cal.2d 403, 94 P.2d 569; People v. Allison, 200 Cal. 404, 253 P. 318.

In any of these circumstances, the accomplice's self interest is the basis for the requirement for corroboration of his accusations against the person on trial. "The reasons which have led to this distrust of an accomplice's testimony," says Dean Wigmore, "are not far to seek. He may expect to save himself from punishment by procuring the conviction of others. * * * The essential element * * * it must be remembered, is this supposed promise or expectation of clemency. If that is lacking, the whole basis of distrust fails." VII Wigmore on Evidence, sec. 2057, p. 322.

But at the time of Wallin's trial, Mrs. Paz had been tried and convicted of murder and was serving the sentence prescribed by law. She was then not subject to prosecution as an accessory to the crime of murder, having already been convicted as a principal, and the driving force which compels corroboration of testimony under section 1111 no longer existed.

Possibly, under certain circumstances, a person may be prosecuted as either a principal or an accessory, but he cannot be charged as both principal and accessory. Section 30 of the Penal Code classifies "parties to crimes" as principals and accessories. Section 31 further states, "All persons concerned in the commission of *a* crime" in certain specified ways are "principals in *any* crime so committed." Section 32 provides: "Every person who" aids one in escape from arrest "is an accessory to *such* felony." (Emphasis added.) These statutes do not create or enumerate separate and distinct substantive crimes; they do no more than to define the parties to any given substantive crime. Herein lies the primary distinction which should be made between the present case and People v. Lima, supra. Lima was prosecuted for receiving stolen goods, and the accomplice-witnesses were the ones who stole the property. The crimes of theft and receiving stolen goods have always been considered as separate substantive crimes, and dual prosecutions of the same person for both of these crimes has long been allowed. See 2 Wharton, Criminal Law, sec. 1234, p. 1551, citing an 1847 case of State v. Coppenburg, 33 S.C.L. 273, 2 Strob. 273. Yet no court has affirmed the conviction of the same person as both principal and accessory after the fact to a single substantive crime, and there is authority directly contrary. Regina v. Brannon, 14 Cox C.C. 394; Crosby v. State, 179 Miss. 149, 175 So. 180, and cases cited therein.

To say the least, the rule of the majority opinion that the phrase is "liable to prosecution" means "at the time the acts were committed" and not "at the time she testified," is an extremely liberal construction of section 1111. In People v. Coffey, 1911, 161 Cal. 433, 119 P. 901, 39 L.R.A.,N.S., 704, this court held that anyone connected with a crime was an accomplice. As a direct answer to the Coffey case, in 1915 the legislature placed in the statute the present restricted definition. The majority opinion broadens the requirement which was narrowed by legislative action.

For these reasons, I would affirm the judgment.

Rehearing denied; EDMONDS, J., dissenting.

32 Cal.2d 763

SAMPSELL v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.

L. A. 20369.

Supreme Court of California, in Bank.

Oct. 1, 1948.

1. Mandamus ⊂⇒28, 48

Mandamus will lie to compel court to give a full hearing in the case before it, although it is not available to inform trial court as to how it should rule with respect to the merits or to correct trial court's decision, whether based on an erroneous conception of its own jurisdiction or on error of law. Code Civ.Proc. § 1085.

2. Mandamus ⊂⇒42

Where trial court dismissed order to show cause why custody of minor child should not be awarded to father pending trial of his action for divorce on ground that father's affidavit in support of order showed that court had no jurisdiction to determine custody of child because child had not been physically present within state since before divorce action was commenced and father had no plain, speedy and adequate remedy in the ordinary course of law, mandamus would lie to compel trial court to hear and determine father's application for custody order pendente lite. Code Civ.Proc §§ 1085, 1086.

3. Mandamus ⊂⇒4(3)

Appeal from order dismissing for want of jurisdiction order to show cause why custody of minor child should not be awarded to father pending trial of his action for divorce did not afford a "plain, speedy and adequate remedy in ordinary course of law" which would preclude issuance of writ of mandamus compelling trial court to hear and determine father's application for custody order pendente lite, since father would have to await outcome of divorce action before perfecting appeal and in meantime would be deprived of custody of child. Code Civ.Proc. § 1086.

See Words and Phrases, Permanent Edition, for all other definitions of "Plain, Speedy and Adequate Remedy in Ordinary Course of Law".

4. Mandamus 🔑42

Mandamus would lie to determine whether trial court had jurisdiction to determine custody of minor child pending trial of father's action for divorce, though child had not been physically present within the state since before divorce action was commenced. Code Civ.Proc. §§ 1085, 1086.

5. Divorce 🔑59, 65

By appearing and answering complaint on the merits in husband's action for divorce and custody of minor child, wife waived any claim of lack of jurisdiction but such appearance did not confer jurisdiction on court over the subject matter of the action, for such jurisdiction cannot be waived by a party or conferred on the court by consent. Code Civ.Proc. § 1014.

6. Mandamus 🔑168(2)

Where father was domiciled in California and under allegations of petition for writ of mandamus to compel trial court to hear and determine application for order awarding custody of minor child to father pending trial of his divorce action, child's mother, though out of the state, was still domiciled in California when divorce action was commenced and she demurred to alternative writ, it must be assumed, for purpose of determining in mandamus proceeding whether trial court had jurisdiction to determine custody of child, that child was domiciled in California when divorce action was commenced.

7. Domicile 🔑4(2)

A new domicile cannot be acquired until a person actually lives in a new place with the intention of remaining there. Government Code, § 244.

8. Domicile 🔑4(1)

Where wife domiciled in California had left that state and moved to Nevada intending eventually to reside in Utah but had not yet gone to Utah to reside when husband commenced action for divorce in California, she had not acquired a domicile in Nevada or Utah but was still domiciled in California. Government Code, § 244.

9. Divorce 🔑62(3)

Where wife was domiciled in California when husband commenced action for divorce in that state, her subsequent acquisition of a domicile in another state could not affect jurisdiction of California court over subject matter of divorce action, since jurisdiction once acquired is not defeated by subsequent action of the parties.

10. Mandamus 🔑163

On demurrer to alternative writ, allegations of petition for writ of mandamus must be regarded as true.

11. Parent and child 🔑2(4)

Courts having jurisdiction in personam over both parents has jurisdiction to determine custody of minor child physically present and domiciled within the state.

12. Infants 🔑19

Decrees determining custody of minor children are not final and conclusive but may be modified or vacated at any time upon a showing that the circumstances have changed since entry of decree or that the facts were unknown to party urging them at time decree was entered. Civ.Code, § 138.

13. Judgment 🔑822(1)

As a matter of comity, California courts treat valid decrees of other states determining the custody of minor children with the same respect as custody decrees of California courts.

14. Judgment 🔑822(1)

A decree determining custody of minor children, being subject to modification or annulment by court which entered it, is likewise subject to modification or annulment in any state having jurisdiction over the subject matter, since such a decree has no constitutional claim to a more conclusive or final effect in the state of the forum than it has in the state where rendered. Civ.Code, § 138; U.S.C.A.Const. Amend. 14.

15. Infants ⚷18

That state has a substantial interest in the welfare of minor child or in the preservation of the family unit of which he is a part is a sufficient basis for jurisdiction to determine custody of the child and such jurisdiction may exist in two or more states at the same time

16. Divorce ⚷290

Where minor child was domiciled in California when father commenced action in that state for divorce and custody of child, trial court, having jurisdiction in personam over both parents, had jurisdiction of father's application for custody of child pending trial of divorce action and must proceed to hear and determine such application on the merits, though child had not been physically present in California since before divorce action was commenced and after commencement of divorce action custody of child was awarded to mother by decree of a Nevada court.

17. Mandamus ⚷172

Where California court in father's action for divorce acquired jurisdiction over subject matter of custody of minor child while child was still domiciled within the state, any subsequent change in child's abode would be relevant only to the determination of how court's jurisdiction should be exercised with due regard to welfare and best interest of the child, which could not be determined in mandamus proceeding to compel trial court to hear and determine on the merits father's application for custody of child pending trial of divorce action.

SCHAUER, SHENK and CARTER, JJ., dissenting.

Original proceeding in mandamus by Paul W. Sampsell, Jr., against Superior Court of the State of California in and for the County of Los Angeles to compel respondent to hear petitioner's application in divorce action for an order pendente lite awarding him custody of minor child.

Peremptory writ issued.

McLaughlin, McGinley & Hanson and J. A. McLaughlin, all of Los Angeles, for petitioner.

Martin S. Ryan, Harold W. Kennedy, County Counsel, and Douglas DeCoster, Deputy County Counsel, all of Los Angeles, for respondent.

TRAYNOR, Justice.

Petitioner, plaintiff in a divorce action pending in respondent court, seeks a writ of mandamus to compel respondent to hear his application for an order pendente lite awarding him custody of the minor child of plaintiff and defendant.

The parties to the divorce action were married in 1941 and have one child, born on September 13, 1944. The child lived with both parents in this state in the County of Los Angeles until June 3, 1946, when the parents separated. The child continued to live in California with defendant, his mother, until October 25, 1946, when she left California taking the child with her. Thereafter they lived in Nevada until June 7, 1947. Since that date they have lived in Utah.

Plaintiff filed a complaint against defendant in respondent court on January 2, 1947 seeking a divorce, custody of the minor child, and a division of the community property. The substance of plaintiff's complaint is as follows: Defendant took the child out of the state without plaintiff's knowledge or consent and established a temporary abode for herself and the child in a motor court in Las Vegas, Nevada. On December 11, 1946 defendant filed an action for divorce in Nevada, fraudulently claiming to be domiciled within that state, although in fact she intended to remain there only long enough to obtain a divorce and then to marry William Holt, a resident of Utah. Plaintiff was not personally served with process in the Nevada action. Plaintiff claims that he is a fit person to have custody of the child and that defendant is not.

Defendant was not personally served in California in the California divorce action; but on April 4, 1947 she appeared through her attorney and filed an answer. In her answer she alleged that on February 4, 1947 she obtained a Nevada decree of divorce and was also awarded custody of the child. She also alleged that she is entitled to all of the community property of the parties and requested the court to award this property to her.

On July 8, 1947 plaintiff applied to respondent court for an order pendente lite awarding him custody of the child pending trial of the California action. Plaintiff's affidavit states that plaintiff and defendant were residents of the County of Los Angeles, State of California, when defendant took the child out of the County of Los Angeles on October 25, 1946 without plaintiff's knowledge and consent; that defendant informed him before she left that she intended to obtain a Nevada divorce and then to marry William Holt, a resident of *Utah.* Before defendant had obtained a Nevada divorce, plaintiff, on January 2, 1947, brought an action for divorce and custody of the minor child of the parties. At that time, under the provisions of Government Code section 244, all three persons, plaintiff, defendant, and the minor child, were domiciled in California. Subsequently on February 4th, 1947, defendant obtained an allegedly invalid Nevada divorce. On June 7, 1947, she married William Holt, and since that time she and the child have been living in Utah. Plaintiff filed the application for an order pendente lite in respondent court on July 7, 1947, alleging the foregoing facts and that neither defendant nor William Holt are fit persons to have the custody of the child and that he has in effect been denied even the right to see his child. An order to show cause why the order requested should not be issued, or, in the alternative why plaintiff should not have reasonable visitation rights, was served on defendant's attorneys, who had made a general appearance in the principal action. On the date on which the order to show cause was returnable defendant appeared through her attorney and made a motion to dismiss the proceeding with respect to the custody of the child, on the ground that the court has no jurisdiction. Defendant contended that respondent court lacks jurisdiction because the child was not in the State of California at the time of the hearing and has not been here at any time since the plaintiff filed his divorce complaint on January 2, 1947. The court granted defendant's motion and dismissed the order to show cause "for lack of jurisdiction."

Plaintiff thereupon filed a petition for a writ of mandamus to compel respondent court to proceed with the hearing. Respondent court and defendant, as real party in interest, jointly filed points and authorities in opposition to the petition for writ of mandamus, stating that, "The respondent court *refused to proceed with the hearing of the application to determine custody of the child on the sole ground that it had no jurisdiction to do so,* based upon the affirmative facts set forth in the affidavit of petitioner in support of the order to show cause, which affidavit of the petitioner showed on its face that defendant and the minor child were physically outside of the State of California before the commencement of the action, and at all times subsequent to the commencement of the action. * * *

"The attorney for the defendant, Martin S. Ryan, appeared at the date set for the hearing on the order to show cause re custody, and at said time made a motion on behalf of the defendant to dismiss the order to show cause for lack of jurisdiction. *This motion was granted because it appeared that the court did not have jurisdiction,* for the reasons hereinabove set forth and by reason of the law pertaining to the factual situation, as hereinafter cited.

"Petitioner states that the issuance of a writ of mandate is proper wherever the court refuses to exercise jurisdiction in a proceeding over which it has jurisdiction. *There seems to be no question but what this is the law, but it does not apply in this case for the reason that it is the contention of the respondents that respondent court at no time had jurisdiction to make any order regarding the custody of the minor child.* * * *

"The court not having jurisdiction originally in the case at bar nor jurisdiction at the time of the hearing of the order to show cause, the respondent court rightfully granted the motion of respondent Gladys J.

Sampsell because the respondent court could not assume jurisdiction as appeared in the pleadings when they showed to the contrary." (Italics added.) This court granted the alternative writ in order to determine whether the respondent court has jurisdiction to continue with the proceeding. Respondent court and defendant, as real party in interest, have jointly filed a demurrer to the alternative writ on the ground that the superior court does not have jurisdiction to make a custody award of a minor child when that child has not been within the state during the pendency of the action.

The question has arisen whether mandamus is the proper remedy by which plaintiff may test the correctness of the trial court's ruling that it has no jurisdiction over the custody of the child. It has been suggested that the rule laid down in Lincoln v. Superior Court, 22 Cal.2d 304, 139 P.2d 13, 14, is controlling on this question and that mandamus is not available.

In the Lincoln case the question of the availability of mandamus depended on "two controverted issues of fact which are to be determined upon the sufficiency of the evidence (the record of the proceedings in the trial court) to establish the allegations of the petition. The dispute is not as to the *substance*, but only as to the effect of such evidence. Such issues are: (1) The petition alleges (and the answer in proper form denies all the averments) 'That said Superior Court refused to hear or consider, and has not heard or considered said motion * * * or said order to show cause, and has held that it has no jurisdiction to hear or determine said motion or determine whether said plaintiff is entitled to relief thereby sought and will not do so unless required by order and mandate of this Court'; (2) The petition alleges (and the answer in proper form denies the averments) 'That petitioner has no plain, speedy or adequate remedy at law; * * *' We find the record insufficient to sustain petitioner in either of the controverted issues." Lincoln v. Superior Court, supra, 22 Cal. 2d at pages 306, 307, 139 P.2d at page 15.

In the present case we have no controverted issues of fact. The plaintiff has alleged, and the respondent court and defendant have conceded, that the trial court did not give a hearing on the merits but "refused to proceed with the hearing on the application to determine custody of the child on the sole ground that it had no jurisdiction to do so, based on the affirmative facts set forth in the affidavit of petitioner in support of the order to show cause, which affidavit of petitioner showed on its face that the defendant and the minor child were physically outside of the State of California before the commencement of the action, and at all times subsequent to the commencement of the action * * *." (Respondent's Points and Authorities, pp. 1–2.)

This court in the Lincoln case determined that petitioner had been given a hearing on the merits. In that case the petitioner had commenced an action against her husband for separate maintenance in a California superior court, and that court issued an order to show cause with reference to temporary support. The defendant appeared on the date set for hearing and filed an affidavit, supported by the exemplified records of a Virginia court, showing that petitioner had submitted herself to the jurisdiction of the Virginia court in an action for divorce and that an order for her support made by the Virginia court in that action was being complied with by defendant. The defendant thereupon filed a motion, based on these facts, to vacate and set aside the order to show cause on two grounds: (1) Lack of jurisdiction to proceed because of the pendency of the Virginia action; (2) the Virginia proceeding was res judicata. This court held that "Neither of such grounds raises a jurisdictional point. * * * The fact that the plaintiff was then receiving support from the defendant pursuant to a court order was, however, material evidence upon the hearing. See Smith v. Smith (1905), 147 Cal. 143, 81 P. 411. The order to show cause came on for hearing upon the complaint and plaintiff's affidavit upon which the order had been issued, and upon defendant's showing in opposition as heretofore set forth.

"After receiving the evidence of the parties, as above related, the superior court made an order which is reflected in its minutes as follows: 'Order to Show Cause re Alimony Pendente Lite, Costs, Attorney's Fees and Restraining Order *comes on for hearing:* * * * Defendant's Motion to Quash *and Dismiss* is granted.' (Italics added.) Petitioner now contends that the trial court, by the action above related, *refused to exercise its jurisdiction* to hear and determine the order to show cause, and seeks the mandate of this court to compel the superior court 'at a specified time and place, to set said order to show cause * * * for immediate hearing and to determine said matter on its merits.' The answer to petitioner's demand is that the superior court *has* exercised its jurisdiction and has conducted a hearing on the merits. Whether its order was erroneous is not now before us." (Id., 22 Cal.2d at page 308, 139 P.2d at page 15, italics by the court.)

"In the case out of which this proceeding arose, *the defendant's motion to dismiss and the evidence which he presented to the trial court did not constitute a mere objection to the jurisdiction of such court.* On the contrary, such procedure was a challenge on the merits to the plaintiff's application and called for an affirmative exercise of jurisdiction by the court. * * *

"As shown by the record, the trial court conducted a hearing on the mooted order to show cause. It had before it and received the proofs both of plaintiff and of defendant. It considered such proofs, gave to them what it thought was their proper legal effect, and made its order dismissing the proceeding. This was, jurisdictionally, a complete trial of such proceeding." (Id., 22 Cal.2d at page 314, 139 P.2d at page 18, Italics added.)

In the present case the defendant presented no evidence or counter-affidavits. Her motion was not a challenge on the merits; it was based on the sole ground that the court lacked jurisdiction because the child was not physically present within the State of California at the time the action was commenced or at any time during the pendency of the action. The trial court heard no evidence and refused to consider the merits of the case before it; it looked at the affidavit of petitioner solely to determine its own jurisdiction. If we were to hold that the dismissal for lack of jurisdiction based on the facts stated in petitioner's affidavit is a determination on the merits precluding the issuance of mandamus, the following cases among others would have to be overruled. Temple v. Superior Court, 70 Cal. 211, 11 P. 699; Hennessy v. Superior Court, 194 Cal. 368, 228 P. 862; Times-Mirror Co. v. Superior Court, 3 Cal. 2d 309, 312, 44 P.2d 547; Cahill v. Superior Court, 145 Cal. 42, 44, 45, 78 P. 467; Miller v. Municipal Court, 22 Cal.2d 818, 852, 142 P.2d 297; Levy v. Superior Court, 15 Cal. 2d 692, 104 P.2d 770, 129 A.L.R. 956; Katenkamp v. Superior Court, 16 Cal.2d 696, 697, 108 P.2d 1; Balconades Ballroom v. Superior Court, 109 Cal.App. 612, 293 P. 631; Smith v. Superior Court, 21 Cal.App. 2d 160, 69 P.2d 176; Archer v. Superior Court, 81 Cal.App. 742, 254 P. 939; MacPherson v. Superior Court, 22 Cal.App.2d 425, 432, 71 P.2d 91; see also Golden Gate Tile Co. v. Superior Court, 159 Cal. 474, 477, 114 P. 978; cases in other jurisdictions collected in State ex rel. Martin v. Superior Court, 101 Wash. 81, 172 P. 257, 4 A.L.R. 572, 582; State ex rel. Musselshell County v. District Court, 89 Mont. 531, 300 P. 235, 82 A.L.R. 1158, 1163; Ferris, Extraordinary Legal Remedies, sec. 300.

In the early case of Temple v. Superior Court, 70 Cal. 211, 11 P. 699, this court held that mandamus should issue to compel a trial court to hear and determine a proceeding to have a person adjudged guilty of contempt, although the trial court had dismissed the proceeding "on the ground of want of jurisdiction" because the case came within Code of Civil Procedure section 336. The court stated in that case that "We have examined the record, and are of the opinion that the matter is within the jurisdiction of the court. The facts stated bring the case clearly within section 1210, Code Civil Proc., and, under such circumstances, the court cannot, by holding without reason that it has no jurisdiction of the proceeding, divest itself of jurisdiction, and evade the duty of hearing and determining it." 70 Cal. at pages 211, 212, 11 P. at page 699. That case has been followed in innumerable cases including Hennessy v. Superior Court, 194 Cal. 368, 228 P. 862, where this court granted mandamus to hear a motion to tax costs, when the trial court denied the motion for lack of jurisdiction. The court considered the question of the availability of mandamus at length and quoted the following language from Cahill v. Superior Court, 145 Cal. 42, at page 46, 78 P. 467, at page 469, "The Code provides that the writ of mandate may be issued to 'compel the performance of an act which the law specially enjoins, as a duty resulting from an office.' Code Civ.Proc. § 1085. The law specially enjoins upon the superior court, and upon the judge thereof, the duty of hearing and determining all matters which are within its jurisdiction, and which come properly before it. The motion under consideration did come properly before that court, but the judge decided, as a matter of law * * * that the court had no power in any case to make orders of the kind there applied for, and upon that ground only refused to proceed to the merits of the application. If the person holding the office could thus decide what were the duties pertaining thereto which the law specially enjoins him to perform, the writ of mandate would be practically useless. The decision refusing to act which gives occasion for the writ would also furnish sufficient cause for denying it."

Nor is the opinion of the District Court of Appeal in Brock v. Superior Court, 119 Cal.App. 5, 6, 5 P.2d 659, inconsistent with these principles. In the Brock case, the trial court had entered an order denying an application for attorney fees, costs, and temporary support of a minor child. The District Court of Appeal stated that "Petitioner claims that the court has refused to exercise its jurisdiction in the matter, but the facts stated in the petition show the contrary. When the order to show cause came before the court, the matter was submitted upon a stipulation of facts. Thereupon the court entered an order denying the requested relief, 'on account of this Court not having jurisdiction to award temporary attorney fees, costs, or support on two grounds, that the child is not within the jurisdiction of this Court, also that provisions in section 137, Civ.Code, in re Attorney's fees, costs and support money do not apply in this case.'" 119 Cal.App. 5, 6, 5 P.2d 659.

[1, 2] The trial court did not dismiss the proceeding but evidently gave a full hearing on the stipulated facts. It denied the relief requested by the applicant on the ground that it lacked authority to give the relief under the circumstances of the case. Since the petitioner was afforded the same hearing that he would have been entitled to had the trial court entertained a different theory as to its jurisdiction, he was not entitled to mandamus to compel a new hearing. Mandamus is available to compel the court to give a full hearing in the case before it, although it is not available to inform the trial court as to how it should rule with respect to the merits of the case. Hilmer v. Superior Court, 220 Cal. 71, 73, 29 P.2d 175. It follows that if the trial court has given the petitioner the full hearing to which he is entitled, mandamus will not ordinarily lie merely to correct the decision reached by the court, whether its decision be based on an erroneous conception of its own jurisdiction or an error of law. In the present case, however, the respondent court has conceded that it did not give plaintiff a full hearing on his application, but dismissed the proceeding and refused to proceed with the hearing. This court should therefore issue the writ unless there is "a plain, speedy, and adequate remedy, in the ordinary course of law." (Code Civ. Proc. § 1086.)

[3] Nor does the fact that plaintiff might have appealed from the order of dismissal necessarily preclude his resort to mandamus. "The remedy by appeal, conceding that there is such, is not always an answer to a petition for mandamus. This writ must be issued when 'there is not a plain, speedy, and adequate remedy, in the ordinary course of law' (section 1086, Code Civ.Proc.); that the right of appeal is not always a speedy or adequate remedy is well settled." Christ v. Superior Court, 211 Cal. 593, 595, 296 P. 612, 613; Lloyd v. Superior Court, 208 Cal. 622, 631, 283 P 931. Thus, in Hennessy v. Superior Court, supra, 194 Cal. 368, 374, 228 P. 862, this court held that

"Conceding the order refusing to tax costs to be an appealable order that alternative would not of itself be a sufficient reason for holding that remedy exclusive." (See also Archer v. Superior Court, 81 Cal.App. 742, 745, 254 P. 939. Other cases where the dismissal was appealable include Times-Mirror Co. v. Superior Court, 3 Cal.2d 309, 312, 44 P.2d 547; Balconades Ballroom v. Superior Court, 109 Cal.App. 612, 293 P. 631.

[4] Plaintiff alleges that an appeal would not be an adequate remedy in this case because of the pendency of the principal action for custody and divorce and because such an appeal would take at least a year, during which time he would not only be deprived of the custody of his child but would be unable even to see the child, while the child would lose all recollection of his father. It is unquestioned that in the principal action the trial court refused to grant petitioner a hearing with respect to the custody of the child regardless of the relative fitness of himself or the defendant and regardless of the interests of the child. This court has issued the alternative writ on the concessions of respondent that it was available if the court had jurisdiction. To deny the writ now on the grounds that plaintiff might appeal would require plaintiff to await the outcome of the principal action before perfecting his appeal. Meanwhile, he would be deprived of the custody of his child and the right to see it without a hearing as to the propriety of a custody order or of the merits of his claim that defendant is unfit to have the care of the child. It therefore follows that the remedy of mandamus is available to plaintiff if respondent court had jurisdiction to determine the question of the custody of the child.

[5] The trial court unquestionably had jurisdiction over the parties, for by answering plaintiff's complaint on the merits defendant waived any claim of lack of jurisdiction over her. Code Civ.Proc. sec. 1014; Jardine v. Superior Court, 213 Cal. 301, 304, 2 P.2d 756, 79 A.L.R. 291. This appearance, however did not confer jurisdiction on the court over the subject matter of the action for such jurisdiction may not be waived by a party or conferred on the court by consent. Taylor v. Taylor, 192 Cal. 71, 78, 218 P. 756, 51 A.L.R. 1074; Harrington v. Superior Court, 194 Cal. 185, 191, 228 P. 15. The question before this court, therefore, is whether respondent court has jurisdiction over the subject matter of the custody proceeding. Dorman v. Friendly, 146 Fla. 732, 737, 1 So.2d 734; Titcomb v. Superior Court, 220 Cal. 34, 40, 29 P.2d 206.

[6-10] It must be assumed that the child was domiciled in this state at the time of the commencement of the proceeding in the trial court whether the domicile of the child is based on that of the mother or that of the father.[1] Defendant con-

---

[1] The parties have argued the question whether in California the domicile of child after the separation of the parents remains that of the child's father or is that of the parent with which it lives. Plaintiff contends that Government Code section 244(d) providing that "The residence of the father during his life * * * is the residence of the unmarried minor child" applies until the custody of the child has been determined by a court of competent jurisdiction. On the other hand, defendant, relying on Civil Code sections 197, 198, and 213, contends that Government Code section 244(d) applies only to the residence or domicile of a child whose parents have not separated. These sections provide that the father and mother of a legitimate child are equally entitled to its custody (section 197); that after separation of the parents, the "father, as such, has no rights superior to those of the wife and mother, in regard to the care, custody, education, and control of the children of the marriage, while such husband and wife live separate and apart from each other." (Section 198); and that the parent entitled to the child's custody has a right to change the child's domicile. (Section 213.) There is authority in support of plaintiff's contention in Luck v. Luck, 92 Cal. 653, 655, 28 P. 787, but that case was decided before section 197 was amended to its present form (Stats.1913, p. 52) and the opinion does not mention sections 198 and 213. (Cf. Cole v. Superior Court, 28 Cal.App. 1, 5, 6, 151 P. 169, which also does not mention these sections.) Similar statutes have been interpreted to mean that, after separation, the child takes the domicile of the parent with

tends that the child was domiciled in Nevada on the grounds that defendant acquired a Nevada domicile and that the domicile of the child was that of the mother. Under the allegations of the petition, however, the mother was still domiciled in Los Angeles County, California, at the time the California proceeding was commenced.[2] Since defendant has demurred to the alternative writ, the allegations of plaintiff's petition must be regarded as true. Moreover, plaintiff's complaint and his affidavit in support of the application for an order pendente lite contained similar allegations, and respondent court has refused to take jurisdiction to determine the correctness of these allegations.

Defendant relying on De La Montanya v. De La Montanya, 112 Cal. 101, 44 P. 345, 32 L.R.A. 82, 53 Am.St.Rep. 165; In re Chandler, 36 Cal.App.2d 583, 97 P.2d 1048; and Maloney v. Maloney, 67 Cal.App.2d 278, 154 P.2d 426, contends that regardless of the child's domicile a court of this state has no jurisdiction of a child custody proceeding if the child is not physically present within the state at some time during the pendency of the action. Although there is language in the De La Montanya case, supra, 112 Cal. 101, at pages 110, 111, 44 P. 345, that is critical of the theory that the domicile of the child alone provides a satisfactory basis for jurisdiction of the subject matter since the child might be domiciled in this state without ever having lived here (cf. Titcomb v. Superior Court, supra, 220 Cal. 34, at page 42, 29 P.2d 206), the actual holding of that case relates to the question of personal jurisdiction over the parties. It was held that the question of custody is not solely one of status and cannot be decided by a court unless it has personal jurisdiction over both parents. It was further held that under the Fourteenth Amendment to the United States Constitution as construed in Pennoyer v. Neff, 95 U.S. 714, 24 L.Ed. 565, constructive service was insufficient to give the court personal jurisdiction over a parent who was not present within the state although domiciled in California at the time of the commencement of the action. (Cf. Milliken v. Meyer, 311 U.S. 457, 463, 61 S.Ct. 339, 85 L.Ed. 278, 132 A.L.R. 1357; cases collected Piggly-Wiggly Georgia Co. v. May Investing Corp., 189 Ga. 477, 6 S.E.2d 579, 126 A.L.R. 1465, 1474; Rest.Judgments sec. 16.) It is unnecessary to reexamine the holding of the De La Montanya case with respect to the problem of personal jurisdiction, for the defendant in this case submitted herself to the jurisdiction of respondent court.

Defendant also relies on In re Chandler, supra, 36 Cal.App.2d 583, 585, 97 P.2d 1048

---

whom it lives. (See 1 Beale, Conflict of Laws, sec. 32.2; Stumberg, Conflict of Laws, p. 43; 5 Vernier, American Family Laws, p. 227.) This interpretation would be in accord with the rule applicable to the determination of the residence of the child under provisions of the Welfare and Institutions Code. (Section 17.1 (a) (b).)

[2] Her domicile in California continued until she acquired a new one, even though she may have left California intending eventually to go to Utah and not to return to this state. A new domicile cannot be acquired until a person actually lives in a new state with the intention of remaining there. (Government Code section 244; Rhodes v. Rhodes, 80 Cal.App.2d 723, 182 P.2d 275; County of Los Angeles v. Superior Court, 128 Cal.App. 522, 528, 18 P.2d 112; additional cases collected 9 Cal.Jur. 834–835; cases in other jurisdictions collected, Kennan, Residence and Domicile, secs. 92, 93, 100, 118–122; 1 Beale, Conflict of Laws 133; Reynolds v. Lloyd Cotton Mills, 177 N.C. 412, 99 S.E. 240, 5 A.L.R. 284, 296; 17 Am.Jur. 609–610; 28 C.J.S., Domicile, § 13, page 30.) Therefore, defendant did not acquire a Nevada domicile simply because she intended to reside in Utah. She could not have acquired a Utah domicile at the time the complaint in the divorce action was filed or at the time of her appearance in that action, for she had not then gone to Utah to live. Whether defendant may now be domiciled in Utah is immaterial to the question of jurisdiction, for if the trial court had jurisdiction at the time of the commencement of the action, such jurisdiction could not be lost by any subsequent change of residence or domicile. Jurisdiction once acquired is not defeated by subsequent action of the parties. Maloney v. Maloney, 67 Cal.App.2d 278, 280, 154 P.2d 426; Roberts v. Roberts, 300 Ky. 454, 189 S.W.2d 691; additional cases collected Little v. Little, 249 Ala. 144, 30 So.2d 386, 171 A.L.R. 1399, 1405.

for the proposition that jurisdiction over the subject matter of the custody of children in divorce actions depends on the physical presence of the children in the state. According to the opinion in that case, however, the children were not only absent from the state but had become domiciled in Texas before the action was commenced. Defendant, although appearing in the divorce action, refused to obey an order of the court that he bring the children to California. He was held in contempt by the trial court, but on petition for habeas corpus the district court of appeal ordered him discharged from custody on the ground that the order was void. The trial court lacked jurisdiction of the subject matter of the custody of the children, for they were domiciled and present in another state during the pendency of the action. In the course of its opinion the court stated that "Respondent concedes that it is well settled that our courts have no authority to award custody of children not within their territorial jurisdiction * * *" In re Chandler, supra, 36 Cal.App.2d at page 585, 97 P.2d at page 1049. Not only was reference to this concession unnecessary to the decision, but a similar statement in Warren v. Warren, 127 Cal.App. 231, 240, 15 P.2d 556 was disapproved by this court in Foster v. Foster, 8 Cal.2d 719, 729, 68 P.2d 719.

Both parties have relied on Maloney v. Maloney, 67 Cal.App.2d 278, 280, 154 P.2d 426. In that case both parents and the child were domiciled in California and were actually living within this state until, during the course of a divorce action, the plaintiff left the state taking the children with him. It was held that the removal of the children did not deprive the trial court of jurisdiction to determine their custody. Nor did the plaintiff, by leaving the state, deprive the court of personal jurisdiction over him. "The court thereafter had power to enter an effective judgment for him or against him, in personam, relative to any substantial allegation of the pleadings. * * * Plaintiff cannot question the jurisdiction which by his own act he conferred. Although the children are beyond the territorial limits of California, they are still under the jurisdiction of the court below (Hersey v. Hersey, 271 Mass. 545, 171 N.E. 815, 818, 70 A.L.R. 518), which attached at the time the suit was filed." Maloney v. Maloney, supra, 67 Cal.App.2d at page 280, 154 P.2d at page 427.

Insofar as the foregoing statement from the Maloney case shows a submission to the personal jurisdiction of the court by the plaintiff it cannot be questioned. Defendant contends that the court also held that plaintiff submitted the subject matter of the children's custody to the jurisdiction of the trial court. A party, however, cannot confer upon a court jurisdiction over the subject matter that it does not already have. Taylor v. Taylor, supra, 192 Cal. 71, 78, 218 P. 756; Harrington v. Superior Court, 194 Cal. 185, 191, 228 P. 15. The trial court in the Maloney case had jurisdiction over the subject matter because the children were domiciled and living in California at the time the action was commenced, and the mere physical absence of the children from the state during a part of the trial did not deprive the court of jurisdiction. In the present case the child was domiciled in this state at the time the action was commenced but was not living here. Thus, neither the Maloney case nor the Chandler case are determinative of the question whether the domicile of the child in this case presents a sufficient basis for jurisdiction over the child's custody.

Several theories have been advanced with respect to the correct basis for jurisdiction over the subject matter of a child custody proceeding. According to one theory jurisdiction over children's custody is based on in personam jurisdiction over the children's parents. Anderson v. Anderson, 74 W.Va. 124, 126, 81 S.E. 706. Another theory regards the question of custody as simply one of status and as such subject to the control of the courts of the state where the child is domiciled. Rest.Conflicts, 117, 148; see Goodrich, Custody of Children, 7 Corn L.Q. 1, 2; 2 Beale, Conflict of Laws, p. 717; Dorman v. Friendly, 146 Fla. 732, 740, 1 So. 2d 734. A third theory requires the child to be physically present within the state, on the ground that the basic problem before the court is to determine what the best interest of the child is, and the court most qualified to do so is the one having access to the child. See Stumberg, Children and Conflict of Laws, 8 Univ.Chic.L.Rev. 42, 55-56; Stumberg, Conflict of Laws, p. 299; Sheehy v. Sheehy, 88 N.H. 223, 225, 186 A. 1, 107 A.L.R. 635.

[11] There is, of course, no question that the courts of a particular state have jurisdiction to determine the child's custody if the court has jurisdiction in personam over both parents, and the child is both physically present and domiciled within the state. The court then has a substantial basis for determining not only the rights of the parents but what the best interest of the child is. All the basic elements in each of the foregoing theories are present. Difficulties have been encountered, however, when one or more of these elements are lacking.

It is apparent that each of the foregoing theories, if regarded as exclusive tests of jurisdiction, ignores important considerations underlying the other theories. It would, however, be no solution of the problem to require all these elements to be present before a court could acquire jurisdiction. Unfortunately cases will arise where one or two elements are lacking, and some court must have jurisdiction in the interest of the child to make proper provision for its custody. The principal difficulty with each of the theories as exclusive tests of jurisdiction is the difficulty inherent in any attempt to apply hard and fast rules of res judicata and conflict of laws to the problem of child custody. The principal cases and most of the secondary authorities have been concerned less with the question whether a court has jurisdiction than with the question whether the courts of other states are bound by the particular decision, when that jurisdiction has been exercised. The respective theories are based on the assumption that in order to achieve finality in this matter one court at one given time must have an exclusive right to determine the issue. "From a standpoint of expediency and of achieving socially desirable ends, there seems to be only one argument in favor of confining jurisdiction to a single state; that it will produce stability and discourage the crossing of state lines to avoid the effect of unpalatable custody decrees." (Stansbury, Custody and Maintenance Law Across State Lines, 10 Law and Contemp.Prob. 819, 830) It is doubtful, however, whether the best interest of the child, the paramount consideration in custody proceedings, is served thereby.

There is authority for the proposition that courts of two or more states may have concurrent jurisdiction over the custody of a child. Finlay v. Finlay, 240 N.Y. 429, 431, 148 N.E. 624, 40 A.L.R. 937; Goldsmith v. Salkey, 131 Tex. 139, 145-147, 112 S.W. 2d 165, 116 A.L.R. 1293; Stafford v. Stafford, 287 Ky. 804, 806, 155 S.W.2d 220. In the interest of the child, there is no reason why the state where the child is actually living may not have jurisdiction to act to protect the child's welfare, and there is likewise no reason why other states should not also have jurisdiction. As stated by Justice Cardozo in Finlay v. Finlay, 240 N.Y. 429, 431, 148 N.E. 624, 625, 40 A.L.R. 937, "The jurisdiction of a state to regulate the custody of infants found within its territory does not depend upon the domicile of the parents. It has its origin in the protection that is due to the incompetent or helpless. Woodworth v. Spring, 4 Allen (Mass.) 321, 323; White v. White, 77 N.H. 26, 86 A. 353; Hanrahan v. Sears, 72 N.H. 71, 72, 54 A. 702; Matter of Hubbard, 82 N.Y. 90, 93. For this, the residence of the child suffices, though the domicile be elsewhere. Matter of Hubbard, supra. But the limits of the jurisdiction are suggested by its origin. The residence of the child may not be used as a pretense for the adjudication of the status of parents whose domicile is elsewhere, nor for the definition of parental rights dependent upon status. Cf. Kline v. Kline, 57 Iowa, 386, 10 N.W. 825, 42 Am.Rep. 47; Griffin v. Griffin, 95 Or. 78, 187 P. 598; Lanning v. Gregory, 100 Tex. 310, 99 S.W. 542, 10 L.R.A. (N.S.) 690, 123 Am.St.Rep. 809; Blackinton v. Blackinton, 141 Mass. 432, 436, 5 N.E. 830, 55 Am.Rep. 484; Matter of Standish, 197 App.Div. 176, 188 N.Y.S. 900. Parents so situated must settle their controversies at home. Our courts will hold aloof when intervention is unnecessary for the welfare of the child."

Thus, if the child is living in one state but is domiciled in another, the courts of both states may have jurisdiction over the question of its custody. It does not follow, however, that the courts of both states will exercise that jurisdiction and reach conflicting results. The courts of one state may determine that the other state has a more substantial interest in the child and leave the matter to be settled there. On the other hand, if the jurisdiction of one state has been exercised over the child, there is no reason why, if the welfare of the particular child is a matter of real concern to the courts of another state, those courts may not also have jurisdiction, which might be exercised in the interest of the child "with respectful consideration to the prior determination of other courts similarly situated." Stansbury, 10 Law and Contemp.Problems, supra at 830–831. See Foster v. Foster, 8 Cal.2d 719, 726, 68 P.2d 719; Titcomb v. Superior Court, supra, 220 Cal. 34, 39, 29 P.2d 206. In any event, there is no reason why courts of one state should not be able to "assume with confidence that the courts of the other jurisdiction will act with wisdom and sincerity in all matters pertaining to the welfare of this child." Miller v. Schneider, Tex.Civ. App., 170 S.W.2d 301, 303.

[12-14] The problem is not one of rendering custody decrees for the courts of other states to regard as final and conclusive determinations. Indeed such decrees are not given conclusive effect in our own courts, for under Civil Code section 138, the court granting the decree "may at any time modify or vacate the same." In order to avoid interminable and vexatious litigation it is generally required that before modification or vacation of such a decree "there must be a change of circumstances arising after the original decree is entered, or at least a showing that the facts were unknown to the party urging them at the time of the prior order * * *" Olson v. Olson, 95 Cal.App. 594, 597, 272 P. 1113, 1114, quoted with approval in Foster v. Foster, supra, 8 Cal.2d 719, 726, 68 P.2d 719. Whatever proof may be required for a modification or vacation of a custody decree, it is not a final judgment. Cooney v. Cooney, 25 Cal.2d 202, 208, 153 P.2d 334. As a matter of comity the courts of this state treat valid custody decrees of the courts of sister states with the same respect as custody decrees of California courts. Foster v. Foster, supra, 8 Cal.2d 719, at pages 728, 729, 68 P.2d 719; Titcomb v. Superior Court, 220 Cal. 34, 39, 29 P.2d 206. No more or less respect for California decrees is expected from the courts of other states. If the decrees of California courts with respect to child custody are subject to modification or annulment in this state, they are likewise subject to modification or annulment in any state having jurisdiction over the subject matter, for such a decree "has no constitutional claim to a more conclusive or final effect in the State of the forum than it has in the State where rendered." (People of State of New York ex rel. Halvey v. Halvey, 330 U.S. 610, 67 S.Ct. 903, 906, 91 L. Ed. 1133; see Harper, Conflict of Laws, 47 Col.L.Rev. 883, 907–909.)

[15] Since the courts of this state do not finally and conclusively determine custody in a divorce proceeding, there is no reason to attempt to arrive at some basis for jurisdiction that should be accepted as final and conclusive in all states. It is a sufficient basis for jurisdiction that the state "has a substantial interest in the welfare of the child or in the preservation of the family unit of which he is a part * * * and this jurisdiction may exist in two or more states at the same time." (Stansbury, 10 Law and Contemp.Prob. supra at 831.)

[16] Since this is a proceeding in mandamus to determine only the question of whether the respondent court has jurisdiction over the subject matter of the custody proceeding, we are not concerned at this time with the question of how the jurisdiction of the respondent court should be exercised or whether under the facts of this case, as they may be determined by the trial court, it would be proper for the trial court to refuse to determine the custody of the minor child in the pending proceeding. It is sufficient that the respondent court has jurisdiction to hear petitioner's application for a custody award. It is likewise immaterial to the determination of this case

whether defendant has been awarded custody of the child by a Nevada court. It may be assumed for the purposes of this decision that the temporary presence of the child in Nevada provided a sufficient basis for a custody award and that the decree of the Nevada court was valid to the extent that it determined the child's custody. Finlay v. Finlay, supra, 240 N.Y. 429, 431, 148 N.E. 624; cf. Rest.Conflicts, sec. 118. Such a decree does not deprive the California courts of jurisdiction over the child (see Titcomb v. Superior Court, supra, 220 Cal. 34, 39, 29 P.2d 206) for the state of domicile, where the child has lived most of its life, clearly has as substantial an interest in the child's welfare as a state in which the child's presence was merely temporary.

[17] The fact that the child is now living in Utah, where it was taken by defendant some time after the commencement of the present action, likewise does not deprive the respondent court of jurisdiction over the child's custody. The respondent court acquired jurisdiction over the subject matter of the custody of the child while the child was clearly domiciled within this state. Any subsequent change in the child's abode is relevant only to the determination of how the court's jurisdiction should be exercised with due regard for the welfare and best interest of the child. That question cannot be decided on the basis of the meagre facts now before this court, even if it were proper in a mandamus proceeding to determine how the trial court should exercise its jurisdiction.

The trial court therefore has jurisdiction of the subject matter of the custody proceeding and of the parties thereto and must proceed with the hearing on the order to show cause why an order pendente lite should not be granted.

Let the peremptory writ issue as prayed.

GIBSON, C. J., and EDMONDS, J. and SPENCE, JJ., concur.

SCHAUER, Justice.

I dissent.

The primary question in this case is whether under the circumstances shown we shall use mandamus to compel a trial court to reverse an order dismissing a proceeding before it. This is not a case where the court simply refused to exercise jurisdiction at all; it is not a case where a mooted proceeding is left pending and undisposed of; here the court did exercise its jurisdiction in the premises upon the facts which it found, upon the evidence before it, in the way which it concluded was legally correct, and which finally and *completely disposed* of the particular proceeding before it. The majority opinion, taking a different view of the evidence and, seemingly, a different view of the law (although this last proposition must necessarily be conjectural, since the majority draws inferences from the evidence different from those impliedly drawn by the trial court), reverses the trial court's order dismissing an order to show cause.

In the exercise of its jurisdiction the trial court had issued the order to show cause, had set a date for hearing thereon, had proceeded with the hearing, had considered evidence from both parties, had impliedly found, upon ample evidence, that before the proceeding had been commenced the defendant in that action (the former wife of petitioner) had left California, taking with her the minor child of such defendant and petitioner and had established for herself and child a domicile outside of California. The trial court had also impliedly found, and there is no room for serious question as to the sufficiency of the evidence, that the defendant and the child had at all times subsequent to their original departure from California remained outside of this state and that the defendant refused to return to California and refused to bring, or to permit any one to bring, the minor child from its new domicile into California. The evidence as to the fixed intent of the defendant wife to permanently relinquish her domicile in California and to live elsewhere is undisputed.

In the light of the recited facts the trial court concluded that no useful purpose would be subserved by hearing further evidence as to the claims of the plaintiff for an order temporarily, pending trial of the case on its merits, awarding the custody of the child, or visiting rights, to him, and, accordingly, entered its order dismissing the proceeding. It is such order of dismissal which the majority opinion by mandamus reverses.

Such holding marks a complete about face by this court as to its policy in respect to the use of mandate as a substitute for appeal, and, if we are to have any intelligible thread of consistency in our law on this subject, must be understood as overruling Lincoln v. Superior Court (1943), 22 Cal.2d 304, 139 P.2d 13, and Brock v. Superior Court (1931), 119 Cal. App. 5, 5 P.2d 659. If there be any ground at all for distinguishing between Lincoln and the case at bar it is that in Lincoln we had a more persuasive case for reversal of the order of dismissal than here. In that case, as here, an order to show cause was issued and came on for hearing. There (page 307 of 22 Cal.2d, page 15 of 139 P.2d), "the defendant husband filed a written motion 'to vacate, set aside and quash the order to show cause and affidavit' and declared that he 'objects to the hearing of said order to show cause.' The defendant's written motion specified two grounds: (1) that the superior court was 'without jurisdiction to proceed with the hearing on said order to show cause by reason of the fact that there is another action [the Virginia suit] pending between the above [p. 308] named plaintiff and defendant covering the identical subject matter'; and (2) that 'the matters to which the defendant * * * is directed to appear and show cause are res adjudicata' by virtue of the Virginia proceedings." As to such two grounds of objection to the hearing we frankly and specifically held that "Neither of such grounds raises a jurisdictional point," *thereby recognizing that the trial court erred in granting the defendant's motion to dismiss.* We there held, however, contrary to the view now contended for by petitioner, that the question of error in the ruling was not to be considered in ruling on the petition for mandamus; we confined ourselves to the question, which we then deemed controlling, *as to whether the trial court in truth exercised, or refused to exercise, its jurisdiction.*

In passing on that controlling issue we said: "It is patent in the record that the superior court had jurisdiction of the cause and of the parties. It is likewise patent that the court exercised that jurisdiction by issuing its order directing the defendant to appear and show cause why he should not be required to make the payments and do the things recited in the order, by conducting the hearing on the order, by receiving and considering evidence, and by entertaining and granting a motion to dismiss." Every statement of the above quotation is equally true in relation to the case at bar. Here the petition for the writ alleges that with the evidence (hereinafter epitomized) before it the trial court "refused to proceed with the hearing on the said Order to Show Cause, and made a minute order which reads and provides as follows: 'Motion of attorney for defendant *to dismiss* Order to Show Cause for lack of jurisdiction is granted.'" (Italics added.)

The cogent force of the Lincoln holding in its direct applicability to the order here involved is made still further apparent by the following language in Lincoln (page 309 of 22 Cal.2d, page 16 of 139 P.2d): "The petition herein discloses that in addition to the written motion to quash the order to show cause the defendant * * * made an oral motion to *dismiss* the proceeding and that such motion to dismiss was granted. If the defendant in the trial court had confined himself to an objection to the proceeding therein, on the ground of want of jurisdiction, and if that court had merely sustained such objection and *left the proceeding still pending,* we should have an esentially different case: there would then appear a failure to exercise jurisdiction. But on the showing made the superior court did not stop there. Upon defendant's application it *dismissed* the proceeding. The effect is the same, so far as this mandamus application is concerned, as though the suit had been dismissed * * * That the trial judge in the case here involved may have *believed* that the Virginia court had exclusive jurisdiction is inconsequential. A mere belief in an erroneous proposition of law cannot oust a court of jurisdiction and does not establish a refusal to act. If the trial court here had *acted* in accordance with such a belief and merely sustained an objection to proceeding with the hearing, we should have a proper factual base, jurisdictionally, for the intervention of mandate. But we are concluded on this phase of the case by the fact that the court, regardless of what its *theory* may have been, in the *action it took* exercised its jurisdiction."

Here, as previously stated, the court exercised its jurisdiction in the premises by issuing the order to show cause, by conducting a hearing thereon and by making an order completely disposing of such order to show cause. Whether such order is correct or erroneous is, as it was held in Lincoln, not properly before us. But, in view of the argument made on behalf of petitioner, and to demonstrate that the court did exercise jurisdiction and discretion in the premises rather than simply refuse to act, it seems proper to note the evidence on which it acted. The evidence before the court included the affidavit of the plaintiff; it included the order of issuance of the order to show cause and it included the plaintiff's complaint and the defendant's answer thereto. From the sworn allegations in such documents the trial court was amply justified, if not as a matter of law compelled, to find that defendant left California in October, 1946, taking with her the minor child, and that at the time she left California she had the fixed and definite intention to cease to be a resident of California and to establish and maintain her residence permanently outside the boundaries of California. Accordingly the trial court was amply justified, if not as a matter of law compelled, to find that at the time the order to show cause was issued (July 8, 1947, and, if it be material, at the time plaintiff commenced his action, January 2, 1947) the defendant's domicile and that of the child had ceased to be in California.

From the record presented by plaintiff, who is petitioner here, it appears without dispute that plaintiff and defendant separated on June 3, 1946; that plaintiff's complaint (commencing the litigation here involved) was filed on January 2, 1947; "that the defendant Gladys J. Sampsell left the State of California on October 25, 1946, *with the avowed intention of obtaining a Nevada divorce and thereafter marrying William Holt and residing with him at his residence in Salt Lake City.* [Italics added.] Six weeks thereafter, and on December 11, 1946, she sued petitioner in Nevada for a divorce, and served him by publication * * * *On June 7, 1947, the defendant Gladys J. Sampsell carried out her original stated intention* by marrying William Holt in Carson City, Nevada, and removing to Salt Lake City, where she has since resided with him. [Italics added.] On July 8, 1947, petitioner filed an affidavit in support of an order to show cause for a pendente lite determination of the minor child's custody, and such order to show cause was issued and made returnable on July 17, 1947, before the respondent Court."

It is to be noted that the affidavit of plaintiff, which is a part of the evidence which was before the trial court when it entered its order of dismissal, specifically avers that "prior to the 25th day of October, 1946, defendant stated to plaintiff that she was going to divorce him and marry one William Holt, who resided in Salt Lake City, Utah, and on the 25th day of October, 1946, said defendant, without the knowledge or consent of plaintiff, left the County of Los Angeles, State of California, where both plaintiff and defendant had resided since their respective childhoods, with the said minor child of plaintiff and defendant, and went to the City of Las Vegas, State of Nevada. That thereafter plaintiff requested that defendant return to the State of California with the said child, but the defendant has at all times failed, neglected, and refused to do so, and instead of returning and as soon as she had lived for six weeks in Las Vegas, Nevada, and on or about the 11th day of December, 1946, defendant filed a divorce action against plaintiff in the District Court of the State of Nevada, in and for the County of Clark. That service by publication in said divorce action was attempted on plaintiff, but that plaintiff did not appear in said action, and plaintiff was never personally served in said action, for the reason that the State of California was the true domicile of the said parties* and the place where any divorce litigation should be maintained, and for the further reason that plaintiff did not have the facilities and his employment did not permit his travelling to the State of Nevada to defend and cross-complain in said action. * * * 4. On or about the 7th day of June, 1947, in Carson City, Nevada, the defendant Gladys J. Sampsell married the William Holt whom she stated to affiant that she intended marrying, before going to the State of Nevada to obtain her said divorce, and since said time said William Holt and said defendant have been living together in Salt Lake City, Utah, as man and wife.

"5. That prior to said marriage, defendant continued to maintain a place of temporary abode in Las Vegas, Nevada, and has never had any intention of making the State of Nevada her permanent place of abode. *That the only intention defendant had was to divorce plaintiff in the State of Nevada, and then remove to the City of Salt Lake City, Utah, after marrying William Holt, and reside with him in his residence in said last named city,* and that the said William Holt has at all times maintained and conducted his business in the said City of Salt Lake City, Utah, and has never resided or intended to reside in the State of Nevada. [Italics added.]

"6. That during all of the times herein mentioned since the defendant went to the State of Nevada, she has maintained the minor child of plaintiff and defendant with her, and has refused to permit plaintiff to have any custody of the child whatsoever, or to see the said child, or to permit the child to be returned to the State of California * * *"

From the above quoted evidence it is obvious that the trial court justifiably found that defendant, with the child, had departed from California and had ceased to be domiciled therein long before the disputed order to show cause was issued. Regardless of whether defendant intended to live in Nevada permanently it is clear that she intended to leave California permanently. The trial court so found and thereupon dismissed the order to show cause. That was a proper exercise, not a refusal to exercise, the jurisdiction of the subject matter which it possessed. (Lincoln v. Superior Court (1943), supra, 22 Cal.2d 304, 309, 315, 139 P.2d 13.) But even if we could hold that the court erred in dismissing the order to show cause on the facts and theory above stated it is still inescapable that at the worst it erred in the exercise of jurisdiction. That was, precisely, the situation in Lincoln and in Lincoln we held that we would not use mandamus to correct such an error.

It is further to be noted here that it is only the pendente lite order to show cause that has been dismissed. The action still pends. Many times, a trial court in handling domestic relations litigation has occasion to exercise its jurisdiction and its sound discretion in respect to applications for awards of custody of minor children pendente lite by denying such applications and postponing any order as to custody until the case is tried on its merits. In fact, the usual rule is that in the absence of some substantial showing requiring a change for the protection of a child, the courts will leave custody where they find it until trial on the merits is had.

An application for an award of custody of minor children, as an incident to divorce litigation, is, like an application for alimony pendente lite, in effect a proceeding for a separate judgment which may be made independent of, or preceding, or subsequent to, the final judgment. Although a provision for custody of the minor children may be included in either or both the interlocutory and final decrees, the provision for the custody (and support) of the children may be modified from time to time upon proper showing, regardless of finality of the decrees otherwise. The application for award, or for modification, of custody may be heard and determined upon a record of its own and may be the subject of a direct appeal. The order of dismissal of the order to show cause was a final determination of that proceeding (Lincoln v. Superior Court (1943), supra, 22 Cal.2d 304, 309, 139 P.2d 13), subject, of course, to the right of the plaintiff to make a similar new application, upon proper grounds, at any time during the minority of the child (Civil Code, § 138). It may be said here as was said in the Lincoln case (22 Cal.2d at page 314, 139 P.2d at page 19), "[t]he only objects that would be attained by granting the writ * * * would be to require the trial judge (1) to *reverse* his ruling in granting the motion to quash and the motion to dismiss, and (2) to resume the hearing of the order to show cause and dispose of it either differently as to result or on a different ground. In other words, the legal objective sought to be attained by the writ is not to compel the trial court to hear and determine a cause, but rather to compel it to rehear and redetermine and reverse its ruling on a question of law [and in this case, apparently, its findings of facts] in a cause it *has* heard and determined. That it might on such rehearing receive additional evidence, or give different legal effect to the evidence it had received, is beside the point."

---

* A mere conclusion of the affiant, so far as domicile of the defendant and of the child is concerned, and incompetent to constitute a substantial conflict in the objective facts from which their domicile is to be inferred. (Johnston v. Benton (1925), 73 Cal.App. 565, 570, 239 P. 60.)

A case which is also squarely in point is Brock v. Superior Court (1931), supra, 119 Cal.App. 5, 6, 5 P.2d 659, wherein the following appears: "Petitioner claims that the court has refused to exercise its jurisdiction in the matter, but the facts stated in the petition show the contrary. When the order to show cause came before the court, the matter was submitted upon a stipulation of facts. Thereupon the court entered an order denying the requested relief, 'on account of this Court not having jurisdiction to award temporary attorney fees, costs, or support on two grounds; that the child is not within the jurisdiction of this Court, also that provisions in section 137, Civ.Code, in re Attorney's fees, costs and support money do not apply in this case.'

"It thus appears that the court did not deny its jurisdiction to pass upon the application. It did pass upon and determine said application, but refused the requested allowance, because the court was of the opinion that it did not have authority to make such allowance to a child not residing in this state and not present in this state, in an action to compel a father to support his child. If the court erred in this conclusion (which we do not decide), it was only an error made by the court in the exercise of its jurisdiction. It was not a refusal to act upon the merits of the matter presented.

"The petition for writ of mandate is denied."

The petitioner would have us hang the weight of a mandated reversal of the dismissal on the tenuous thread of an assumption, contrary to all the established objective facts and contrary to the trial court's implied finding, that the minor child, notwithstanding the valid award of custody to his mother by the Nevada court and notwithstanding her admittedly permanent residence in Utah, is a "domiciliary" of California and therefore, subject to jurisdiction which, the majority hold, the superior court "refused" to exercise when, after considering the evidence pertinent to its jurisdiction of the res and its practical power to enforce any order it might make, it dismissed the order to show cause. The most that can be claimed for the California court, on any view of the evidence, is a fringe of partial jurisdiction. To compel the trial court to reverse its prior order of dismissal, to resume the hearing and, presumptively, to award custody of the child or visiting privileges to the plaintiff pending trial on the merits, with only partial and inadequate jurisdiction or power to enforce its order, seems to me to be an abuse of the power of this court and of mandamus procedure. "Complete jurisdiction includes not only the power to hear and determine, but the power to enforce the determination, as the judgment or decree is the end for which jurisdiction is exercised, and it is only through the judgment and its execution that the power of the court is made efficacious and its jurisdiction complete. To render the jurisdiction of a court complete, it must have jurisdiction over the subject matter, and in actions in personam over the person, or in proceedings in rem over the res or matter in contest." (21 C.J.S., Courts, § 21, page 35, and cases there cited.) In

14 Am.Jur. 364, § 160, it is said that "Complete jurisdiction includes not only the power to hear and determine the cause, but also power to enforce the judgment; and courts usually decline to entertain or to attempt to exercise jurisdiction intended to be complete if it fails to confer power to enforce the judgment which may be rendered * * * [pp. 373-374, § 174] A court having jurisdiction to render a judgment or decree has authority and jurisdiction to make such orders and issue such writs as may be necessary and essential to carry the judgment or decree into effect and render it binding and operative * * * [A] court will not adjudicate where it cannot enforce the adjudication * * *" In the simplest and most concise language the supreme court of Connecticut says (Bankers Trust Co. of New York v. Greims (1929), 110 Conn. 36, 147 A. 290, 293, 66 A.L.R. 726, 731): "It is a fundamental principle that courts will not adjudicate when they cannot enforce." It seems to me that, even if we assume that the trial court could in some practical manner (which has not yet been suggested) enforce an order for custody pending the trial, we should not, under the circumstances here shown, apply mandamus to compel it to reverse the order made. We, of course, do not know what order might be made after trial on the merits.

Here, both the minor child and his mother, with whom he lives in Utah, are outside the territorial boundaries of California and are domiciled outside California. It is true that the mother has "appeared" in the present California proceeding by the filing of an answer to the complaint through an attorney. But neither the mother nor the child is physically within the State of California and neither is within reach of the sheriff of a California county. The fact that the court has jurisdiction to render an in personam judgment as against the mother does not mean that such judgment can be executed upon res beyond the boundaries of the state. The child is not a party to the basic litigation, either plaintiff or defendant, nor is he an intervenor, cross-complainant or cross-defendant. By a process of elimination, then, it would seem that his relationship to the case insofar as an order awarding his custody is concerned, most logically, is analogous to that of the res the status of which is to be litigated. "A court has no jurisdiction of rights or actions in rem where the property in controversy lies without the limits of the court's control and its process cannot reach the locus in quo * * *" (21 C.J.S., Courts, § 43, page 52.) It is unnecessary and would be improper for us to speculate here as to what could possibly be accomplished if the mother were physically within reach of California process and had been ordered to bring the child into the state. No such order has been made and neither the child nor the mother is available to the sheriff in California.

Upon the showing made the order of dismissal was within, and constituted an exercise of, the jurisdiction of the court. Contrary to a statement in the majority opinion that "If we were to hold that the dismissal for lack of jurisdiction based on the facts stated in petitioner's affidavit is a determination on the merits precluding the issuance of mandamus" some eleven California cases "would have to be overruled," an examination of the cited cases discloses no holding requiring that under circumstances such as are apparent here the writ must issue. There is broad language, somewhat loosely used in some of those cases, but the fact remains that Lincoln and Brock are the only two California cases squarely in point with the case at bar and those two cases, if we are to be consistent, require that the writ be denied.

Perhaps the most serious objection to the majority opinion, from the standpoint of the profession, is that it leaves the law relating to the use of mandamus as a substitute for appeal in such a confused state that no lawyer or judge will be able to differentiate intelligibly between cases where mandamus will lie to correct error in the exercise of jurisdiction and where it will be denied. I think it is clear that no lawyer or judge of a lower court can carefully read Lincoln (22 Cal.2d 304, 139 P.2d 13) and Brock (119 Cal.App. 5, 5 P.2d 659) and compare the court action and orders there made with the court action and order here made, and find any substantial legal basis or rule for distinguishing the earlier cases from this one. If the majority determine, as they do here, that our former rather strict policy against using mandate as a substitute for appeal is to be so broadly liberalized, it is my view that, for the sake of clarity of the law with which others must deal, they should frankly acknowledge that their opinion is essentially inconsistent with the earlier ones (Brock, 1931 and Lincoln, 1943) and unequivocally declare that those cases are overruled.

For the several reasons hereinabove elucidated the application for mandate should be denied.

SHENK and CARTER, JJ., concur.

32 Cal.2d 673

PEOPLE v. LOPEZ.

Cr. 4856.

Supreme Court of California, in Bank.

Sept. 29, 1948.

Rehearing Denied Oct. 28, 1948.

1. Assault and battery 🔑92

Evidence sustained conviction for assault with deadly weapon.

2. Assault and battery 🔑96(3)

In prosecution for assault with deadly weapon, charge that shooting was not justifiable if done without any overt act or physical demonstration on part of victim sufficient to warrant defendant as reasonable man in believing he was in great bodily danger was proper.

3. Criminal law 🔑1186(4)

In prosecution for assault with deadly weapon, where evidence of defendant's guilt was overwhelming, failure to give more complete instructions relative to law of self-defense did not result in miscarriage of justice. Const. art. 6, § 4½.

4. Criminal law 🔑636(7)

Constitutional guaranty of defendant's right to be present at all stages of trial and have jury instructed in his presence is satisfied where trial judge in presence of defendant instructs jury as to problems of his individual case, but does not contemplate keeping prospective jurors in state of ignorance about matters of general information and concern to them, and does not prohibit giving of general preliminary information which will make them better able to perform their duties in deciding cases. Const. art. 1, § 13.

5. Criminal law 🔑1186(4)

Where jurors in prosecution for assault with deadly weapon had used pamphlet relating to general instructions concerning duties and responsibility of trial jurors in criminal department of superior court which had been distributed among them in another department of court some time before, but court specifically instructed them as to particular case, defendant could not be deemed prejudiced in his constitutional right to be present at all stages of trial and have jury instructed in his presence notwithstanding some statements were not applicable to the prosecution. Pen.Code, §§ 1093, 1126, 1127; Code Civ.Proc. §§ 607a, 608, 609; Const. art. 1, § 13; art. 6, § 4½.

CARTER, J., dissenting.

◆

Appeal from Superior Court, Los Angeles County; Edward R. Brand, Judge.

Antonio Lopez was convicted of assault with a deadly weapon, and from the conviction and an order denying a motion for new trial he appeals.

Judgment and order affirmed.

Prior opinion 185 P.2d 831.

William J. Currer, Jr., of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., and Howard S. Goldin, Deputy Atty. Gen., for respondent.

GIBSON, Chief Justice.

Defendant, having been convicted of assault with a deadly weapon, claims on this appeal that the verdict is not supported by the evidence, that the court did not correctly instruct on the law of self-defense, and that certain members of the jury were instructed in his absence.

On the evening in question defendant was drinking in a cafe in Los Angeles with Robert Fernandez, an unidentified man and two women. The entire party left the cafe, took a short ride in a taxicab, and then stopped near the place where they lived. Defendant, who was intoxicated, engaged in a fight with the unindentified man over the cab fare. Fernandez intervened, took a blackjack away from defendant, and stopped the fight. Defendant went to his home and a few minutes later re-appeared with a loaded gun, walked up to Fernandez and said, "I am going to shoot you." One of the women, Fay Thomas, stepped in front of Fernandez and said to defendant, "You don't know what you are doing, put your gun away." Defendant started to back up and said, "Get away, Fay, I am going to shoot." She replied, "No, you are not, you had better go home and put that gun away," and moved toward defendant, with Fernandez following closely behind her. Defendant pushed her aside and shot Fernandez in his right knee, the bullet passing through his leg. Fernandez, who had not made any threats, was holding the blackjack at the time he was shot, but defendant did not see it.

[1] The evidence is clearly sufficient to support the verdict. Defendant complains, however, that the court gave an erroneous instruction on the law of self-defense. The jury was told that if they believed that "without any overt act or physical demonstration upon the part of Robert Fernandez sufficient to warrant the defendant, as a reasonable man, in believing that he was in great bodily danger, he, the defendant, fired a shot at said Robert Fernandez and hit him; such shooting under such circumstances was not justifiable."

[2] Defendant criticizes the use of the word "great" in the instruction and argues that it unduly restricts his right of self-defense in a prosecution for assault with a deadly weapon. He concedes that similar instructions have been approved in homicide cases (see People v. Emerson, 130 Cal. 562, 568, 62 P. 1069; People v. Holt, 25 Cal.2d 59, 63, 153 P.2d 21), but urges that under a charge of assault with a deadly weapon probable danger of less degree than great bodily injury will justify the exercise of the right of self-defense. Although the distinction contended for by defendant appears to have been made in a few states, the great weight of authority is to the contrary and is in accord with the California decisions which have approved similar instructions in cases where the accused was charged with felonious assault. See 114 A.L.R. 634-650; People v. Lynch, 101 Cal. 229, 231, 35 P. 860; People v. Romero, 143 Cal. 458, 459, 77 P. 163; People v. Guidice, 73 Cal. 226, 228, 15 P. 44; People v. Corlett, 67 Cal.App.2d 33, 46, 153 P.2d 595, 964; People v. Moody, 62 Cal.App.2d 18, 22, 23, 143 P.2d 978; People v. Semikoff, 137 Cal.App. 373, 376, 377, 30 P.2d 560; People v. Washburn, 54 Cal.App. 124, 128, 201 P. 335.

[3] The defendant also complains that the court failed to instruct the jury fully on the law of self-defense. The instructions were in some respects incomplete, but in view of the overwhelming evidence of defendant's guilt it does not appear that the failure to give more complete instructions resulted in a miscarriage of justice. See Cal.Const., art. VI, § 4½.

The principal ground urged by defendant for reversal is that some of the jurors were instructed in his absence. He relies on the fact that, when prospective jurors were being impaneled several months before the trial, they were given a pamphlet entitled "General Instructions" which is set forth as an appendix to this opinion. The propriety of using such a pamphlet has not been passed upon in this state (cf. People v. Cowan, 44 Cal.App.2d 155, 160, 161, 112 P.2d 62), but it was been held, in an analogous situation, that no prejudice resulted from giving prospective jurors general oral instructions as to their duties prior to the commencement of the trial of a particular case. People v. Tennant, 32 Cal.App.2d 1, 7, 88 P.2d 937. The practice of giving booklets of general instructions to jurors at the time of their selection for jury duty has been approved in at least one state (Knight v. State, 50 Ariz. 108, 69 P.2d 569), and is being used apparently with approval, in other jurisdictions. See State v. Cooney, 23 Wash.2d 539, 161 P.2d 442; (1925) 11 A.B.A.Jour., 289, 401 (N.Y.); (1928) 14 A.B.A.Jour. 410 (Kan.);

(1947) 22 N.Y.U.L.Q. 442 (Federal District Courts); (1946) 41 Ill.L.Rev. 187 (Ill.).

The pamphlet used in the present case is designed, as its title indicates, to give jurors some conception of legal procedure and of the responsibilities attached to jury service. The first portion of the pamphlet is devoted mainly to an explanation of the steps leading up to actual trial, and the remainder consists of the statement of rules to be found in the codes or in the judicial declarations of the appellate courts of this state, together with admonitions and sound advice as to the proper conduct of jurors. Substantially all of the material is so general in nature as to be helpful to jurors in any kind of a criminal trial.

[4, 5] Even a cursory reading of these "General Instructions" shows that they are not, and should not be considered to be, the instructions which the codes require to be given to the jury at the close of a trial. See Pen.Code, §§ 1093, 1126, 1127; Code Civ.Proc. §§ 607a, 608, 609. The pamphlet was not intended to take the place of the required instructions but to give the jurors background and general information concerning their duties and responsibilities; and it is expressly stated, in at least two places in the pamphlet, that the jury must follow the law as declared by the trial court's instructions. Under the circumstances there was no violation of defendant's right to be present at all stages of the trial and to have the jury instructed in his presence. Const. art. 1, § 13. That constitutional guaranty is satisfied where, as here, the trial judge, in the presence of the defendant, instructs the jury as to the problems of his individual case. The Constitution does not contemplate keeping prospective jurors in a state of ignorance about matters of general information and concern to them, and neither the letter nor the spirit of the Constitution prohibits the giving of general, preliminary information which will make them better able to perform their duties in deciding cases.

An enlightened administration of justice requires the intelligent service of well informed men and women, and there is obviously considerable value in acquainting jurors in advance of trial with a few elementary principles of law and procedure, and with the serious duties and responsibilities they are about to assume. It is immaterial whether they derive their knowledge from prior service as jurors in other cases or from the study of such a pamphlet. In either event, wholesome and helpful advice of the type found in this pamphlet should be of great assistance in securing to defendant a fair and impartial trial.

There is no claim that any portion of the pamphlet is erroneous as a matter of law or is in conflict with the instructions given by the trial court, and we find nothing which could have been prejudicial to defendant. Although some of the statements were not applicable to this prosecution, it does not appear how they could have misled the jury or harmed the defendant, and it must be assumed that the jurors followed the specific instructions given at the close of the trial.

The judgment and order denying a new trial are affirmed.

SHENK, EDMONDS, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

Appendix.

General Instructions

concerning the duties and responsibilities of trial jurors in the criminal departments of the Superior Court of Los Angeles County, California.

Read and Study Them Carefully.

You have been summoned to serve as a trial juror in the criminal departments of the Superior Court of Los Angeles County for a limited period of time. The right of trial by jury is guaranteed by both the federal and state constitutions and is one of the basic principles of liberty and representative government. While jury service may entail some personal and financial inconvenience to you, it is a duty and privilege which, if conscientiously performed, is a mark of good citizenship.

Jury service has its compensation in the fact that the experience necessarily offers an opportunity for a more intimate knowledge of the manner in which our courts function, and the orderly method under legal procedure by which justice is sought to be administered. Many of you will see a side of life with which you have never come in contact and it is bound to leave with you a fuller understanding of the complexity of the problems with which the courts have to deal.

Upon being selected as a juror you become an integral part of the judicial system, provided by law, in the conduct and trial of cases involving the rights of citizens and of the State. Your responsibility is great for the reason that to you is assigned the duty of rendering a decision upon the facts in the case. You are the judges of the facts, while to the court is assigned the duty of being the judge of the law in the case.

The judge has the duty of ruling upon all questions of law throughout the trial and of giving you instructions indicating to you how the principles of law involved shall be applied by you to the facts in the case. Upon the proper exercise of these coordinating functions depends a fair and impartial trial and the ultimate rendition of a fair and impartial verdict—a verdict that shall speak the truth as nearly as it is humanly possible to do so.

Therefore, with this in mind and in order that you may have some conception of our legal procedure, and of the responsibilities attached to your service as a juror, this pamphlet has been prepared and is handed to you for your careful perusal. Read it over several times in your leisure moments because the extent of your understanding of its contents will determine in a large measure your value and success as a juror.

The cases which are tried by juries may be divided into two classes: Civil cases and criminal cases. A civil case is one in which one person sues another to enforce a private right or to collect money or to recover damages for a violation of a private right. Criminal cases include all cases where a law has been violated and such violation is punishable under the law by the death penalty, imprisonment in the state prison or jail or by fine.

Civil cases are begun and prosecuted by the private party who feels that he has been wronged. In criminal cases it is the theory of the law that the commission of the crime is a wrong against the State and therefore a criminal case is prosecuted in the name of the People of the State of California against the defendant. The person injured by the crime is not a party to the prosecution and his sole connection with the case is that of a witness. The person accused of the crime is known as the defendant. You have been summoned as trial jurors in criminal cases only and for the purposes of these instructions you may be concerned only with that type of case.

Criminal cases in the Superior Court are begun there by filing either an indictment or an information. So far as you are concerned there is little difference in practical effect between them. Each is a charge in writing setting forth briefly the crime or crimes of which the defendant is accused. There is a difference however in the procedure under which they are issued. An indictment comes from the Grand Jury of the county which has met and heard evidence, as a result of which, twelve or more of such Grand Jurors believing the evidence so heard by them to be strong enough to justify criminal prosecution have voted to return an indictment which is then filed in the Superior Court. Where the prosecution is by information it is begun by filing a complaint before a magistrate, usually a judge of the Municipal Court or a justice of the peace. Before the case reaches the Superior Court a preliminary hearing is held, at which the witnesses against the defendant give their testimony under oath and may be cross-examined by the defendant or his lawyers. The defendant may also testify in his own behalf and may put such witnesses upon the stand to testify as he may desire. If after all the witnesses have been heard the magistrate believes that a crime triable in the Superior Court has been committed and that there is probable cause to believe the defendant guilty he makes an order holding the defendant for trial in the Superior Court. The District Attorney then prepares and files the information charging the crime or crimes shown by the evidence at the preliminary examination.

Both in the case of the hearing before the Grand Jury and before a magistrate a shorthand reporter is required by law to be present and this reporter takes down the testimony and then writes it out on the typewriter and a copy of such testimony is filed with the Superior Court and a copy is also given to the defendant. These preliminary steps are in no sense evidence and must not be considered by the jury as any proof of guilt or innocence. They are merely a means whereby the case reaches the Superior Court and it is only on the trial thereof that the question of the defendant's guilt or innocence is determined.

The Trial.

A jury trial begins with the selection of twelve jurors. The District Attorney or one or more of his deputies represent the People in the prosecution of the case and the defendant is represented by any attorney whom he chooses to retain or by the Public Defender. The attorneys on both sides have the right of asking such questions of each juror as serve to satisfy them that the juror's mind is free and clear from all interest, bias or prejudice that might prevent his finding a just and true verdict. Each side is given under the law certain challenges to the jurors if he desires to exercise them. Challenges are of two kinds: For cause and peremptory. Challenges for cause are set forth by statute, an example of which is that the prospective juror might be related to the defendant in the action or might have at some time been employed by him. Peremptory challenges are those for which no cause need be stated, each side being given a certain number of such challenges by law. A challenge to a juror should never be taken personally as in any way reflecting upon him or his impartiality or ability to try the case. There may be a variety of reasons in the minds of the attorneys for both sides with which the juror need not be concerned. When the juror is accepted by both sides he is sworn to try the case fairly and impartially and a true verdict render according to the evidence received and the law as given by the court. The indictment or information is then read to the jury by the clerk, together with a statement of the plea of not guilty entered by the defendant. The District Attorney then opens the case for the prosecution. In some cases he makes an opening statement of what he expects the evidence will prove, and at the beginning of the defendant's part of the case his counsel also has the privilege of making an opening statement of what the defense expects to prove, such statements being only explanatory and are never to be regarded or considered as evidence in the case.

In criminal cases the defendant at the outset of the case is presumed to be innocent. This presumption continues throughout the trial and will prevail unless after hearing and considering all the evidence worthy of belief the jury is convinced beyond all reasonable doubt of the guilt of the accused. If the evidence considered as a whole leaves in the mind of a juror a reasonable doubt, that is, a doubt for which there is a reason arising either from the evidence or lack of evidence of the guilt of the accused the juror should vote "not guilty." However the law does not require proof to an absolute certainty before it becomes a juror's duty to vote for a verdict of guilty. The law only requires that guilt shall be proved to a moral certainty; that the degree of proof shall be sufficient to convince an unprejudiced mind of the guilt of the accused beyond all reasonable doubt.

Direct and Circumstantial Evidence.

The guilt or innocence of the accused, or any incidental fact, may be proved either by direct or by circumstantial evidence. Direct evidence is proof of a fact by the testimony of a witness who knows of the fact of his own knowledge and who as an eye-witness is able to give a complete statement as to the existence or nonexistence of the fact desired to be proved. All other evidence is circumstantial evidence and consists of proof of a series of facts or circumstances, which when considered together, prove or disprove an ultimate matter of fact. The term "circumstantial evidence" does not mean proof of a circumstance which leads merely to a suspicion. Circumstantial evidence is evidence or proof of a fact which when considered with the evidence of other facts leads to a conclusion as to the fact it is desired to prove. If a shot were heard coming from a closed room and upon rushing in people discovered a man fatally shot and another standing by his side holding in his hand the revolver from which the fatal shot was fired, such facts would not be direct evidence that the man holding the gun had shot the other. It would be strong circumstantial evidence. The conclusion that the man holding the gun had fired the fatal shot could only justly be reached when all of the circumstances taken together would warrant such a conclusion. In considering whether direct or circumstantial evidence has the greater weight we must bear in mind that the direct testimony of an alleged eye-witness may be the result of a mistake or poor observation or may be intentionally false, while the likelihood of mistake or falsification may be less where to constitute a complete chain of circumstantial evidence the testimony of each witness to one of the facts making up that chain must fit with all of the other facts testified to by the other witnesses and going to make up that chain. In other words, it is less likely that a number of witnesses could get together and each falsify or by mistake tell a story which makes a consistent entirety than for one alleged eye-witness to tell a story which would appear to be true.

Credibility of Witnesses.

Every witness is presumed to speak the truth. This presumption may be overcome by his manner of testifying, his interest in the case, if any, or his bias or prejudice, the character of his testimony, his reputation for truthfulness, the reasonableness of his testimony, his prior conviction of a felony or by the fact that on other occasions he has made statements contradictory to his testimony at the trial. There are other factors which a jury should take into consideration in determining the extent to which they will accept a witness' testimony. Among these is the degree of the witness' intelligence, his opportunity of knowing the facts to which he testifies, his physical ability to see, hear and observe and his accuracy of observation, the accuracy of his memory, and his general attitude while testifying.

Defects of Honest Witnesses.

The jury must be careful however not to misinterpret the conduct of a witness. Thus it must not be assumed that the nervousness of a witness is necessarily due to his telling that which is not true. A nervous condition is possibly due to the fact that he is experiencing the normal reaction incidental to most witnesses when placed upon the stand in a court room. Neither does the mere fact that a witness has contradicted himself necessarily mean that he is not entirely honest. He may have mis-spoken or he may have misunderstood the question. Memories are not perfect. The recollection of any one of us as to a past event may become hazy or inaccurate. Also our powers of observation are not perfect. When an accident occurs or a crime is committed the eye-witness rarely sees more than ten per cent of all that is observable. We best observe that which attracts our interest, and as the interest of various eye-witnesses is likely to be different so we may expect that they may observe different things. Then again the witness' observation may be impaired by a defect of sight, hearing or one of the other senses. We must not be too critical in considering testimony as to time, distance, etc., for we know how inaccurate we are in making such estimates. Differences in experience or education, calmness or excitement, anger, resentment and other emotions and instincts may and often do play a large part in affecting the observation, memory and subsequent testimony of a witness.

Impeachment of Witnesses.

A witness is said to be impeached when there appears in the evidence the basis for a reason to discount the testimony of such witness. One common impeachment is contradictory evidence shedding doubt upon the testimony of the witness. A witness may also be impeached by evidence that he has been convicted of a felony, that is, of a state prison offense. This does not mean that merely because a witness has been convicted of a felony he is not worthy of belief. It is for the jury to decide in the light of the testimony of the witness and the facts of such conviction just how much weight will be given to his testimony. A witness may also be impeached by evidence that on some former occasion he has made a statement differing from the testimony given at the trial as to some matter material to the case on trial. A witness thus impeached is allowed by law to explain apparent inconsistencies in his statements and testimony and such explanation should be taken into consideration in weighing the testimony given at the trial.

Declaration of the Accused.

The law permits evidence of statements made by the accused outside of court where such statements have a tendency toward proving his guilt. Such statements are ordinarily called admissions but when the statement is of such character that standing by itself it shows the guilt of the accused then the statement is known as a confession. In the case of confessions the law provides that they may be received in evidence only when they are first shown to have been made freely and voluntarily. Even when a confession has been given in evidence and is later proved to have been made involuntarily it must be disregarded and cannot be considered by the jury.

Objections by Counsel—What Is Not Evidence.

Contrary to a somewhat popular idea the objections made by the attorneys during the trial of a case are not for the purpose of obstructing the proceedings. The trial of cases is governed by rules of law and the purpose of objections is to call to the attention of the trial judge that there has been or is about to be a violation of one of those rules. If the judge agrees with the point thus called to his attention he sustains the objection, otherwise it is overruled. The judge may himself of his own motion exclude improper evidence. If evidence is given which turns out to be improper because it violates some rule of law such evidence is often stricken out of the record by the order of the court. Whenever evidence is so stricken out it ceases to have any legal or other effect and that evidence so stricken must be entirely disregarded by the jury and cannot be considered for any purpose. Statements made by the attorneys and questions asked which are not permitted to be answered are also no part of the case and must not be considered nor can any inference be drawn therefrom. In brief, the conclusion of the jury as to the facts can lawfully be based only on the sworn testimony which is given before them and the exhibits received in evidence.

The Law of the Case.

Since the verdict of a jury must be in accordance with the law some provision had to be made to inform the jury of the law applicable to the case. The duty of declaring the law and deciding on questions of law rests with the judge. The law in the form of the court's instructions is given to the jury after all of the evidence is in and the arguments of lawyers concluded. Under their oaths the jury must accept without question and must follow the law as declared by the judge. If a juror has an idea that the law is different than as stated by the judge or if he has a belief that the law should be otherwise, such ideas and beliefs must be entirely disregarded. The trial of a criminal case is a complete whole depending upon its being handled in accordance with the law. If the law is not followed the entire plan of criminal procedure is disrupted and injustice necessarily follows.

Penalties—Influences.

Under the law the jury determines the penalty or place of imprisonment in only three instances: first degree murder, kidnapping and statutory rape. The decision of the jury as to the penalty in these particular cases is final. The judge in imposing sentence can neither increase nor reduce the penalty from that fixed by the jury.

In all cases other than those just enumerated the jury has nothing whatever to do with the penalty which may be inflicted if the defendant is found guilty. The subject of penalty or punishment should not be mentioned or considered in the deliberations of the jury. Upon a verdict of guilty never add thereon any recommendation for either leniency or severity so far as sentence by the court may be concerned. The questions of penalty, leniency and probation are solely for the decision of the trial judge. Under no circumstances may a juror permit his judgment and verdict to be influenced by pity, passion or by what seems to be the public opinion. There are, and naturally will be, cases in which the evidence before the jury may give the impression that though the accused has violated the law the circumstances are so mitigating in character that little apparent reason for punishment exists. The juror may be tempted in such a case to favor an acquittal as a means of relieving the accused from punishment. Jurors should, however, put aside all such ideas. In the first place if the evidence of guilt is satisfactory the verdict should in accordance with law and the juror's oath be one of guilty, leaving to the judge the question of leniency. A verdict of guilty does not necessarily mean a term of imprisonment in the state prison but may in some cases result in a county jail sentence, a fine, or proceedings under the provisions of the probation law. Neither should a jury convict because, although the evidence of the crime charged is not sufficiently convincing, the evidence discloses other reasons why punishment is advisable. Not only is the judge better fitted by his experience to pass more justly on the matters of leniency, probation, and sentence, but at that time the judge has the benefit of much information as to outside facts which must necessarily be considered in justly passing upon the subject of penalty, such as past history, environment and former criminal record if there be any. The jury does not have this information before it and without such data might be unduly severe, and on the other hand might exercise undue leniency in favor of one whose past record would not merit any such consideration.

Jurors should always remember that they are the judges of the facts and that their duty is properly performed only when the verdict represents a just and accurate conclusion drawn from the facts regardless of what the later effect of the verdict may be.

Deliberating on the Verdict.

In criminal cases the verdict must be unanimous. Each juror must concur in the verdict. Unless all agree upon the same verdict there is a mistrial. The time, effort and money spent upon the trial has produced no conclusions and there must be another trial to decide the case. In the proper administration of the law cases should be decided and jurors should agree upon a verdict if they can conscientiously do so. There may now and then be a case in which there is fair room for a difference of opinion but in the vast majority of cases differences of opinion are more likely to be the result of a misunderstanding of the facts or the instructions of the court on the law, or a lack of appreciation of the significance of some piece of evidence. Differences of opinion by the jurors, being usually due to honest misunderstanding, may ordinarily become reconciled so that there is an agreement of the jurors if each juror will conscientiously try to agree. If the jurors will fairly argue and state their opinions in the jury room and listen to the arguments of their fellows a calm and fair consideration and discussion will almost always result in an agreement of the jury providing the law as declared in the instructions of the court is followed.

To aid in securing such a consideration a few suggestions may be of value. It is well to avoid any emphatic expression of opinions and conclusions until there has been a full and frank discussion of the evidence, for it is but natural that a person thus expressing himself is more or less hesitant in changing such expressed views. Again, jurors should not indulge in a discussion or enter into controversies over immaterial facts and circumstances which cannot affect the decision of the case one way or the other. It will be found advisable to begin the discussion by ascertaining those facts which are admitted or undisputed and as to which all will agree before discussing facts regarding which a difference of opinion may exist. Where there is a material difference in the testimony of various witnesses it is worth-while to consider the possible explanation or reason for such differences, always remembering the factors which tend to cause a difference in the testimony of honest witnesses. It may be well to again point out the importance of carefully following the evidence as it is received in court, bearing in mind that what appears at the time to be a comparatively unimportant piece of evidence may in the end prove to be of most vital importance.

Privileges Of Jurors.

A juror may with the permission of the court question a witness, but his questions are subject to the same objections and are governed by the same rules of law as are the questions of the attorneys. Jurors should refrain from asking any questions until attorneys for both sides have completed their examination of the witness, because in all probability the question which the juror has in mind will be asked of the witness before his testimony is concluded. If the question is not asked and the juror then feels it to be material he should ask leave of court to propound the question. If the juror desires, and this is often advisable, he may make written notes and memoranda during the taking of testimony and the same may be used by him during the deliberations of the jury in the jury room as a means of refreshing his memory. If during the deliberations of the jury a difference of recollection exists as to the testimony of any witness or witnesses the judge at the request of the jury will have it returned into court and the testimony under discussion will be read to it. The law does not permit the jury to take the official transcript of the testimony into the jury room. If a difference of opinion arises as to the interpretation of court's instructions or if further instructions are required to make the law more clear the jury, upon request, may be returned into court where the judge will give further instructions as to the law.

It is the law that the jury may consider only such evidence as is received in open court. It is not only highly improper for a juror to look up evidence or to visit any place mentioned in the evidence for the purpose of gaining information, but such misconduct may result in a mistrial or compel a retrial of the case. Should the jury during the course of the trial consider it necessary that they be given an opportunity to inspect some place mentioned in the evidence they should inform the trial judge of such desire and in his discretion he may arrange for the jurors to view the place in the regular manner provided by law. Similarly it is improper for any juror to conduct tests or experiments out of court and if such are necessary the court will arrange that they be properly made. If it should happen that a juror is in possession of evidence which he believes should be considered by the jury he can not lawfully give this information to his fellow jurors or even consider it in arriving at his own conclusions unless this is done in the manner provided by law. The proper method is to inform the judge of the fact and the juror will then be allowed to give his testimony from the witness stand the same as any other witness.

Conversing About the Case.

Until the case is finally submitted to the jury and it has retired to deliberate upon a verdict the members thereof are prohibited by law from conversing among themselves or with any other person upon any matter, no matter how trivial, relating to the case. It is further their duty not to form or express any opinion as to any issue or fact or the merits of the case until the case is finally submitted to them. Should any person in the hearing of any juror make any statement regarding a case on which a juror is serving, the juror should do whatever is in his power to avoid hearing such a statement. This may be done by informing the person that a member of the jury is present and that such conduct is contrary to law. If any person should persist in such conduct there is strong reason to believe that he is intentionally trying to influence the juror and the matter should be immediately reported to the trial judge or to an officer of the law if one is available. Jurors should avoid conversation with strangers in and about the court room or court house. As illustrative of this fact an incident recently occurred in one of our criminal courts wherein a juror was approached in a general conversation in the hallway outside the court room by a stranger. The incident was properly reported to the trial judge and subsequent investigation disclosed the stranger to be an employee of one of the defendants on trial. You can readily imagine the embarrassment which this situation caused not only the juror involved but all parties concerned in the case. Jurors should not converse on any subject with any of the attorneys in the case or with any of the witnesses or persons who may be witnesses. While it is not unlawful for a juror to talk with one of the lawyers or witnesses about something which has absolutely nothing to do with the case, if a juror is seen in such a conversation he is immediately subject to the suspicion that he is talking about the case on trial and can immediately expect that the incident will be called to the attention of the judge and that he will be subjected to the natural embarrassment of an investigation by the court. Jurors should always so conduct themselves that no suspicion of any impropriety can ever arise.

Another matter may properly be called to your attention which on its face seems trivial but which causes a great deal of inconvenience, time and unnecessary expense. It sometimes occurs that one or more jurors will deliberately hold up the rendition of a verdict for the petty and unworthy cause of securing a free lunch or dinner at the expense of someone else. This causes the judge, court attachés and interested parties a loss of time and patience, and such pettiness is unworthy of anyone entrusted with the real responsibility of a trial juror.

Do not be late at the opening of court in the morning or upon its reconvening after a recess. Your tardiness causes an unnecessary expense to the county and to the litigants as well as embarrassment to yourself. Do not by exclamation, facial expression or otherwise give any indication of how you are affected by any testimony or exhibits in the case. Your reactions are your own until you reach the jury room when they may be shared with your fellow jurors.

No parking accommodations are provided for jurors and automobiles driven by jurors should be parked in a safe place in order that they may be properly cared for in the event of the jury being locked up after hours or over-night. Possibly a word by you to the parking lot attendant will cover this situation for you.

A juror's family is supposed to anticipate that the juror during the normal course of service may be on occasions locked up over-night. Under these circumstances the court attachés will try to notify your family for you if they can be reached by telephone.

Conclusion.

The verdict of a juror should in every case result in a just determination; just not only to the defendant or to the people but just to both sides. Such a determination is more certain to be reached if the decision be based solely upon the law and the facts regardless of what the effect may be, always remembering that the function of the jury is solely that of deciding what the facts of the case are and applying to these facts the law as given in the court's instructions.

In all his acts, conduct and decisions each member of the jury must ever be mindful that he is acting as a representative of his fellow citizens and as such is charged by them and his oath with deciding all cases in accordance with the facts and the laws which have been laid down by those citizens for their protection. There are two sides to every controversy and you should not make up your mind until all parties to the case have presented their evidence and you have heard the arguments of counsel and have heard the instructions of the court. When jury duty is thus performed no just criticism can be directed at any verdict which the jury may return.

CARTER, Justice (dissenting).

I dissent.

I cannot agree that it is proper to approve the giving to the jury, prior to the time the case is tried, a mass of instructions such as those contained in the appendix to the majority opinion. It is virtually impossible, in the time available, to examine and arrive at an intelligent conclusion as to the correctness of the long and detailed sheaf of instructions here involved. There may be many situations and conditions that would arise in various cases which cannot now be foreseen that would render some of the instructions highly improper. To arrive at a fair appraisal of all those instructions would require a lengthy study of the particular wording of the instructions and the cases to which they might be applicable. There may well flow from these instructions, implications which are contrary to law by reason of the failure to mention certain qualifying factors which may exist in some cases. In the time available I do point out the following questionable features in the instructions which were submitted to the jury in this case.

(1) On page 3 of the appendix to the majority opinion, 197 P.2d 760, it is said that "Criminal cases include all cases *where a law has been violated.*" That clearly gives the impression that if the case is a criminal one *a law has been violated,* the very issue to be determined at the trial, or to state it another way, that the mere charge of a criminal law violation imports that one has occurred.

(2) On the same page of the appendix it is said: "Civil cases are begun and prosecuted by the private party who feels that he has been *wronged.* In criminal cases it is the theory of the law that the commission of the crime is a wrong against the State and therefore a criminal case is prosecuted in the name of the People of the State of California against the defendant. *The person injured by the crime is not a party to the prosecution and his sole connection with the case is that of a witness.*" That clearly implies that the complaining witness in a criminal case has not been wronged and therefore he is a wholly impartial and disinterested witness—the same as any witness who has no ax to grind. Such is plainly not true. No place will a person find more biased and vindictive attitude than is displayed by a complaining witness in a criminal trial.

(3) Further on pages 3 and 4, 197 P.2d 760, great stress is laid upon the finding by a grand jury or a magistrate at a preliminary hearing as showing that they believed defendant had committed the crime. While it is said at the bottom of page 4, 197 P.2d 761, that that is no proof of guilt, yet the jury is definitely given the impression that either a magistrate or a grand jury has in effect found guilt. From that the jury naturally infers, contrary to the presumption of innocence, that defendant is presumably guilty. That is especially dangerous when we recognize the well known tendency to assume that merely because some one has been charged with a crime there must be some merit in the charge—that where there is smoke there is fire. How the case got to the stage where it is ready for trial is wholly immaterial.

(4) On page 5 of the appendix, 197 P.2d 761, in giving an example of when challenges of jurors for cause is proper, the only mention is of a case where the prosecution may make the challenge.

(5) On page 8, 197 P.2d 762, it is said: "In other words, it is less likely that a number of witnesses could get together and each falsify or by mistake tell a story which makes a consistent entirety than for one alleged eye-witness to tell a story that would appear to be true", which in effect states that circumstantial evidence carries more weight than direct evidence. That is not the law. (10 Cal.Jur. 1157-8; 8 Cal.Jur. 191.)

(6) It is stated on page 9, 197 P.2d 762, that an eye-witness to an accident rarely sees more than 10% of that which is observable. Where is the scientific or statistical data to support that statement? It might well lead the jury to discount an eye-witness' account by 90% resulting in very little consideration being given to his testimony.

(7) In discussing "impeachment" of a witness on page 10, 197 P.2d 762, it fails to include *all* the methods of impeachment although on its face it purports to be comprehensive. This may lead the juror to reject other forms of impeachment.

(8) It is said also on page 10, 197 P.2d 763, that the law permits proof of statements of the defendant made out of court as evidence against him. The jurors might infer that statements purportedly made by defendant and reported in a newspaper could be used. The "outside of court" feature would loom as the important factor in his mind.

(9) It is said on page 11, 197 P.2d 763, that statements made by attorneys are not part of the case. Certainly such statements

are a part of the case when made in argument to the jury.

(10) In discussing the subject of "Deliberating On The Verdict" (p. 14), 197 P.2d 764, stress is laid on the necessity of arriving at a verdict to save the state money. The whole tenor of the discussion would impel jurors to compromise their convictions and go with the majority. Moreover telling the jury how they shall conduct themselves while deliberating, page 15, 197 P.2d 764 (how they shall present their views and the like to their fellow jurors) is wholly improper. It would tend to make them act in an unnatural manner and destroy the traditionally lay aspects of a true jury trial. Their deliberations are secret and how they are conducted is their own business.

To the foregoing observations undoubtedly many more could be added upon a closer scrutiny. Suffice it to say it is not the province of this court to pass upon, *in advance of any controversy,* the validity of a whole series of jury instructions in a criminal case.

Finally it should be observed that the instructions are not, as appears from the foregoing discussion, and a reading thereof, mere general advice to jurors. They go into detail on many questions of the value of various kinds of evidence and the like.

It should be remembered that the instructions here involved are given jurors in pamphlet form by an attaché of the court, and that a conscientious juror would undoubtedly read and study the same with the view of attaining the qualifications which he deems essential to the performance of jury duty in a manner acceptable to the court in which he is serving. Because these instructions are placed in the possession of jurors so that they have access to them while they are not actually performing jury duty, they have an opportunity to become more conversant with them than with the specific instructions read by the court to the jury at the conclusion of the trial. It may be assumed, therefore, that the instructions contained in the appendix of the majority opinion will have greater influence upon the average juror than any other instructions read by the court to the jury during the trial. Such being the case, if the so-called pamphlet instructions are misleading and would tend to give the juror an erroneous concept of the law, they are more apt to have a prejudicial effect than the instructions read by the court to the jury during the trial.

In my opinion it was error to permit the jury in the case at bar to have access to the instructions contained in the appendix to the majority opinion, and for this error I would reverse the judgment.

Rehearing denied; CARTER, J., dissenting.

87 Cal.App.2d 816

HOWARD GREER CUSTOM ORIGINALS v. SUPERIOR COURT, LOS ANGELES COUNTY.

Civ. 16695.

District Court of Appeal, Second District, Division 2, California.

Oct. 5, 1948.

1. Judgment 🔑948

The plea of res judicata is a defensive plea, and does not affect the court's jurisdiction.

2. Judgment 🔑174

Where court denied motion to set aside a default judgment, doctrine of res judicata did not preclude the court from thereafter entertaining a motion to set aside the judgment.

3. Prohibition 🔑3(2)

Erroneous rulings cannot be reached in a proceeding for a writ of prohibition and they may be corrected only by an appeal.

4. Prohibition 🔑3(3)

Prohibition would not lie to prevent the trial court from entertaining a motion to set aside a default judgment on ground that previous ruling was res judicata, since remedy by appeal furnished an adequate remedy, and the ruling, if wrong, was merely erroneous.

◆

Petition by Howard Greer Custom Originals, a corporation, against Superior Court of the State of California, in and for the County of Los Angeles, for a peremptory writ of prohibition to command the superior court to desist from hearing a motion to set aside a default judgment previously entered.

Alternative writ of prohibition discharged; petition for a peremptory writ denied.

Abraham Gottfried, of Los Angeles, for petitioner.

Harold W. Kennedy, County Counsel and James A. Cobey, Deputy County Counsel, and Geo. W. Rochester, all of Los Angeles, for respondent.

MOORE, Presiding Justice.

Petitioner seeks a peremptory writ of prohibition to command the superior court to desist from hearing a motion to set aside a default judgment previously entered.

On March 19, 1948, petitioner filed a complaint naming as defendants "J. C. Capritti doing business under the fictitious firm name and style of Rose Marie of California, John Doe, Richard Roe, Jane Doe, individually and as copartners doing business under the name of Red and Brown Company, a copartnership, and Black and White Company, a corporation." A return having been filed showing personal service of the amended complaint on defendant Capritti, the clerk entered his default on May 17, 1948. The answer of Rose Marie of California, Inc., sued as Black and White Company, a corporation, was filed May 7, 1948. Demurrer to the answer to amended complaint and demurrer to cross-complaint were sustained June 3, 1948. On June 29 defendant Capritti filed his notice of motion to set aside his default. Such motion was supported by his affidavit that "an answer was filed for and on behalf of the corporation * * * and affiant was under the impression that this would be sufficient and that there was no need for affiant to file an answer in his individual and personal capacity."

When the cause was called for trial, July 29, Capritti's motion was denied, and judgment was entered against him. On August 9, 1948, he moved the court to set aside the judgment and for leave to file his answer. The hearing of such motion was continued after which the instant petition was filed and the alternative writ issued.

Petitioner contends that the court having denied the motion to set aside the default no longer has jurisdiction to entertain the motion to set aside the judgment for the reason that the ruling on the former motion is res judicata as to the second.

[1, 2] This point need not be decided. Even if the issues created by the second motion were res judicata by virtue of the first order the trial court would not thereby be divested of jurisdiction for the reason that res judicata is a defensive plea and does not affect the court's jurisdiction. Baird v. Superior Court, 204 Cal. 408, 412, 268 P. 640; Lincoln v. Superior Court, 22 Cal.2d 304, 308, 139 P.2d 13; City of Pasadena v. Superior Court, 92 Cal.App. 523, 525, 268 P. 664.

[3] Erroneous rulings cannot be reached in a proceeding for a writ of prohibition. Meserve v. Superior Court, 2 Cal.App.2d 468, 475, 38 P.2d 453. Only by appeal may they be corrected. Lindley v. Superior Court, 141 Cal. 220, 74 P. 765.

[4] The alternative writ of prohibition is discharged: the petition for a peremptory writ is denied.

McCOMB, and WILSON, JJ., concur.

87 Cal.App.2d 790

MAZZENGA v. ROSSO et al.

Civ. 16346.

District Court of Appeal, Second District, Division 1, California.

Oct. 5, 1948.

1. Marriage 🔑50(1)

Mere proof of a former marriage and the continued life of both spouses is not sufficient to show invalidity of second ceremonial marriage, and there must be a further showing that the first marriage has not been set aside by judicial decree.

2. Marriage 🔑40(11)

Burden of proof is on party attacking the validity of second marriage of one of the spouses.

3. Marriage 🔑50(1)

Finding that deceased, though previously married to plaintiff, was legally married to defendant at time of death, was sustained by the evidence.

4. Descent and distribution 🔑52(2)

Upon dissolution of putative marriage by death, putative wife takes same share to which she would have been entitled as legal spouse.

5. Trial 🔑377(2)

Refusal to reopen case in order to allow plaintiff to testify was not an abuse of discretion.

Appeal from Superior Court, Los Angeles County; A. M. Runnells, Judge.

Suit by Teresa Iola Mazzenga against Sadie Rosso and others to quiet title and for an accounting, wherein Maria Cappetto intervened. From judgment for defendant, plaintiff appeals.

Affirmed.

Joseph A. Lazaroni, Edmund M. Bluth, and McCarroll & McCarroll, all of Los Angeles (Neil G. McCarroll, of Los Angeles, of counsel), for appellant.

Albert G. Bergman, of Los Angeles, for respondent Sadie Rosso Mazzenga.

DORAN, Justice.

According to the appellant's brief, "The suits below were in the nature of quiet title and accounting actions to determine conflicting claims to real property, chattels, monies and credits accumulated by deceased, Antonio Mazzenga, and defendant Sadie Rosso (Mazzenga) with whom he was living at the time of his death."

The record discloses that Teresa Iola Mazzenga and the decedent were married at Pittsburgh, Pennsylvania, on November 24, 1904. In 1907 Mr. and Mrs. Mazzenga moved to Italy; in 1912 Antonio Mazzenga returned, alone, to the United States, and after a short stay in New York City resided in Pittsburgh until May 20, 1919. On the latter date Mazzenga and one Sadie Schear were married at Steubenville, Ohio, under the name of Thomas Rosso; in 1922 the two moved to California. As set forth in appellant's brief, "From that time until his death (intestate) on February 19, 1946, the two lived together, worked together and accumulated the properties which are the subject of this litigation." Sadie Rosso (Mazzenga) had operated a rooming house in Pittsburgh which was sold prior to removing to California, and there is evidence that Sadie "had about a thousand dollars when we came out here (to California)"; that Mazzenga then had no money; that the real property in question was held by Antonio and Sadie Mazzenga, as husband and wife, in joint tenancy, and was purchased with money earned by these parties during the purported marriage. It appears that Antonio and Teresa, the first wife, had five children, one of whom, Maria Cappetto, testified at the trial. Antonio and Sadie, the second wife, had no children. There is evidence that Antonio Mazzenga had voiced an intention to bring the first wife back to the United States but that Teresa never did return here during Mazzenga's lifetime.

The judgment of the trial court was that the defendant Sadie Rosso was the lawful wife of Antonio Mazzenga, deceased, and as survivor of that marriage became the owner of the real and personal property involved herein; that Teresa Mezzenga, the first wife, and the daughter Maria Cappetto, intervenor, had no interest in said property. The findings were, "That at the time of his said marriage to defendant, Sadie Rosso, there was no existing marriage between said Tom Rosso (Mazzenga), and the said plaintiff, Teresa Iola Mazzenga" ; that the marriage with Sadie Rosso was legal; and "That during all of said time the said plaintiff, Teresa Iola Mazzenga, had full knowledge that said Tom Rosso and Sadie Rosso were living together as husband and wife and that never during any of said time did she, (Teresa) * * * assert or claim any rights as a wife of the said Tom Rosso."

[1, 2] The basis for the trial court's decision is set forth in a Memorandum of Opinion filed herein: "The presumption of continuance which ordinarily attaches when the relation of husband and wife has once been shown does not apply when the validity of a second marriage is called in question. In such instances the presumption as to the validity of the second marriage displaces the presumption as to the continuance of the first relation. Under the decisions it appears to the Court that the plaintiff should have submitted proof as to whether or not Antonio Mazzenga obtained a divorce in the County of Allegheny, Pennsylvania. For the reasons as stated herein it appears that judgment must be for the defendant Sadie Rosso." In so ruling, the trial court followed the law stated in Marsh v. Marsh, 79 Cal.App. 560, 567, 250 P. 411, 413: "It has been held time and again by the Supreme Court of this state that mere proof of a prior marriage and the continued life of both spouses is not sufficient to make a case against a second ceremonial marriage—that there must be a further showing that the first marriage has not been set aside by judicial decree," citing Estate of Hughson, 173 Cal. 448, 160 P. 548, and other cases. The burden of proof, is, of course, on the party attacking the validity of the second marriage. That such is the law, there can be no doubt.

[3] The appellant argues, however, that "The law does not insist upon any wooden or procrustean rule as to specific evidence required to overcome a presumption," and that "The evidence in the instant case overcomes the presumption of the validity of the second marriage." In appellant's reply brief it is contended that "The rights of a 'putative wife' do not prevail over those of the 'de jure' wife upon the death of the bigamous husband." As noted in respondent's brief, the above argument is, in effect, merely that the trial court "made its findings upon the *wrong version* of the conflicting evidence." Since the record discloses substantial evidence in support of the judgment below, such contention on appellant's part, cannot, under the long established rules of appellate procedure, prevail.

The record does not indicate that the plaintiff, Teresa Mazzenga, testified either in person or by way of deposition. Evidence offered by plaintiff's counsel consisted merely of record proof of Teresa's marriage to Antonio Mazzenga, also known as Tom Rosso, with no proof concerning the existence or nonexistence of any divorce or annulment of such marriage, other than the daughter's testimony that the mother, who resided in Italy, did not, to the daughter's knowledge, receive any divorce papers from the United States. Maria Cappetto, the daughter, also testified: "Well, I asked him (Antonio Mazzenga) if he was have a divorce, how come he was living with another woman when I came to this country, and he told me that he was never divorced, that he didn't believe in divorces"; that in the presence of Sadie Rosso, the second wife, Mazzenga "always tell me that he never got no divorce, they were married in the Catholic Church, and that they never believe in divorce." To other witnesses Mazzenga stated an intention to bring Teresa, the first wife, back to the United States. However, the second wife, Sadie Rosso, testified: "I asked him why he didn't tell me that he was married before he married me, and that he had a wife and family, and he said, well, it didn't concern me because he was divorced, he was a single man and he just considered it wasn't any of my affairs. * * * I asked him if he had any papers to show, and he said, 'No, I did have them but I lost them,' " and that the witness never brought up the subject again. Dr. Stern, foreign law librarian, testified that, from 1908 to 1946, the Italian law did not permit divorces, but that during that period, marriages could be annulled for certain reasons.

[4] In Estate of Krone, Feb. 20, 1948, 83 Cal.App.2d 766, 189 P.2d 741, 743, the court said: "From the foregoing review it appears that the preponderant holdings of the appellate courts coincide with the view that upon the dissolution of a putative marriage by decree of annulment or by death the (putative) wife is to take the same share to which she would have been entitled as a legal spouse. * * * the logic appears irrefutable that if according to statute (Probate Code, Sec. 201) the survivor of a valid, ceremonial marriage shall be entitled to take all of the community estate upon its dissolution, then by parity of reasoning why should not the wife inherit the entire estate of a putative union upon the death of her husband intestate? Clearly she does inherit it all." It is argued in appellant's brief that the Krone case, which involved a second marriage during the interlocutory year following a divorce, is not factually similar to the present situation. The analogy, however, is too close to be ignored, and the principle there enunciated must be determinative of the instant appeal. Nor has the appellant cited any decision which would lead to a different determination.

[5] The appellant also contends that "The discretion of the trial court was abused in arbitrarily refusing to reopen the case" for additional evidence after submission of the cause. Appellant's reply brief states that Teresa Mazzenga "is now in Los Angeles and awaits an opportunity to testify." The fact that this matter of reopening the case involved an exercise of discretion on the part of the trial court, and that no abuse of that discretion appears, obviously presents no point for reversal.

The judgment is affirmed.

YORK, P. J., concurs.

WHITE, Justice (concurring).

I concur. At the time decedent married respondent the latter was operating a rooming house in Pittsburgh, which she sold prior to the time she and decedent moved to California. At the time they migrated to this state, respondent had about a thousand dollars, while decedent possessed no money or property. The property here in question was accumulated through the joint efforts of decedent and respondent, working side by side over a period of some 27 years. There is substantial evidence in the record to support the finding of the trial court that respondent, at the time of her marriage to decedent, and at all times thereafter, honestly believed that at the time of the marriage he was a single man.

Appellant contributed nothing toward the acquisition of the property here in question and evidenced no interest whatsoever in the existence of decedent for approximately 34 years prior to his death. She apparently awakened to her identity as his wife and her claimed interest by reason of such status only upon his demise and the disclosure of his interest in the property here involved. Under the facts present in the case at bar, I am persuaded that under the plainest principles of equity the property here in question should be divided as community property would be upon the dissolution by death of a valid marriage.

In re WORLEY'S ESTATE.

WORLEY v. WHITAKER.

Civ. 3903.

District Court of Appeal, Fourth District, California.

Sept. 29, 1948.

Rehearing Denied Oct. 26, 1948.

Hearing Denied Nov. 22, 1948.

1. Workmen's compensation ⚷11

Purpose of statute authorizing compensation for death or detention of employees of war contractors outside the United States when due to enemy action is to provide compensation for loss of earnings to those employees who in time of war are held as prisoners. 42 U.S.C.A. §§ 1701, 1705.

2. Husband and wife ⚷259

Where decedent who was taken prisoner was a civilian employee rendering services for the navy and his wages were in effect continued by the government during his detention under statute authorizing compensation for detention of employees of war contractors outside the United States, payments so made were not a "gift", but were based on sufficient consideration so as to make them a part of employee's "community property" and distributable as such on his death. 42 U.S.C.A. §§ 1701, 1705; Civ.Code, §§ 164, 1146, 1605.

See Words and Phrases, Permanent Edition, for all other definitions of "Community Property" and "Gift".

Appeal from Superior Court, San Diego County; Arthur L. Mundo, Judge.

Proceeding in the matter of the estate of William Joseph Worley, also known as William Joe Worley, W. J. Worley, W. Joe Worley, and Wm. Joe Worley, deceased, wherein Beatrice Worley Whitaker objected to the petition of Virginia Worley, as administratrix of the estate of deceased, for distribution. From an adverse decree, objector appeals.

Affirmed.

Gray, Cary, Ames & Driscoll, of San Diego, for appellant.

Wright, Thomas, Dorman & Fox, of San Diego, for respondent.

MUSSELL, Justice.

This is an appeal from a decree of the Superior Court approving waiver of accounting and final account and report of the administratrix and final distribution. The decree was based on the final account and petition for distribution filed by the administratrix wherein she alleged that all the property of the estate was community property and that therefore, she in her individual capacity, as widow of the decedent, was entitled thereto. Appellant filed objections in which she alleged facts which she contended established that the money in possession of the administratrix was separate property, in which she, as the daughter of the decedent by a former marriage, was entitled to share. The decision was based entirely upon these two documents and the court found that all of the property inventoried in the estate was the community property of the decedent and that no part of it was received as a gift and that respondent administratrix was entitled to the entire estate.

The facts, which are not in dispute, are as follows: Prior to December 23, 1941, decedent, who was then the husband of respondent, was employed upon Wake Island by an organization known as Contractors Pacific Naval Air Bases, and as such employee was engaged in construction work being carried on under contracts between his employer and the United States. On that date, and while so employed, decedent was captured by the Japanese forces and thereafter remained a prisoner of the Japanese until his death in Japan on February 27, 1945.

The asset of the estate in controversy is the sum of $5960.08 paid to respondent as administratrix under the provisions of an Act of Congress approved by the President on December 2, 1942, effective December 7, 1941, and entitled, as amended:

"Chapter 12.—Compensation For Injury, Death, Or Detention Of Employees Of Contractors With The United States Outside The United States." 42 U.S.C.A. § 1701.

The sole contention of appellant is that the money so received by respondent was a gift and was, therefore, separate property of the decedent.

In order to pass upon the question involved it is first necesssary to examine the wording of the Act of Congress, known as S.2412, Public Law 784, 77th Congress, 56 Stat. 1028. As originally enacted it was entitled, "An Act To provide benefits for the injury, disability, death, or enemy detention of employees of contractors with the United States, and for other purposes."

"Title I.—Compensation For Injury, Death, Or Detention Of Employees Of Contractors With The United States And Certain Other Persons Or Reimbursement Therefore."

It provides in part as follows:

"Sec. 101. (a) In case of injury or death resulting from injury—

"(1) to any person employed by a contractor with the United States, if such person is an employee specified in the Act of August 16, 1941 * * * as amended, and no compensation is payable with respect to such injury or death under such Act; * * * (3) * * * and such injury proximately results from a war-risk hazard, whether or not such person then actually was engaged in the course of his employment, the provisions of the Act entitled 'An Act to provide compensation for employees of the United States suffering injuries while in the performance of their duties, and for other purposes', approved September 7, 1916 (5 U.S.C., Ch. 15), as amended, and as modified by this Act, shall apply with respect thereto in the same manner and to the same extent as if the person so employed were a civil employee of the United States and were injured while in the performance of his duty, and any compensation found to be due shall be paid from the compensation fund established pursuant to section 35 of said Act of September 7, 1916, as amended."

The amended Act, 42 U.S.C.A. § 1701, provides in part as follows:

"(b) (1) Any person specified in subsection (a) who—

"(A) is found to be missing from his place of employment, whether or not such person then actually was engaged in the course of his employment, under circumstances supporting an inference that his absence is due to the belligerent action of an enemy, or

"(B) is known to have been taken by an enemy as a prisoner, hostage, or otherwise, * * * shall, * * * be regarded * * * as totally disabled, and the same benefits as are provided for such disability under this subchapter shall be credited to his account and be payable to him for the period of such absence or until his death is in fact established * * *: Provided, That if such person has dependents residing in the United States * * * the Administrator during the period of such absence may disburse a part of such compensation, accruing for such total disability, to such dependents, which shall be equal to the monthly benefits otherwise payable for death under this subchapter, and the balance of such compensation for total disability shall accrue and be payble to such person upon his return from such absence."

"Benefits found to be due under this subsection shall be paid from the compensation fund established pursuant to section 785 of Title 5, as amended: * * * the amount of benefits to be credited to the account of such person * * * shall be 100 per centum of the average weekly wages of such person, * * * and should a person entitled to benefits for detention also be entitled to workmen's compensation or similar benefits under any other law, agreement, or plan * * * where such other benefits are paid or to be paid directly or indirectly by the United States, the amount thereof accruing as to the period of absence shall be taken into account and the benefits credited to the account of the detained person reduced accordingly."

Section 1705: "(c) Where any person specified in section 1701(a) of this title, or the dependent, beneficiary, or allottee of such person, receives or claims wages, payments in lieu of wages, insurance benefits for disability or loss of life (other than workmen's compensation benefits), and the cost of such wages, payments, or benefits is provided in whole or in part by the United States, the amount of such wages, payments, or benefits shall be credited, * * * against any payments to which any such person is entitled under this subchapter."

It is significant in considering the intent of Congress that the word "gift" nowhere appears in the statute. The payments provided for are referred to as "compensation," "benefits," "compensation for disability," "compensation benefits" and "detention benefits," and are measured by and given in lieu of wages which the employee, but for the fact that he was taken prisoner, would have earned. Under the provisions of this Act the employee is to be regarded as totally disabled and the same benefits payable under the Act are credited to his account and are payable to him for the period of his absence. Payment of a portion of such compensation, to dependents is provided and compensation paid under any other statute on account of such absence is deducted. Benefits found to be due are payable from a compensation fund. Where claim is made for wages, payments in lieu of wages, insurance benefits for disability or loss of life (other than workmen's compensation benefits), and the cost, is paid in whole or in part by the United States. It is deducted from payments made under this Act. The provisions of the Act to provide compensation for employees of the United States suffering injuries while in the performance of their duties is made to apply with respect thereto in the same manner and to the same extent as if the person so employed were a civil employee of the United States and was injured while in the performance of his duty. The purpose of this Act is to provide compensation for wage loss in case of detention, or death, and its provisions are not in accord with the theory that the payments are to be considered as a gift.

A gift is defined in section 1146 of the Civil Code as a transfer of personal property, made voluntarily and without consideration. Section 1605 of the same code provides as follows: "Any benefit conferred, or agreed to be conferred, upon the promisor, by any other person, to which the promisor is not lawfully entitled, or any prejudice suffered, or agreed to be suffered, by such person, other than such as he is at the time of consent lawfully bound to suffer, as an inducement to the promisor, is a good consideration for a promise."

As heretofore noted the payments made under the provisions of the Federal Statute were referred to as "compensation" and "benefits". Both of these words have been defined to be equivalent to or synonymous with the word "consideration". 15 C.J.S., Compensation, page 654.

In Hughson Consolidated Milk Co. v. State Board, 23 Cal.App.2d 281, 285, 73 P.2d 290, 292, it was said:

"The word 'compensation' is defined in 12 C.J., beginning on page 229, as follows: 'An act which a court orders to be done, or money which a court orders to be paid, by a person whose acts or omissions have caused loss or injury to another, in order that thereby the person damnified may receive equal value for his loss, or be made whole in respect of his injury; a consideration; the consideration or price of a privilege purchased; an equivalent in money for a loss sustained; an equivalent given for property taken or for an injury done to another; the giving back an equivalent in either money which is but the measure of value, or in actual value otherwise conferred; the rendering an equivalent in value or amount; indemnification; making amends; payment of damages; a recompense in value; a recompense or reward for some loss, injury or service, especially when it is given by statute; remuneration for the injury directly and proximately caused by a breach of contract or duty; remuneration or satisfaction for injury or damage of every description; that return which is given for something else; that which is necessary to restore an injured party to his former position. The term etymologically suggests the image of balancing one thing against another, its primary signification being equivalence, and the secondary and more common meaning something given or obtained as an equivalent.'"

[1, 2] The precise question here involved has not been decided in any case to which our attention has been directed. However, it appears that the manifest intention of Congress was not to make a

"gift" of payments but to provide for compensation for loss of earnings to those employees who in time of war were held as prisoners. The decedent, at the time he was taken prisoner, was an employee rendering service for the Navy. His wages were in effect continued by the Government during the time of his detention. His employment was necessary to qualify him to receive the compensation provided by the Act of Congress. The statute was passed in 1942. By its terms its effective date was as of December 7, 1941, prior to the surrender of Wake Island. Under the circumstances sufficient consideration existed for the payment of the compensation benefits and the funds in controversy should be considered as community property as defined in section 164 of the Civil Code.

Judgment affirmed.

GRIFFIN, Acting P. J., concurs.

87 Cal.App.2d 772

PEOPLE v. ROBINSON.

Cr. 2086.

District Court of Appeal, Third District,
California.
Oct. 2, 1948.

1. Infants 🔑20

Evidence sustained conviction for lascivious conduct toward a twelve year old girl. Pen.Code, § 288.

2. Criminal law 🔑1159(4)

Evidence is not "inherently improbable" so as to authorize appellate court to discredit the witness and reject uncontradicted evidence in the record unless evidence is so unreasonable that reasonable minds would not differ in that regard.

See Words and Phrases, Permanent Edition, for all other definitions of "Inherently Improbable".

3. Infants 🔑20

In prosecution for lascivious conduct toward a twelve year old girl, evidence that there was a stain or spot on the girl's clothes as the result of the defendant's acts tending to arouse her passions, was admissible. Pen.Code, § 288.

4. Criminal law 🔑351(3)

In prosecution for lascivious conduct toward a twelve year old girl, evidence that after arraignment and fixing of time for trial, defendant was released on bond and failed to appear at time fixed for trial and was later apprehended in New Mexico and returned for trial, was competent as some indication of flight and guilty knowledge on the part of the defendant. Pen. Code, §§ 288, 1127c.

5. Criminal law 🔑808½

In prosecution for lascivious conduct toward a twelve year old girl, an instruction in the language of statute on subject of defaulting of bail bond or flight correctly stated the law. Pen.Code, §§ 288, 1127c.

6. Criminal law 🔑829(1)

Refusal to give to jury instructions offered by defendant was not error as to instructions which were fully covered by others which were given to the jury.

7. Criminal law 🔑814(10)

In prosecution for lascivious conduct toward a twelve year old girl, proffered instructions on the effect of defendant's intoxication upon the necessary element of intent, were properly refused where there was no evidence of defendant's intoxication at time of the offense. Pen.Code, § 288.

8. Constitutional law 🔑268

The due process of law clause of 14th amendment not being applicable to state criminal prosecutions pursuant to local statutory law, did not therefore preclude district attorney in prosecution for lascivious conduct toward a twelve year old girl, from commenting in argument to jury pursuant to California constitutional and statutory authority, on defendant's failure to deny the affirmative testimony of the girl that defendant committed lascivious acts upon her person. Pen.Code, §§ 288, 1323;

Const. Cal. art. 1, § 13; U.S.C.A.Const. Amend. 14.

◆

Appeal from Superior Court, San Joaquin County; George F. Buck, Judge.

Charles L. Robinson was convicted of lascivious conduct toward a twelve year old girl, with two prior convictions, and he appeals.

Affirmed.

Charles L. Robinson, in pro per. (S. P. Galvin, of Merced, of counsel), for appellant.

Fred N. Howser, Atty. Gen. and Doris H. Maier, Dep. Atty. Gen., for respondent.

THOMPSON, Justice.

The defendant was charged by an amended information filed in San Joaquin County, with lascivious conduct, under Section 288 of the Penal Code, toward a twelve year old girl, and with two prior convictions of felonies and imprisonment therefor in the state prison of Oklahoma. On arraignment he pleaded not guilty to the chief offense, but admitted the prior felonies as charged. He was released on bail until the time of trial, but absconded. He was, however, apprehended, returned and tried with a jury. He was represented by his attorney at the trial. He failed to take the witness stand in his own behalf. He was convicted of the offense as charged. He was sentenced to state prison for the term prescribed by law. From the judgment and from the order denying a new trial this appeal was perfected.

On appeal the defendant appeared in proper person. At his request, an attorney volunteered his services and was appointed to represent him at the hearing. The hearing was continued so the attorney might familiarize himself with the issues. The appellant was ably represented in this court by that attorney.

[1,2] It is unnecessary to recite the evidence upon which the defendant was convicted. It is sufficient to say the evidence adequately supports the verdict and judgment. The young girl told a perfectly plausible story of the affair. She appears to have been an intelligent person. Some of the circumstances were corroborated by her mother, and by other witnesses. The defendant did not take the witness stand to contradict any of the evidence. The evidence of the prosecutrix does not appear to be inherently improbable. Unless the evidence is so unreasonable that reasonable minds would not differ in that regard, it is not deemed to be inherently improbable. People v. Meyers, 62 Cal.App.2d 24, 28, 144 P.2d 60; People v. Jefferson, 31 Cal.App.2d 562, 566, 88 P.2d 238; People v. Battilana, 52 Cal.App.2d 685, 691, 126 P.2d 923; 8 Cal.Jur., p. 590, sec. 582.

[3] The evidence that there was a stain or spot on the child's clothes as the result of defendant's acts tending to arouse her passions, was properly received in evidence. There was no objection to that evidence at the trial. Her mother corroborated the presence of that spot. The child told her mother of the act of the defendant immediately upon her return to the home. The mother saw it and testified to that fact.

To reverse the judgment in this case for lack of evidence would require this court to discredit the witnesses and to reject the uncontradicted evidence in the record. This the appellate court may not do unless the testimony is inherently improbable. We have held that it is not. We are of the opinion the verdict and judgment are adequately supported by the evidence.

[4, 5] The court did not err in receiving evidence, over the objections of the defendant, of his flight to New Mexico, and of his "jumping his bond" and failing to appear at the time fixed for the trial. After arraignment and the fixing of time for trial, defendant was released on bond and failed to appear at the time fixed for trial. He absconded. He was later apprehended by the officers in New Mexico and returned for trial. The evidence shows his knowledge of the time set for his appearance. That evidence was competent as some indication of flight and of guilty knowledge on the part of the defendant. People v. Abbott, 65 Cal.App. 120, 223 P. 77; People v. Ashmead, 118 Cal. 508, 50 P. 681; People v. Cook, 10 Cal.App.2d 54, 58, 51 P.2d 169; Penal Code, sec. 1127c; 22 C.J.S., Criminal

Law, § 625b, page 960; Underhill's Crim. Ev., p. 473, sec. 253; 8 Cal.Jur., p. 346, sec. 388. The language of Section 1127c of the Penal Code was given to the jury as an instruction on the subject of "defaulting of the bond" or flight. It was a correct statement of the law. In 22 Corpus Juris Secundum, Criminal Law, § 625b, page 960, it is said:

> "It may be shown that accused, after being released by the arresting officer, did not return at the time promised, or that he forfeited his recognizance or bail by failing to appear at the time specified. So, it may be shown that accused left the state immediately after his discharge from custody. * * *."

In support of the first statement of the foregoing text, People v. Ashmead, supra, is cited.

[6, 7] The court did not err in refusing to give to the jury twelve instructions offered by the defendant. All of the instructions, except three on the subject of intoxication, were fully covered by others which were given to the jury. The appellant fails to point out the asserted error or prejudice in refusing any one of said instructions. He merely states generally that "the instructions [refused] were in good and proper order, well worded in an honest and fair manner." The court specifically and clearly cautioned the jury to "examine the testimony of the prosecuting witness with caution," and informed it that the charge "is easily made, and, once made, difficult to disprove even if the defendant is innocent." The jury was charged that the defendant was presumed to be innocent, and that his guilt must be established beyond a reasonable doubt. It was instructed that it was the duty of the jury to distrust the entire testimony of a witness who has sworn falsely. The jury was also told that the defendant was not required to take the witness stand, and that his failure to do so "does not, however, create a presumption of guilt or by itself warrant an inference of guilt, nor does it relieve the prosecution of its burden of proving every essential element of the crime and the guilt of the defendant beyond a reasonable doubt." The three proffered instructions on the effect of defendant's intoxication upon the necessary element of intent, were porperly refused. There was absolutely no evidence of defendant's intoxication at the time of the offense. People v. Price, 207 Cal. 131, 277 P. 316.

The appellant infers, but does not specifically state or give any reasons therefor, that the district attorney was guilty of prejudicial misconduct in commenting to the jury in his argument that the defendant had failed to deny the affirmative testimony of the prosecutrix that he committed licentious acts upon her person, contrary to the provisions of Section 288 of the Penal Code. Appellant does not state, but we may assume he infers that such comment of the district attorney was in violation of Section 1323 of the Penal Code, and of the Fourteenth Amendment to the United States Constitution, which guarantees an accused person due process.

[8] The district attorney's argument to the jury is not before this court. We are unable to determine from the record what, if anything, was said regarding defendant's failure to deny specific charges of lascivious acts. Moreover, the very charge of appellant that the argument of the prosecuting officer constitutes a lack of due process, has been definitely determined against him. People v. Adamson, 27 Cal.2d 478, 487, 165 P.2d 3; People v. Peterson, 29 Cal.2d 69, 78, 173 P.2d 11; People v. Greenberg, 73 Cal.App.2d 675, 167 P.2d 214; People v. Torres, 84 Cal.App.2d 787, 192 P.2d 45. In the Adamson case the judgment of conviction of the defendant was affirmed by the Supreme Court of the United States (332 U.S. 46, 67 S.Ct. 1672, 91 L.Ed. 1903, 171 A.L.R. 1223), holding that the California law authorizes such comment, and that the Fourteenth Amendment of the Federal Constitution does not apply to state trials in criminal cases pursuant to local statutory law.

Article I, Section 13, of the California Constitution, as amended in 1934, provides in part that, "* * * in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury." Section 1323 of the Penal Code, as amended in 1935, provides in accordance with the foregoing amendment of the Constitution in part:

> "* * * The failure of the defendant to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by counsel."

Assuming that the district attorney commented to the jury upon the failure of defendant to deny the affirmative testimony of the prosecutrix that he committed specified lascivious acts upon her, the district attorney was authorized by the California Constitution and said Section 1323 to do so. There is no merit in the appellant's assignment of error in that respect. The court clearly instructed the jury in that regard.

We have read the entire record and find no reversible error therein. The jury was fully and fairly instructed on all essential issues. The defendant appears to have had a fair and impartial trial.

The judgment and the order are affirmed.

ADAMS, P. J., and PEEK, J., concur.

87 Cal.App.2d 850

STOEHR v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.

Civ. 16706.

District Court of Appeal, Second District,
Division 2, California.
Oct. 6, 1948.

1. Attachment 🔑302

Where sheriff took possession of mortgaged personalty under writ of attachment, creditor's failure to pay amount of mortgage debt as demanded by mortgagee or to provide an undertaking therefor required sheriff to release the attached property. Code Civ.Proc. § 689b.

2. Attachment 🔑294

Code section providing that if personalty levied on is claimed by a third party by written claim, officer making levy must release property unless person in whose favor writ runs, gives officer an undertaking in a sum equal to double value of the property levied on, was not applicable in case of attachment of mortgaged personalty by virtue of writ of attachment issued in action against mortgagor by a creditor of the mortgagor. Code Civ.Proc. § 689.

3. Chattel mortgages 🔑122

Chattel mortgage providing that it covered all tools, dies, and machinery and equipment used by mortgagor or located in mortgagor's plant, and providing that it was intent to mortgage entire plant, machinery, equipment, furniture, tools and dies of mortgagor, whether specifically enumerated or not, covered all property of mortgagor located in mortgagor's plant.

◆

Prohibition proceeding by Frederick G. Stoehr, petitioner, against Superior Court in and for the County of Los Angeles, respondent, to restrain respondent from refusing to release certain mortgaged property held by the sheriff pursuant to a writ of attachment.

Peremptory writ of prohibition granted.

Harold W. Kennedy, County Counsel, and James A. Cobey, Deputy County Counsel, both of Los Angeles, for Superior Court in and for Los Angeles County.

George I. Devor and Norman Newmark, both of Los Angeles, for Jaques Braunstein.

McCOMB, Justice.

Petitioner seeks a writ of prohibition to restrain respondent from refusing to release certain mortgaged property held by the sheriff pursuant to a writ of attachment.

Chronology.

(1) On January 9, 1948, Southwest Products Company executed and delivered to petitioner a chattel mortgage securing payment to petitioner of the sum of $13,930.

(2) On July 12, 1948, Southwest Products Company executed and delivered to petitioner another chattel mortgage securing payment to petitioner of an additional sum of $49,000.

(3) On August 10, 1948, the sheriff of Los Angeles County levied upon and took possession of the property described in the chattel mortgages by virtue of a writ of attachment issued in an action entitled Braunstein v. Southwest Products Company.

(4) On August 11, 1948, petitioner presented to the sheriff of Los Angeles county a verified notice, statement and demand in writing, notifying the sheriff that petitioner was the mortgagee of the property so levied upon by him, and that the indebtedness was $51,735.77 plus interest, and further demanding payment of said indebtedness or the release of the property.

(5) On August 16, 1948, respondent made an order directing the sheriff not to release the property which he had levied upon, and at the same time set petitioner's alleged third party claim for hearing on September 2, 1948. Pursuant to this order the sheriff has refused to release the property described in the mortgage.

(6) Plaintiff in the action of Braunstein v. Southwest Products Company has not paid to petitioner, nor has he deposited with the sheriff, the amount of the indebtedness plus interest due petitioner, and he has not deposited the amount thereof with either the county clerk or treasurer payable to the order of petitioner (mortgagee). Likewise plaintiff has not presented a verified statement to the sheriff that the mortgage is void or invalid and delivered a good and sufficient undertaking in double the amount of indebtedness claimed by petitioner (mortgagee).

Question Presented for Determination.

In view of the foregoing facts, was the order of respondent of August 16, 1948, erroneous?

[1] This question must be answered in the affirmative. Section 689b, Code of Civil Procedure, provides that within five days after the sheriff has taken possession of mortgaged property pursuant to a writ of attachment, he shall make demand on the plaintiff for the amount of the debt and interest due the mortgagee, which amount the plaintiff (1) shall deposit with the sheriff within five days after receipt of such demand, (2) shall deliver such amount to the county clerk or treasurer, payable to the order of the mortgagee, or (3) if the attaching creditor presents to the sheriff a verified statement that the mortgage is void or invalid for reasons therein specified, he must deliver to such officer a good and sufficient undertaking in double the amount of indebtedness claimed by the mortgagee or in a sum equal to double the value of the personal property. Otherwise the sheriff must release the attached property.

In the instant case the plaintiff has failed to meet any one of the foregoing requirements. Therefore it is the duty of the sheriff to release the attached mortgaged property. The trial court's order directing the sheriff to retain the property in his custody was erroneous.

[2] There is no merit in respondent's contention that section 689 of the Code of Civil Procedure is applicable to the present case. The facts here are governed by the specific provisions of section 689b of the Code of Civil Procedure. Neither is there any merit in respondent's contention that not all of the property located in the plant of the mortgagor and levied upon by the sheriff was subject to petitioner's mortgage. The mortgage of July 12, 1948, provided in part as follows:

"The following items are subject to an unpaid principal balance of One Thousand Dollars ($1000.00) secured by a chattel mortgage on said items to Brooks Gifford, dated April 20, 1948; 1 Gisholt Turret Lathe, Serial No. 2812-2; 1 Automatic Screw Machine, B & S, No. 2-G, Serial No. 13890.

"All tools, dies, machinery and equipment used by the Mortagor or located in the plant of the mortgagor, and all replacements thereof and additions thereto made or acquired by the Mortgagor, it being the intent hereof to mortgage to the mortgagee the entire plant, machinery, equipment, furniture, tools and dies of the mortgagor, whether herein specifically enumerated or not, as additional security for the payment to the mortgagee of all promissory notes by the mortgagor to Frederick G. Stoehr and to Frederick G. Stoehr as Trustee, * * *."

[3] Clearly all property of the mortgagor located in its plant was covered by the foregoing clause in the mortgage. (See Wood v. United States Fidelity & Guaranty Co., D.C., 143 F. 424, 425.)

It is ordered that a peremptory writ of prohibition issue as prayed.

MOORE, P. J., and WILSON, J., concur.

87 Cal.App.2d 765

PEOPLE v. MANGAN.

Cr. 2534.

District Court of Appeal, First District, Division 1, California.

Oct. 1, 1948.

Hearing Denied Oct. 28, 1948.

1. Criminal law ⚷1202(1)

Service of a term within Penal Code section providing that persons convicted of enumerated crimes, including robbery, after serving separate terms in any state prison under sentences on two previous convictions thereof shall be adjudged habitual criminals, includes part of term, as well as full term. Pen.Code, § 644(a).

2. Criminal law ⚷1202(1)

One serving all but 12 days of 7½ year term in state prison, under sentence on conviction of robbery, separately from time served by him under sentence on conviction of previous robbery, served two separate terms for such offenses, and hence was properly sentenced as habitual criminal on third conviction of robbery. Pen. Code, § 644(a).

Appeal from Superior Court, Alameda County; O. D. Hamlin, Jr., Judge.

Thomas L. Mangan was convicted of robbery, and, from so much of a judgment as adjudged him to be an habitual criminal, he appeals.

Affirmed.

Thos. L. Mangan, of San Quentin, in pro. per. for appellant.

Fred N. Howser, Atty. Gen., and Clarence A. Linn, Deputy Atty. Gen., for respondent.

PETERS, Presiding Justice.

Thomas L. Mangan appeals from that portion of a judgment rendered by the Superior Court of Alameda County adjudging him to be an habitual criminal under § 644(a) of the Penal Code. That section provides that every person who shall be convicted of certain enumerated crimes, including robbery, "who shall have been previously twice convicted upon charges separately brought and tried, *and who shall have served separate terms therefor* in any State prison" for certain enumerated crimes, including robbery, "shall be adjudged an habitual criminal." (Italics added.) Section 3047.5 of the Penal Code provides that such a person shall not be eligible for parole until he shall have served a minimum term of at least nine years. Appellant concedes that his last conviction was for robbery, and that he suffered two prior convictions for robbery and served terms or a term therefor, but he contends that the sentence on the second prior ran, in part, concurrently with his sentence on the first prior, and that, therefore, he did not serve "separate terms therefor" as required by § 644(a), Penal Code. The point is without merit.

In 1947 appellant, together with two others, was accused of having committed a robbery on October 3, 1947. The information also charged two priors, in that it charged appellant with a conviction and service of a term therefor for robbery in San Francisco in 1925, and with a conviction and service of a term therefor for robbery in Alameda county in 1935. The information did not charge that the two terms were "separate" terms. Appellant admitted the two priors as charged, and pleaded not guilty to the main charge. He was found guilty of the main charge by a jury, and, in view of his admissions of the two priors, adjudged to be an habitual criminal.

The transcript on the present appeal shows that when appellant, in Alameda County, was convicted of the offense of robbery in 1935, the then trial judge sentenced him to San Quentin "for the term prescribed by law." That was in January, 1935. In September of that year the same trial judge, nunc pro tunc, made an "Order Correcting Commitment." That order first recites the 1925 San Francisco conviction for robbery and service of a term therefor, and then recites:

"Whereas, at the time of passing judgment in the above entitled action this Court had no knowledge that this defendant was then on parole, and

"Whereas, it has since come to the attention of this Court that said defendant was on parole at the time judgment was pronounced herein;

"Now Therefore it is hereby ordered, adjudged and decreed that the judgment in this action shall run concurrently with any and all sentences previously imposed upon this defendant."

The argument made by the public defender in the trial court and by appellant in propria persona in this court is that, since the 1935 sentence was made to run concurrently with the unexpired 1925 sentence, "separate" terms were not served for the two offenses, and, therefore, he is not an habitual criminal within the meaning of § 644(a). In other words, it is the thought of appellant that, although he served a portion of his term for the 1925 offense in San Quentin and was released on parole to serve the balance, and, while still on parole, in 1935 committed a second offense, and since this term was made to run, in part, concurrently with the balance of the 1925 term, he has not served a separate term for each offense.

The records of San Quentin show that on the 1925 San Francisco offense appellant was received at the prison on April 7, 1925. In June, 1930, his sentence was fixed at 15 years, part on parole. On June 28, 1934, he was released on parole. His parole was suspended in January, 1935, apparently because of the 1935 charge then pending in Alameda County. He was received back at San Quentin on February 1, 1935, on both the 1925 and 1935 convictions. *He was discharged on the 1925 charge on February 12, 1935.*

[1] The records also show that he was received at the prison on the 1935 commitment from Alameda County on February 1, 1935, the sentence to run concurrent with the unexpired balance of the 1925 sentence. In August, 1937, his sentence on the 1935 conviction was fixed at 25 years, which, in March, 1942, was refixed at 12 years. He was discharged at the expiration of his term on June 1, 1942. Thus the records show that but 12 days of the two terms were concurrent. The entire balance of the 1925 and 1935 terms were entirely separate and distinct. It is well settled that the service of a "term" within the meaning of § 644 of the Penal Code includes part of a term as well as a full term. In People v. Carkeek, 35 Cal.App.2d 499, at page 502, 96 P.2d 132, at page 134, it is stated: "* * * it is urged that the Habitual Criminal Act (§ 644 of the Penal Code), provides not only that the prior conviction must be proved, but that the defendant served a 'term' * * * While appellant plead guilty to having been convicted and having served a term upon each of the prior convictions charged, he admitted later, in answer to questions propounded by the trial court, that he escaped from one of the prisons. He urges, therefore, that he did not actually serve a 'term'. But the legislature does not require that a *full term* be served, and a reasonable construction of the word would seem to be any period of time, otherwise, a premium would be placed upon the act of escape." See, also, People v. Keilly, 54 Cal.App.2d 764, 129 P.2d 939; People v. Martin, 78 Cal.App.2d 340, 177 P.2d 813; In re Brady, 5 Cal.2d 224, 53 P.2d 945.

[2] Under the rule of these cases it appears that appellant has served a "term" under the 1925 sentence. He likewise served a "term" under the 1935 sentence. All but 12 days of a 7½ calendar year

term under that sentence were separate and distinct from the times served under the 1925 sentence. Thus the major part of the 1935 term was separate from the 1925 term. Since part of a term is a "term," within the meaning of the section, it follows that parts of two terms constitute "separate" terms within the meaning of the section.

The portion of the judgment appealed from is affirmed.

WARD and BRAY, JJ., concur.

---

87 Cal.App.2d 831

Ex parte HARRINGTON.

Cr. 4267.

District Court of Appeal, Second District, Division 2, California.

Oct. 5, 1948.

1. Judges ⚷51(3)

A judge should not be disqualified lightly or upon frivolous allegations or mere conclusions. Code Civ.Proc. § 170.

2. Judges ⚷51(4)

An affidavit of prejudice, alleging that extensive publicity adverse to defendant minor had created a sentiment in county which made fair and impartial trial before any judge living in county improbable, and that judge was acquainted with such feeling, and that judge had been informed concerning facts of case and nature of charges and had been consulted with reference to procedure to be followed, stated sufficient facts to require a reference to another judge to determine alleged disqualification of judge. Code Civ.Proc. § 170, subd. 5.

3. Judges ⚷51(4)

The provisions of statute providing that judge upon the filing of an affidavit setting forth facts constituting alleged grounds of disqualification may file consent in writing that action or proceeding be tried before another judge, or may file his written answer admitting or denying any or all allegations in the affidavit, are mandatory. Code Civ.Proc. § 170, subd. 5.

4. Habeas corpus ⚷29, 109
Judgment ⚷9

Where affidavit of bias and prejudice was filed and judge improperly decided question of his own qualification instead of submitting such question to decision of another judge, judgment and commitment of minor defendant to California Youth Authority were void, and defendant was entitled on habeas corpus to be released from custody of superintendent of school for boys, and to be returned to custody of sheriff pending further proceedings against defendant. Welfare and Institutions Code, § 700(m); Code Civ.Proc. § 170.

Proceeding in the matter of the application of Thomas Edwin Harrington, a minor child, for a writ of habeas corpus.

Petition granted conditionally.

George T. Davis, of San Francisco, for petitioner.

Fred N. Howser, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for respondent.

WILSON, Justice.

Petitioner, a boy about 11½ years of age, was charged in the Superior Court of Contra Costa County with the crime of murder. That court, after a hearing had in session as a juvenile court, found that he was guilty of the crime charged and that he came within the provisions of section 700(m) of the Welfare and Institutions Code. Thereupon the court committed him to the California Youth Authority. He is now in the custody of the superintendent of the Fred C. Nelles School for Boys at Whittier and petitions for his release on habeas corpus.

When the cause came on for hearing before the Honorable Harold Jacoby, a judge of said court, petitioner filed with the clerk of the court and with the trial judge, in the manner prescribed by section 170 of the Code of Civil Procedure, a written objection under oath to the trial judge, together with a written statement of facts in support of his objection, to wit, the judge's bias and prejudice against petitioner. The statement sets forth the reasons why, in petitioner's opinion, the trial judge was disqualified to hear any issue of law or fact in the matter then before him. The trial judge disregarded the objections, declared that he was not disqualified, and ordered the cause to proceed to trial immediately. Petitioner objected to such procedure, to the taking of testimony, and to the determination of any question of law or fact by Judge Jacoby until his qualifications should be passed upon by another judge in the manner provided by law. Code Civ.Proc., sec. 170. The judge overruled all objections and proceeded with the trial which resulted in the commitment of petitioner as above recited. The foregoing facts are not controverted by respondent's return to the writ of habeas corpus.

Section 170 requires the affidavit of bias and prejudice to set forth "the fact or facts constituting the ground of the disqualification of such [the trial] judge." Respondent contends that the affidavit of bias and prejudice filed on behalf of petitioner is based on "frivolous" grounds and that it contains no facts but only conclusions, hence the judge was justified in disregarding it and in deciding the question of his own qualifications, citing People v. Hooper, 16 Cal.App.2d 704, 61 P.2d 370; People v. Sweet, 19 Cal.App.2d 392, 394, 65 P.2d 899, and Ephraim v. Superior Court, 42 Cal.App.2d 578, 109 P.2d 378. In the Hooper case the defendant attempted to disqualify the judge from hearing his motion for a new trial on the sole ground that in the trial of the case to the court without a jury the judge had formed an opinion as to the guilt of the defendant. The purpose of the trial was to inform the judge of the facts so that he could and would form an opinion whereby he could determine the guilt or innocence of the defendant. The court held that the judge was justified in ruling on his own disqualification for the reason that no facts were set forth in the affidavit sufficient to show any ground therefor. In the Sweet case the only ground assigned for disqualification was that six years previously the judge had been a deputy district attorney and for that reason had a high personal regard for the district attorney and his deputies and it was probable that the defendant could not have a fair and impartial trial by the judge. Since no facts were stated showing bias and prejudice the ruling of the judge on the question of his qualifications was sustained. Likewise in the Ephraim case the affidavit of bias and prejudice alleged no facts but only conclusions of the affiant.

The affidavit of bias and prejudice presented by petitioner's attorney to the trial court states sufficient facts to require a reference to another judge for the purpose of determining the alleged disqualification of Judge Jacoby. The affidavit alleges that (1) the "extensive and unusual publicity adverse to the minor" which had already been given to the proceeding had caused a "state of feeling, sentiment, bias and prejudice" in Contra Costa County which makes it appear probable that a fair and impartial trial cannot be had before any judge living in the county; (2) Judge Jacoby is acquainted with said matters of bias, prejudice, sentiment and feeling making it improbable that he could sit in the matter as a trial judge without being affected thereby in such manner as to make it impossible for him to give the defendant a fair and impartial trial; (3) the judge has been interviewed and talked to in connection with the matters involved in and connected with the proceedings by another judge, by a deputy district attorney and others, and in the course of the conversations the judge has been informed of the nature of the charges against the defendant and of the nature of the evidence against him; the judge has otherwise been informed concerning the facts of the case and has been consulted with reference to the procedure to be followed, including whether he should sit as the trial judge in the matter, all such conversations and consultations having been had with the judge out of the presence of the defendant's attorney and without his knowledge and without opportunity of any person representing the defendant to participate therein; (4) the effect of such acts and conduct were such as to bias and prejudice the judge to such an extent as to make it appear probable that by reason of such bias and prejudice a fair and impartial trial cannot be had before him; (5) by reason of the peculiar nature of the case and the unusual publicity that has been given to it and by reason of the acts and conduct of the deputy district attorney and other persons above related, and by reason of the local feeling and prejudice within the county it would be for the best interest of the minor child that he should be tried before a judge from outside Contra Costa County free of public reaction and of the reaction and determination of public officials of the county in connection with what should or should not be done with the defendant.

[1] A judge should not be disqualified lightly or upon frivolous allegations or mere conclusions. At the same time consideration must be given to the fact that the defendant is a child of tender years and is charged with the crime of murder, and to the fact that his future life will be affected by his trial and by the punishment and discipline imposed upon him. Hence more careful consideration should have been given to the allegations of bias and prejudice of the trial judge than might be required in a case not fraught with the possibility of such serious consequences as may result in this case.

[2] While the affidavit contains some conclusions, it states sufficient facts to require a decision of another judge as to the disqualification of Judge Jacoby and to estop the latter from determining his own qualifications to sit as the trial judge in the case.

[3] The provisions of subdivision 5 of section 170 of the Code of Civil Procedure are mandatory. Upon the filing of an affidavit setting forth facts constituting alleged grounds of disqualification the judge (1) may file his consent in writing that the action or proceeding be tried before another judge, or (2) may file his written answer admitting or denying any or all allegations in the affidavit. Judge Jacoby did not consent that the action be tried before another judge, nor did he file an answer to the affidavit of bias and prejudice. He was without power to pass upon the question of his own disqualification and he was without jurisdiction to hear the cause unless and until, after a hearing had by another judge in the manner prescribed by section 170, petitioner's objections had been overruled and the judge had been found not to be disqualified to act.

[4] Since the judge who heard the case was not qualified at the time of the hearing to act, it follows that by virtue of a void judgment and commitment petitioner is held in custody from which he is entitled to be released. However, until he has been tried in a lawful manner he should not be discharged from the custody of the officials who are authorized by law to detain him.

The petition for a writ of habeas corpus is granted and it is ordered that petitioner be delivered by respondent to the sheriff of Contra Costa County who shall detain him in custody pending further proceedings against him in that county to be had in the manner prescribed by law.

MOORE, P. J., and McCOMB, J., concur.

---

87 Cal.App.2d 844

NEMANICK v. CHRISTENSEN et al.

District Court of Appeal, First District,
Division 1, California.
Oct. 6, 1948.

1. Master and servant 🔑43

Repudiation being a question of intent and ordinarily determined as a fact, whether employee repudiated employment contract was for jury.

2. Master and servant 🔑40(3)

Evidence that plaintiff, employed by defendants as a broker to dispose of packed and unpacked vegetable products, announced that he was quitting at end of a designated day and that labels registered in his name would no longer be available to defendants, and that defendants, in reliance upon such announcement, employed a third person to take plaintiff's place and made arrangements for other labels, authorized finding that plaintiff had repudiated his contract and that defendants had acted in reliance thereon and were not liable to plaintiff for breach of contract.

◆

Appeal from Superior Court, Monterey County; H. G. Jorgensen, Judge.

Action by Ralph A. Nemanick against Harold S. Christensen and others, doing business under the firm name and style of Salinas Growers Exchange, to recover for breach of employment contract. Judgment for defendants, and plaintiff appeals.

Affirmed.

Jas. F. Boccardo and Jos. P. Kelly, both of San Jose, for appellant.

J. T. Harrington, of Salinas, for respondents.

WARD, Justice.

This is an appeal by plaintiff from a judgment for the defendants after verdict by a jury.

The complaint sets forth a cause of action for an alleged breach of an employment contract whereby defendants employed plaintiff as a broker to dispose of certain packed and unpacked vegetable products in Monterey County. Plaintiff was to act as general manager, but under the "suggestions or directions" of defendants, during the calendar year 1946, and, subject to certain conditions, for the years 1947 and 1948. The amended answer admits the allegations of the complaint, the existence of the written contract, and alleges: "* * * that on the 18th day of April, 1947, plaintiff voluntarily and of his own accord, terminated his employment under said contract and at said time notified defendants that he was quitting said employment as of the 18th day of April, 1947, and that after said date, defendants could not further use the labels registered in the name of the plaintiff; * * * admit that plaintiff has heretofore offered to perform the terms, requirements and conditions of said contract on his part to be performed but allege that said offer was made subsequent to the time that plaintiff voluntarily terminated said employment and further, that at the time said offer was made, defendants had already employed a third person to perform the duties of plaintiff under said contract."

The indirect cause of the trouble between plaintiff and defendants arose over a claim made against the defendants by one Wynn, a watchman, for services rendered. Plaintiff advised that the claim should not be paid. On April 18, 1947, defendants reached the conclusion that it should be paid and directed plaintiff to make out a check for the amount. One of the defendants testified: "And I told him that we had decided to settle it for him to go ahead and have a check made out and signed and send it in, that we wanted it settled. So then he was very calm in answering that afternoon. In answering, he says 'If that's what you fellows think of my judgment and management,' he says, 'I am quitting.' So we didn't say anything and he didn't say anything for probably a minute or so. Then he brought up that—oh, I think he repeated again that—something about that he had 22 years experience in the business. And so I answered him again and told him that we wanted it settled and go ahead and make a check out and have it sent in. So then he thought that over for a couple of minutes and very calm he says, 'Well, if that's the case, I am quitting, and I am quitting tonight. I'll finish the day out and as of tonight my labels stop and don't forget that.'" Plaintiff's recollection of the incident is different in many details. He mailed the check to the watchman following the dispute.

[1] It was the duty of the jury to determine whether plaintiff repudiated the contract on the afternoon of the discussion relative to the claim of the watchman. Repudiation is a question of intent and is ordinarily determined as a fact. Gold Min. & Water Co. v. Swinerton, 23 Cal.2d 19, 142 P.2d 22. Plaintiff cites Sonnicksen v. Sonnicksen, 45 Cal.App.2d 46, 113 P.2d 495, as authority for the following statement: "Repudiation is a question of fact and intent and must be determined by the facts in the particular case."

Plaintiff in his brief presents the question to be considered on appeal as follows: "Can a written contract of employment for a term of years be repudiated by the employee by a bare statement to the effect that he is quitting, which statement is made in the heat of an argument over an insignificant matter and which statement is followed by continued performance and conduct wholly inconsistent with repudiation, but to the contrary indicating a clear intention to continue to perform and be bound by the contract?"

No complaint is made as to instructions given or refused, or as to the admission or rejection of evidence. The first point stressed by plaintiff is that repudiation to be effective must be clear, absolute and unequivocal. At the request of plaintiff the court gave the following instruction:

"The defendants, in this case, have set up a defense that plaintiff had voluntarily terminated his employment; that is, that the plaintiff himself had repudiated his contract of employment and refused to perform his contract.

"In considering this defense and in judging the nature and character of the refusal by one party, which will justify nonperformance by the other, you are instructed that before the defendants could avoid performance, plaintiff's refusal to perform should appear to have been explicit, positive and unequivocal. A mere assertion that a party will be unable, or will refuse, to perform his contract is not sufficient; it must be a distinct, unequivocal and absolute refusal to perform the promise, and must be treated and acted upon as such by the party to whom the promise was made. If you find from all of the evidence in this case that the plaintiff's assertions, if any, did not amount to a distinct, unequivocal and absolute refusal to perform, which was understood, treated and acted upon as such by the defendants, then you cannot find that the plaintiff voluntarily terminated his employment or repudiated his contract.

"If you find that a reasonable person in the position of the defendants would not have interpreted the plaintiff's statements or conduct as a repudiation by him of his contract, then I instruct you that the defendants were not justified in treating it as such, and they would not be excused from performance of the contract on their part. The defendants had to act reasonably, and if you find that their acts in treating the plaintiff's assertion or conduct as a repudiation were not reasonable, under all of the circumstances in this case, then they were not justified in treating such assertion or conduct as a repudiation on the part of plaintiff and they were not excused from performing their contract."

Plaintiff's second point is: "The verdict of the jury in the court below indicates an absolute failure to consider the surrounding facts and circumstances prior, concurrently with and subsequent to the alleged repudiation by the plaintiff." Stated another way, plaintiff contends that there is no substantial evidence that the conduct of plaintiff constituted a disobedience of any reasonable direction made by defendants. This was entirely a question of fact. Whether there was any disobedience or not plaintiff gave notice that he had "quit" as of April 18, 1947.

[2] The final point presented by plaintiff is: "Assuming, but not conceding, that the plaintiff did in the conversation with the defendants on April 18, 1947, verbally repudiate the contract, such repudiation was nullified and withdrawn by the plaintiff before the defendants elected to treat it as a termination of the contract or otherwise materially change their position to their damage in reliance upon said alleged repudiation." Defendants accepted plaintiff's statement as a termination of the contract. Following their conversation with plaintiff, they materially changed their position in reliance upon the repudiation. They hired plaintiff's successor to commence work the following morning and arranged to get labels other than plaintiff's. This point is merely a question of fact to be decided by the jury.

There is substantial evidence to sustain the verdict of the jury. The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

87 Cal.App.2d 727

FRANKLIN v. PETERSON et al.

Civ. 16329.

District Court of Appeal, Second District,
Division 1, California.

Sept. 28, 1948.

Hearing Denied Nov. 22, 1948.

1. Constitutional law 🔑48
Municipal corporations 🔑120

Where a statute or ordinance is susceptible of two constructions, one of which will render it constitutional and the other unconstitutional in whole or in part, court will adopt the construction which, without doing violence to the reasonable meaning of the language used, will render it valid in its entirety, or free from doubt as to its constitutionality, even though other construction is equally reasonable.

2. Constitutional law 🔑48
Municipal corporations 🔑122(2)

It is presumed that legislative body intended not to violate the constitution, but to make a valid statute or ordinance within the scope of its constitutional powers.

3. Licenses 🔑7(1)
Municipal corporations 🔑122(2)

Where ordinance of city of Los Angeles imposing a gross receipts tax upon occupations was not specifically limited to those subject to jurisdiction of city, it would be presumed that a valid ordinance had been intended and ordinance would be held valid as intended to operate only upon those subject to jurisdiction of city.

4. Constitutional law 🔑46(1)
Municipal corporations 🔑121

Ordinarily court will inquire into the constitutionality of a statute or ordinance only to the extent required by the case under consideration.

5. Municipal corporations 🔑121

Generally, one cannot complain of a possible illegal application of an ordinance, if he himself is not a party thereby aggrieved.

6. Municipal corporations 🔑121

The possible illegal application of city ordinance imposing a gross receipts tax upon occupations, by including those not subject to jurisdiction of city, would not work any injustice upon an attorney practicing law in city, or violate rights of attorney, and attorney could not complain of a possible illegal application as ground for having ordinance declared invalid.

7. Municipal corporations 🔑592(1)

A city cannot impose a license requirement or regulate the business of an attorney by ordinance.

8. Taxation 🔑219

A license to practice law does not carry with it exemption from taxation.

9. Municipal corporations 🔑592(1)

A state license to practice law is not a bar to the right of a city to impose, for revenue purposes only and not regulating business of attorneys, an occupation tax on gross receipts of attorneys who practice law within the city.

10. Licenses 🔑5½

The levy by city of Los Angeles of a gross receipts tax for revenue purposes only upon occupations, is a "municipal affair" within power of city to provide for by ordinance under constitutional grant to chartered cities of authority to make laws and regulations in respect to "municipal affairs" subject only to charter limitations. Const. art. 11, §§ 6, 8.

See Words and Phrases, Permanent Edition, for all other definitions of "Municipal Affair".

11. Licenses 🔑7(1)

Gross receipts tax upon occupations imposed by ordinance of city of Los Angeles is not invalid as being an "income tax".

See Words and Phrases, Permanent Edition, for all other definitions of "Income Tax".

12. Licenses 🔑7(9)

The minimum fee of $12 fixed by ordinance of city of Los Angeles imposing gross receipts tax upon occupations in sum of $12 per calendar year or fraction thereof for the first $12,000 or less of gross receipts and in addition one dollar per year for each additional $1,000 or fractional part thereof of gross receipts in excess of $12,000 does not render the tax discriminatory, unreasonable or unjust.

13. Licenses ⚩7(2)

The fact that a difference existed between volume of business done by attorneys in city of Los Angeles who were required under ordinance to pay a minimum tax on gross receipts up to $12,000, was not evidence of such a discrimination as to make the ordinance void.

14. Licenses ⚩5½

Ordinance of city of Los Angeles imposing gross receipts tax upon occupations, imposes a tax upon the doing of business within city and is not applicable to a single act done in city by an attorney which is but an incident to business maintained, transacted, or carried on, outside the corporate boundaries of city.

◆

Appeal from Superior Court, Los Angeles County; Hartley Shaw and Jess E. Stephens, Judges.

Action by Alan Franklin against Walter C. Peterson, as City Clerk of the City of Los Angeles, and the City of Los Angeles, as a body politic, to have section of Los Angeles municipal code imposing a gross receipts tax upon occupations declared void as to plaintiff and other members of the state bar. From an adverse judgment, plaintiff appeals.

Judgment affirmed.

Alan Franklin, of Los Angeles, in pro. per.

Ray L. Chesebro, City Atty., William H. Neal and Bourke Jones, Asst. City Attys., and Lester L. Lev, Deputy City Atty., all of Los Angeles, for respondents.

WHITE, Justice.

This cause comes before us on an agreed statement on appeal (Rule 6, Rules on Appeal). It is a declaratory relief action wherein an attack is made upon the constitutionality of section 21.190 of the Los Angeles Municipal Code, being an amendment to Article I, Chapter 2 of said Code. The section in question imposes a gross receipts tax upon persons engaged in various trades, callings, occupations, professions or other means of livelihood, in the sum of $12 per calendar year or fractional part thereof, for the first $12,000 or less of gross receipts, and in addition thereto the sum of one dollar per year for each additional $1,000 or fractional part thereof of gross receipts in excess of $12,000.

The case was tried upon a short stipulation of facts wherein it is set forth that plaintiff is an attorney at law duly admitted to practice in the State of California and is an active member of the State Bar of California. That he maintains an office in the City of Los Angeles, where at all times material to this action he has been actually engaged in the practice of law. The licensing ordinance in question, which is conceded to be for revenue purposes only, became effective May 27, 1946, and has continued in effect as amended up to and including the present. Plaintiff has refused to pay said business license tax and brought this action to have the same declared void as to him and other members of the bar.

Following trial, judgment was rendered upholding the constitutionality, validity and enforceability of the aforesaid section 21.190 of the Municipal Code, and decreeing that "it was the duty of the plaintiff to obtain a license and pay the fee prescribed under said section for engaging in the practice of law in the City of Los Angeles during the calendar years 1946 and 1947." From such judgment plaintiff prosecutes this appeal.

[1-3] Appellant first contends that the ordinance in question is indefinite, ambiguous, uncertain and invalid, in that its provisions are not limited to occupations carried on within the City of Los Angeles, but are broad enough to include occupations carried on entirely without the corporate limits of said city by persons who are not residents nor engaged in business within the city. It is true the ordinance does not specifically state that it applies only to persons engaged in business within the city limits, but it is manifest that an ordinance such as the one before us operates only within the territorial limits of the municipality and affects only those engaged in a busines or profession within

such limits. It is the rule that where a statute or ordinance is susceptible of two constructions, one of which will render it constitutional and the other unconstitutional, in whole or in part, the court will adopt the construction which, without doing violence to the reasonable meaning of the language used, will render it valid in its entirety, or free from doubt as to its constitutionality, even though the other construction is equally reasonable. The rule is based on the presumption that the legislative body intended not to violate the constitution, but to make a valid statute or ordinance within the scope of its constitutional powers. Read in the light of this rule, the ordinance here in question must be held as intended to operate only upon those subject to the jurisdiction of the City of Los Angeles.

[4-6] Furthermore, a court will ordinarily inquire into the constitutionality of a statute or ordinance only to the extent required by the case under consideration. In the case at bar the stipulated facts show that appellant maintains a law office within the City of Los Angeles and carries on his law practice there. The construction given the ordinance by appellant would not, therefore, work any injustice upon him or violate his rights. He is therefore confronted with the general rule that one cannot complain of a possible illegal application of an ordinance if he himself is not a party thereby aggrieved. In re Nowak, 184 Cal. 701, 709, 710, 195 P. 402; Miller v. Municipal Court, 22 Cal.2d 818, 828, 142 P.2d 297.

It is next contended that the City of Los Angeles has no legal authority whatever to impose a license tax for revenue purposes upon occupations, and particularly upon such professions as the law, medicine, or other professions or occupations which are licensed by the state, because no such city tax is authorized by the Constitution, the Legislature of the State of California, or by the Charter of the City of Los Angeles.

[7, 8] There is nothing new or novel about the imposition of revenue taxes upon the business of practicing law. As far back as 1886, in Royall v. Virginia, 116 U.S. 572, 6 S.Ct. 510, 29 L.Ed. 735, a revenue tax on attorneys was sustained. Conceding that a license requirement cannot be imposed upon a lawyer, nor his business be regulated by ordinance, the tax provided for in the ordinance here under consideration is levied upon the business of practicing law, rather than upon a person because he is an attorney at law. A license to practice law does not carry with it exemption from taxation. Attorneys are not public officers, but are engaged in a private profession pursued primarily for pecuniary profit. It must therefore be held that the weight of authority in this country is to the effect that there is nothing which particularly exempts the attorney from bearing a just share of necessary public burdens, and that consequently he can claim no specific exemption from an occupation tax imposed for revenue purposes. In re Johnson, 47 Cal.App. 465, 468, 190 P. 852; In re Galusha, 184 Cal. 697, 698, 699, 700, 701, 195 P. 406; City of San Mateo v. Mullin, 59 Cal.App.2d 652, 654, 139 P.2d 351. In the case of In re Johnson, supra, 47 Cal. App. at page 469, 190 P. at page 854, it is said: "A lawyer's office makes certain demands upon the various fire, police, street, and other functions of a city, which differ from above classes only in quantity, and not in quality. If the one should be required to assist in keeping up the revenues of a city, no reason is apparent why the other should not." In City of Redding v. Dozier, 56 Cal.App. 590, 206 P. 465, an occupational license tax on physicians was sustained.

[9] We entertain no doubt that a state license issued to a lawyer authorizing him to practice his profession is not a bar to the right of a municipality to impose a license tax upon attorneys who conduct within a city the business of practicing law.

The Los Angeles ordinance does not attempt to regulate the professions, businesses or occupations which are subject to the tax. It provides only for a license for revenue purposes, and is not a regulatory measure affecting the business or profession so taxed.

[10] We come now to a consideration of appellant's contention that respondent

city was without power to levy a business tax for revenue purposes. The claim is without merit. The City of Los Angeles has taken advantage of the privilege of legislative autonomy extended by the provisions of sections 6 and 8 of Article XI of the California Constitution. Since the amendment of section 6 of Article XI in 1914, the requirement that the state must specifically grant powers to the municipality has been eliminated. From the effective date of the amendment, city charters have been recognized as limitations, rather than grants, of powers as to municipal affairs. Those powers concerning purely municipal affairs are conferred directly by section 6 of Article XI of the state Constitution, which grants to chartered cities authority "* * * to make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters, * * *."

That taxation for municipal purposes is a municipal affair and that the power to levy such a tax stems directly from the Constitution is no longer open to question. As was said in West Coast Adver. Co. v. City and County of San Francisco, 14 Cal. 2d 516, 524, 95 P.2d 138, 143, "No doubt is entertained upon the proposition that the levy of taxes by a municipality for revenue purposes, including license taxes, is strictly a municipal affair. (Citing cases.) * * * As such a municipal affair it must be deemed to have been included within the special grant and privilege tendered by the constitutional amendment in 1914 and later accepted by the city." The City of Los Angeles has availed itself of the municipal affairs provision of our state Constitution, and is therefore empowered to act thereunder. Department of Water and Power v. Inyo Chemical Co., 16 Cal. 2d 744, 753, 108 P.2d 410.

In the case of West Coast Adver. Co. v. City of San Francisco, supra, 14 Cal.2d at page 521, 95 P.2d at page 142, our Supreme Court declared:

"It is now established by a line of decisions of the courts of this state that a city which has availed itself of the provisions of the Constitution as amended in 1914 has full control over its municipal affairs unaffected by general laws on the same subject-matters, and that it has such control whether or not its charter specifically provides for the particular power sought to be exercised, so long as the power is exercised within the limitations or restrictions placed in the charter. (Citing cases.) * * * As stated in Re Galusha, 184 Cal. 697, at page 700, 195 P. 406, at page 407, 'The question, then, is not whether the charter grants the power to impose the tax, but whether it prohibits the tax, * * *.' Also in Re Nowak, 184 Cal. 701, 704, 195 P. 402, 403, it was said: 'The net result * * * is that, as to municipal affairs, the charter, instead of being a grant of power, is, in effect, a limitation of powers, and, the imposition of the tax for revenue purposes being strictly a municipal affair, the city has the power to impose that tax unless the power was taken from it by the charter itself. (Citing cases.)' "

It therefore follows that the imposition of the tax here in question for revenue purposes being strictly a municipal affair, the municipality possessed the power to impose that tax unless such power was taken from it by the charter itself.

An examination of the Charter of the City of Los Angeles discloses no limitations whatever upon the right of the city to raise revenue for municipal purposes. On the contrary, such power is specifically provided for in section 2 (sub. 11) of Article I, as follows: "Among the rights and powers which may be exercised by the City of Los Angeles, are the following, this enumeration being a partial enumeration and in no sense a restriction or limitation upon the rights and powers of the city: * * * (d) to assess, levy collect and enforce taxes; (e) to license and regulate, under general and uniform laws, any lawful business or calling, and to impose other license fees; * * *."

The charter containing no limitations or restrictions upon the power of the City of Los Angeles to levy taxes for revenue purposes, it follows that the municipality is vested with power to levy business license taxes for municipal purposes, including a tax upon the business of practicing law.

[11] Appellant's next contention, that the ordinance in question is invalid because it is an income tax, must be rejected. A long line of decisions rendered in this state has sustained the validity of gross receipts taxes, and furthermore a gross receipts occupation tax is not an income tax. Philadelphia & S. Mail S. S. Co. v. Pennsylvania, 122 U.S. 326, 7 S.Ct. 1118, 30 L.Ed. 1200.

[12, 13] Appellant cites no authority to support his contention that the minimum fee of $12 fixed by the ordinance renders the tax discriminatory, unreasonable and unjust, nor is there any evidence in the record that appellant's gross receipts from the practice of law are less than $12,000 annually, thereby entitling him to complain. The fixing of a minimum fee under a tax ordinance does no violence to California decisions, which have been uniformly adverse to the contention of appellant herein. In re Nowak, supra, 184 Cal. page 709, 195 P. 402; City of Los Angeles v. Los Angeles, etc., Co., 152 Cal. 765, 768, 93 P. 1006. We find no decision in this state directly holding that a minimum license tax imposed upon all persons whose business produces an annual income up to a certain amount is an unreasonable discrimination. The ordinance here in question operates uniformly on the class to which it applies and makes no exceptions in favor of or against any one carrying on the business taxed. The fact that there is a difference between the volume of business done by the respective persons engaged therein who are required to pay the minimum tax is not, as was said in City of Los Angeles v. Los Angeles, etc., Co., supra, 152 Cal. at page 769, 93 P. at page 1007, "* * * evidence of such a discrimination * * * as to make the ordinance void."

[14] Appellant's claim that an attorney maintaining an office and doing business outside the Los Angeles city limits, who comes to Los Angeles for one day to try a case, would be guilty of a misdemeanor unless he first paid the tax, is untenable. The tax is levied upon the business of practicing law within the corporate limits of the City of Los Angeles. It is therefore the business or occupation, and not an act which is merely incidental thereto, which is subject to the tax. The distinction between a single act and the business in which the act is done is very marked and well recognized. The ordinance must be held, therefore, to impose a tax upon the doing of business within the City of Los Angeles and not upon a single act which is but an incident to the business maintained, transacted and carried on outside the corporate boundaries of the municipality. Matter of Application of Smith, 33 Cal.App. 161, 163, 164 P. 618.

The tax being valid, the judgment must be affirmed. It is so ordered.

YORK, P. J., and DORAN, J., concur.

Hearing denied; SCHAUER, J., dissenting.

---

87 Cal.App.2d 812

KUHN v. FERRY & HENSLER et al.

Civ. 16638.

District Court of Appeal, Second District, Division 2, California.

Oct. 5, 1948.

1. Appeal and error 🔑659(3)

Respondents' motion to augment record, on appeal on judgment roll by bringing up exhibits and testimony necessary to enable respondents to present their position properly and show insufficiency of evidence to support findings in judgment roll, should be granted, as appellate court has no means of knowing whether findings are sustained by evidence or whether decision on judgment roll alone will result in miscarriage of justice. Rules on Appeal, rules 5(f), 12(a), 52.

2. Appeal and error 🔑659(1)

Respondents cannot ordinarily demand reporter's transcript of evidence, but may move to augment record on appeal on judgment roll to show that error was cured at trial or for some other purpose. Rules on Appeal, rules 5(f), 12(a).

3. Appeal and error ⟹659(1)

When proceedings or evidence in trial court should be considered on appeal, denial of respondents' right to augment record on appeal on judgment roll is abuse of appellate court's discretion. Rules on Appeal, rules 5(f), 12(a).

4. Appeal and error ⟹659(1)

The appellate court, desiring further knowledge on any point, owes duty to augment record on appeal on judgment roll before proceeding with decision. Rules on Appeal, rules 5(f), 12(a).

5. Appeal and error ⟹659(1)

A litigant cannot, by adopting one form of appeal, as on judgment roll, foreclose his opponent from presenting to reviewing court entire record or any material portion thereof on which trial court based judgment appealed from. Rules on Appeal, rules 5(f), 12(a).

6. Courts ⟹85(3)

The Rules on Appeal, authorizing reviewing court to allow augmentation of record on respondent's motion whenever necessary to prevent miscarriage of justice and to order transmission to it of exhibits and portions of oral proceedings at trial, have force of law and cannot be disregarded or ignored by litigant or court. Rules on Appeal, rules 5(f), 12(a).

◆

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by B. W. Kuhn, doing business as the Dragline Rentals Company, against Ferry & Hensler, a joint venture, and others. Judgment for defendants, and plaintiff appeals. On respondent's motion for augmentation of the record.

Motion granted, and augmentation of the record ordered.

Charles M. Stark and Paul W. McComish, both of San Francisco, for appellant.

Herbert Cameron, of Los Angeles, for respondents.

WILSON, Justice.

This cause is now before the court on respondents' motion for augmentation of the record.

Judgment was rendered in favor of defendants and plaintiff has appealed on the judgment roll. Respondents request that the record on appeal be augmented by bringing up certain of the exhibits introduced at the trial, including a contract and vouchers, and the evidence of three witnesses. The motion is made on the ground (1) that the exhibits and testimony of the witnesses are necessary to enable respondents to present their position in a proper manner, (2) that findings contained in the judgment roll to the effect that certain highways are public highways are not supported by the evidence, and (3) that the oral testimony introduced at the trial and the exhibits are necessary in order that the insufficiency of the findings in that respect may be shown and in order that the issues raised by appellant's opening brief may be fairly and meritoriously decided.

Appellant's opposition to the motion to augment is on the grounds (1) that the exhibits requested by respondents are not necessary to a determination of the action, and (2) that if the exhibits and the oral testimony requested by respondents are ordered to be made a part of the record on appeal then other exhibits and the oral testimony of three of plaintiff's witnesses should be before the court in order to show that the findings are supported by the evidence.

Rule 5(f) of the Rules on Appeal expressly provides "that on motion of the respondent the reviewing court may allow augmentation of the record whenever it is necessary to prevent a miscarriage of justice." 22 Cal.2d 6. Rule 12(a) (p. 11) provides that on the suggestion of any party or on its own motion, the reviewing court may order that the original or a copy of any exhibit used at the trial and portions of the oral proceedings be transmitted to it, and when so transmitted such exhibits and transcript of the oral proceedings shall be deemed a part of the record on appeal.

[1] At this stage of the appeal we have no means of knowing whether the

findings referred to in respondents' motion are or are not sustained by the evidence, nor do we know whether the exhibits and the oral testimony referred to do or do not sustain the findings, or whether a decision of the case on the judgment roll alone will result in a miscarriage of justice. Since Rule 5(f) expressly authorizes the augmentation of the record when "it is necessary to prevent a miscarriage of justice" and since respondents assert that justice cannot be done in the absence of additional portions of the record, a matter which we cannot determine without an examination of the proposed additions, the motion to augment should be granted.

The necessity for augmentation is emphasized by the provisions of Rule 52 that if a properly authenticated record on appeal does not contain all the record and oral proceedings "it shall be presumed in the absence of proceedings for augmentation that it includes all matters material to a determination of the points on appeal." 22 Cal.2d 33. This presumption was applied in Alkus v. Johnson-Pacific Co., 80 Cal.App.2d 1, 9 et seq., 181 P.2d 72.

[2-4] Rule 5(f) was devised for the very purpose of bringing before the appellate court all such evidence as may be essential to an intelligent and proper decision of the issues presented. If the respondents know or the court believes that such evidence was received without the support of any allegations in the pleadings or for the purpose of upholding an improper finding, Rule 12(a) allows the augmentation and Rule 5(f) emphasizes this by expressly authorizing it. Also, while the respondents cannot ordinarily demand a reporter's transcript yet they may move to augment the record "to show that error was cured at the trial or for some other purpose." Under the present rules it is indispensable that in order fairly to meet the issues on appeal the respondents should be in a position to show what actually occurred. When it appears that proceedings were had or evidence was introduced which should be considered on appeal a denial of the right to augment would be an abuse of discretion. Moreover, it is the duty of the court, when it desires further knowledge upon any point, to augment the record before proceeding with its decision. Alkus case, supra, 80 Cal.App. 2d at pages 11–19, 181 P.2d 72.

Whether a finding that certain highways are public highways is or may be material to or determinative of this appeal cannot be decided upon the affidavits filed respectively by respondents in support of their motion to augment and by appellant in opposition to the motion. Manifestly this court must examine the evidence introduced at the trial in order to ascertain (1) the effect of the finding and its applicability to the result of the litigation and (2) whether the finding is sustained by the evidence.

[5, 6] By reason of the express terms of the rules on appeal to which reference has been made a litigant cannot, by adopting one form of appeal, foreclose his opponent from presenting to the reviewing court the entire record, or any material portion thereof, upon which the trial court based its judgment. The rules have the force of law and cannot be disregarded or ignored by litigant or court. This is a new procedure (17 So.Cal.L. Rev. 123) and must be given the effect intended although it is radically different from that previously in force.

To the end that the cause may be properly determined on appeal and that a miscarriage of justice may not result by reason of the absence from the record of the exhibits and the oral evidence requested in respondents' motion to augment, their motion should be granted. Furthermore, the additional exhibits and oral evidence referred to in appellant's opposition should likewise be lodged with this court.

It is ordered that the original exhibits introduced at the trial of the action be transmitted to this court, that the oral testimony of William H. Fair, Jr., R. R. Hensler, Joe Famularo, Charles W. Shepard, James W. Shepard and Doris Shepard be transcribed and filed in this court, and that the exhibits and oral testimony shall become a part of the record on appeal. The cost of transcribing the oral testimony shall be paid in the first instance by appellant and shall be taxed as costs against respondents in the event that appellant prevails on this appeal. The time for the filing of respondents' brief is extended for a period of 30 days after the filing in this court of the transcript hereby ordered.

MOORE, P. J., and McCOMB, J., concur.

87 Cal.App.2d 799

STARK v. KILGORE et al.

Civ. 16452.

District Court of Appeal, Second District, Division 2, California.

Oct. 5, 1948.

1. Master and servant 🔑70(2)

Under contract for payment of commissions to real estate agents providing that prospects belong to salesman whose day it was to be on the "floor", salesman's right to commissions was confined to first visit of prospect while salesman was on the "floor", but when sale had been accomplished and commission earned, purchaser then ceased to be a "prospect", and any subsequent return by same buyer would automatically make him a "new prospect" belonging to salesman on floor on that day. Code Civ.Proc. § 1858.

See Words and Phrases, Permanent Edition, for all other definitions of "Prospect".

2. Master and servant 🔑70(2)

Under contract for payment of commissions to real estate agents providing that prospects coming into office belonged to the salesman whose day it was, providing that he was on the "floor", where prospect first entered defendant's office on date when salesman was on the floor, a subsequent sale to him by defendant when salesman was not on the "floor", would not entitle salesman to share in commission earned, where salesman contributed no effort or activity to sales to purchaser.

3. Master and servant 🔑70(2)

Under contract for payment of real estate agents' commissions providing that all prospects coming into office would belong to salesman, whose day it was, providing he was on the "floor", payment of commissions on sales made by agent while he was "on the floor" which were consummated and negotiated by him, were not precedents for payment of commissions on other sales on ground that they constituted a practical construction of the agreement, where latter sales were readily distinguished from the former.

4. Master and servant 🔑80(9)

In real estate salesman's action for commissions alleging right to share in commissions on sales because they were due to the plaintiff's "efforts" and "activities" pursuant to his employment with defendant, plaintiff was not entitled to recover in absence of proof of either "activity" or "effort" in effecting sales for which commission was sought.

5. Appeal and error 🔑219(2)

Where no attack was made upon trial court's findings, trial court's construction of contract involved, if reasonable and consistent with true intent and meaning of the parties, would not be disturbed and a new interpretation substituted, simply because it was also possible.

◆

Appeal from Superior Court, Los Angeles County; Walter French, Judge Pro Tem.

Action for commissions by O. G. Stark, against John W. Kilgore and John W. Kilgore, doing business as the Wilshire Investment Company. From the judgment plaintiff appeals.

Affirmed.

Richard K. Gandy and Robert G. Cockins, both of Santa Monica, and Mark E. O'Leary, of Los Angeles, for appellant.

Ryan & Ryan and Milan E. Ryan, all of Santa Monica, and John B. Moore, of Los Angeles, for respondents.

MOORE, Presiding Justice.

Judgment having denied him commissions allegedly earned as a selling agent of respondents, appellant seeks a reversal on the sole ground that the findings do not support the judgment.

In 1941 respondent Kilgore operated a real estate brokerage business in Los Angeles county. In that year by a writing he employed appellant as a salesman. In 1943 such writing was amended by a memorandum which contains the following rules governing the division of commissions:

"1. All salesmen will alternate days on the floor, except between the hours of 11:30 am to 1 pm. This period will belong to Mrs. Heaton.

"2. It will be the duty of the salesmen on the floor to see that the office is taken care of and wastepaper baskets emptied.

"3. All new prospects (potential customer) which come into the office will belong to the salesman whose day it is, providing he is on the floor.

"4. Salesmen making a sale will receive 60% of commission received by office except in the following cases:—When salesman and office work together on a sale, the commission will be 50-50."

The foregoing provisions remained in full force and effect as the rules for the division of commissions until appellant was discharged on September 26, 1946. Respondent Nichols joined Kilgore as copartner, January 1, 1946, and thereupon became a party to the commission agreement.

Four transactions or sales relate to or are involved in the instant action. The first two had their inception on days when appellant was "on the floor" and were consummated or negotiated by him; transactions three and four were effected by respondents without any assistance on the part of appellant and were initiated on days when appellant was not "on the floor." The four are as follows: (1) On July 14, 1944, one Marion Zaninovich called at respondents' office while appellant was on the floor. Property on Santa Monica boulevard was eventually purchased by Marion's brother-in-law, Peter Jakovich. In conformity with the agreement appellant received 50 per cent of the commission earned. (2) On a day prior to July 27, 1945, Peter Jakovich and George Zaninovich entered respondents' office while appellant was on the floor. Parcels in tract 8978 were shown them by appellant and were eventually purchased by Jakovich and George and Marion Zaninovich. Appellant received 50 per cent of the commission earned by that sale. No claim is based upon either of these transactions. In both instances appellant was on the floor and also assisted in the negotiations.

The situation in transactions three and four is wholly dissimilar to that which obtained in the first two. (3) On February 8, 1946, respondents as brokers sold to Marion Zaninovich certain real property on Crenshaw boulevard. (4) In May, 1946, they effected a sale to Marion of real property situate on Wilshire boulevard. In the sale of neither did appellant contribute any effort or activity. Respondents collected no commission on the sales but in lieu thereof were employed to manage the properties for Zaninovich. It is the commissions on the two last mentioned sales in which appellant seeks to share. His claim is based upon his construction of the above quoted commission agreement.

In addition to the finding that the commission agreement was in full force and effect between the parties during the period in which all transactions occurred, the court found that appellant gave no assistance in negotiating or consummating sales three and four and did nothing with regard to the management of either property; that he received nothing by reason of either of said transactions as a commission or in lieu of a commission; that respondents have made a full and complete accounting to appellant on all other business closed between July 1, 1941, and September 26, 1946, which was due to appellant's efforts and activities pursuant to said employment, and that he has been paid in full all sums due him therefor. On the basis of these findings judgment was entered for defendants.

Appellant bottoms his argument on the proposition contained in rule 3 that "all new prospects which come into the office will belong to the salesman whose day it is, provided he is on the floor." It is argued that since the purchaser first entered respondent's office on July 14, 1944, when appellant was on the floor, Zaninovich became appellant's prospect, and that any subsequent sale to him would entitle appellant to share in the commission earned even though appellant did not act to effect such sale. Appellant also asserts that any other construction would be a radical departure from the explicit terms of rule 3, and that therefore the trial court was unwarranted in taking any view other than that contended for by appellant.

[1, 2] Appellant cites Mitchel v. Brown, 43 Cal.App.2d 217, 110 P.2d 456; Cousins Investment Company v. Hastings Clothing Company, 45 Cal.App.2d 141, 113 P.2d 878, and Code of Civil Procedure, section 1858, to the effect that a court may not vary the terms of a written agreement. Conceding this to be the law it does not follow that the court in the instant case varied the terms of the agreement. The construction of the trial court was that since appellant contributed no "effort or activity" to the two latter sales to Zaninovich he was not entitled to any commission thereon. Such a construction is a reasonable interpretation of the commission agreement which clearly confines appellant's right to a share of the commissions earned on sales which emanated from the first visit of potential customers while appellant was on the floor. Until such a sale is consummated the prospect "will belong to the salesman whose day it is." But when the sale had been accomplished and the commission earned, the purchaser then ceased to be a prospect. Any subsequent return by the same buyer would automatically make him a new prospect belonging "to the salesman whose day it is." Such salesman would not necessarily be identical with him who was on the floor at the time of the prospect's prior visit. Not only is such construction not strained but it is rational and accords with the unequivocal language of the agreement. The interpretation contended for by appellant on the other hand is utterly fallacious. Its adoption would infringe upon the rights of his fellow salesmen.

[3] From the foregoing it must be clear that the payments of commissions on sales 1 and 2 were not precedents for the payment of the claims urged by this action, and are not to be deemed as such a construction of the agreement as would warrant appellant's recovery of commissions on sales 3 and 4. The latter's rights under his first two sales are readily distinguishable from his claims asserted under the later sales.

[4] The fact that the agreement was amended in 1943 to include the four quoted regulations does not require the conclusion that sales made by respondents without any assistance from appellant to a purchaser who came to respondents' office on days when appellant was not "on the floor" were such as to entitle appellant to a share of the commissions. The agreement shows a lack of any such intention. But if the language of the agreement were not so persuasive appellant must fail because his present claims are a radical departure from his allegations which assert a right to share in the commissions on sales because they were "due to plaintiff's efforts and activities pursuant to said employment." In the absence of proof of either "activity" or "effort" on the part of appellant in effecting sales 3 and 4 his recovery was not legally possible. His contention before this court that he was entitled to commissions on sales 3 and 4 because he had made sales to Zaninovich in 1944 and 1945 finds no support in logic or in law.

[5] Inasmuch as no attack is made upon the findings it follows that if the construction given by the trial court is one which is reasonable and consistent with the true intent and meaning of the parties it would not lie within the province of the reviewing court to annul the determination and judgment of the trial court and substitute a new interpretation simply because it is also possible. McNeny v. Touchstone, 7 Cal.2d 429, 436, 60 P.2d 986.

The judgment is affirmed.

McCOMB and WILSON, JJ., concur.

MOFFAT v. SMITH.

Civ. 7506.

District Court of Appeal, Third District, California.

Oct. 4, 1948.

Hearing Granted Dec. 2, 1948.*

1. Abatement and revival 🔑55(1)
Executors and administrators 🔑443(1)

The statute authorizing action against executor or administrator whose testator or intestate, in his lifetime, wasted, destroyed, took, or converted plaintiff's property, created departure from common-law rule that action ex delicto does not survive tort-feasor's death to extent of action for injury to property, and fact that complaint states facts which would have constituted cause of action against deceased tort-feasor in his lifetime does not foreclose maintenance of same or similar cause of action against his executor. Probate Code, § 574.

2. Abatement and revival 🔑55(1)

An injury to person's estate, whether present or expectant, as distinguished from personal injury, is injury to "property" within statute authorizing action against executor or administrator whose testator or intestate, in his lifetime, wasted, destroyed, took, or converted plaintiff's property. Probate Code, § 574.

See Words and Phrases, Permanent Edition, for all other definitions of "Property".

3. Abatement and revival 🔑55(1)

An injured person's right to support himself in future by carrying on and earning money in his profession constitutes "property" within statute authorizing action against executor or administrator whose testator or intestate, in his lifetime, destroyed plaintiff's property, so that action for loss of future potential earnings as result of injuries received in automobile accident did not abate on tort-feasor's death, but was properly brought against executrix of his estate. Probate Code, § 574.

◆

Appeal from Superior Court, Madera County; Stanley Murray, Judge.

Action by Eugene Alan Moffat against Bessie B. Smith, as executrix of the estate of David D. Copenhaver, deceased, for personal injuries sustained in an automobile collision. From a judgment of dismissal, plaintiff appeals.

Reversed with directions.

David S. Folsom, of Corcoran, for appellant.

Chester O. Hansen and John Said, both of Fresno, for respondent.

ADAMS, Presiding Justice.

Plaintiff brought this action seeking the recovery of damages for injuries sustained in an automobile collision alleged to have been due to carelessness and negligence on the part of one David D. Copenhaver. The latter having died subsequent to the accident, the action was brought against the executrix of his last will.

Plaintiff's complaint alleges that because of the negligence of Copenhaver plaintiff sustained injuries which will prevent him from carrying on his occupation as a chemical engineer, and from advancing in his profession as such; that he would otherwise be capable of earning large amounts of money, and that, because of his injuries, he has been deprived, and will be deprived in the future, of great gains and profits which he might otherwise have made, to his damage in the sum of $50,000. It further alleges that plaintiff filed a claim against Copenhaver's estate which was rejected. A copy of said claim is made a part of the complaint. Therein $50,000 is claimed "For loss of future potential earnings as a result of injuries received in an automobile accident * * * said injuries having been caused by the carelessness and neglegence" of the deceased. A demurrer was filed by respondent on general grounds and on the ground that the alleged cause of action abated with the death of Copenhaver. Said demurrer was sustained without leave to amend, the action was dismissed, and this appeal followed.

The only question presented here is did plaintiff's cause of action for loss of future potential earnings abate with the death of the negligent tort-feasor.

---

* Subsequent opinion 206 P.2d 353.

Section 574 of the Probate Code, as enacted in 1931, provides: "Executors and administrators may maintain an action against any person who has wasted, destroyed, taken, or carried away, or converted to his own use, the property of their testator or intestate, in his lifetime, or committed any trespass on the real property of the decedent in his lifetime; and any person, or the personal representative of any person, may maintain an action against the executor or administrator of any testator or intestate who in his lifetime has wasted, destroyed, taken, or carried away, or converted to his own use, the property of any such person or committed any trespass on the real property of such person."

[1] The foregoing section was considered and applied in Hunt v. Authier, 28 Cal.2d 288, 169 P.2d 913, 171 A.L.R. 1379, and appellant premises his right to recover upon that decision. In that case one Mounsey killed a Dr. Hunt, and then took his own life. Hunt's surviving widow and children filed a claim against the estate of Mounsey for waste and destruction of their property, their property rights and estate. The court said that the legislative tendency may be said to enlarge rather than to restrict the causes of rights of action which will survive; and in construing section 574, supra, said, 28 Cal.2d at page 292, 169 P.2d at page 916: "The statute does not use express words of 'survival.' Nevertheless the section affords the right to maintain actions after the death of those who could have been plaintiffs or defendants if they had lived, in cases of injury to property, and to that extent has created a departure from the common law rule that actions ex delicto do not survive. The fact that the complaint states facts which would have constituted a cause of action against the tort feasor in his lifetime does not foreclose the maintenance of the same or a similar cause of action to the extent authorized by section 574."

It also stated, 28 Cal.2d at pages 296, 297, 169 P.2d at page 918:

"Injuries suffered by the plaintiffs by the lessening of their estate and the invasion and deprivation of their pecuniary interest and right to future support from their decedent by the commission of the wrongful act is as much a destruction or injury to property as was involved in the foregoing cases; and the tort likewise in this case should be deemed to be an invasion of their property rights within the meaning of the present statute. Where the courts have not held such losses to be injuries to property, it has been due to a reluctance to depart from ancient judicial declarations or to the absence of a statute designed to modify the old rule of nonsurvival. The Legislature has definitely spoken by the amendment of our statute so as to enlarge the class of property rights and interests which shall receive protection in the event of the death of the wrongdoer. Where the Legislature has so provided the courts should not countenance a tortious deprivation of property without redress.

[2] "It follows that wherever a plaintiff has sustained an injury to his 'estate,' whether in being or expectant, as distinguished from an injury to his person, such injury is an injury to 'property' within the meaning of that word in the present statute. The plaintiffs have therefore stated a cause of action for recovery from the defendants of the material losses sustained, including the present value of future support from their decedent considering their respective normal life expectancies, but exclusive of any damages for such items as loss of consortium, comfort or society of the decedent."

[3] And while in that case it was the right of the survivors of a decedent whose life had been taken by the action of the tort-feasor that was involved, it would be an anomaly to hold that their right to future support from their decedent constituted property within the provisions of section 574, supra, but that the right of the surviving victim of the tort to his own future support is not. And when the court in the Hunt case said that when a plaintiff has sustained an injury to his "estate," whether in being or expectant, such injury is an injury to property, it laid down a rule which governs in the case before us.

Also see Nash v. Wright, 82 Cal.App.2d 475, 186 P.2d 691 (hearing in Supreme Court denied).

The judgment is reversed with directions to overrule the demurrer.

PEEK, J., concurs.

THOMPSON, Justice.

I concur for the sole reason that I assume this court is bound by the majority decision in Hunt v. Authier, 28 Cal.2d 288, 169 P.2d 913, 171 A.L.R. 1379. I am in accord with the minority opinion in that case which suggests that the court has invaded the province of the legislature in virtually abolishing the ancient and uniform general rule of abatement of a cause of action for tort by the death of the wrongdoer. That rule, in the absence of a statute to the contrary, has been the established rule at common law and in the United States for many years. The majority decision determines that the adoption of Section 574 of the Probate Code in 1931 changed that rule to authorize a suit for damages growing out of tort, in spite of the death of the tortfeasor, if it affects the estate or property of the plaintiff or his heirs, whether the property rights are "in being or expectant, as distinguished from an injury to his person." In the Hunt case the complaint alleged "pecuniary loss of and damage to the property, property rights and estate of the plaintiffs." In the present case, which is a suit for damages for personal injuries received by plaintiff in an automobile collision, the tortfeasor having died before the action was commenced, it is merely alleged, on information and belief, that a permanent brain injury which resulted from the accident, prevented plaintiff from carrying on his employment as a chemical engineer and precluded him from earning "large amounts of money in his lifetime." No damage to tangible property in existence at the time of the tort is alleged. Merely intangible, uncertain, speculative and prospective diminution of earning capacity is alleged in this case. Clearly, this suit is an ordinary action for personal injuries sustained as a result of an automobile casualty. It was not a suit for damages to property under Section 574 of the Probate Code. But the judicial construction of that section by the majority decision in the Hunt case includes therein any injury or impairment to property whether it is tangible and in actual existence at the time of the tort, or merely "expectant." We are required to accept that construction as the law of this state, as this opinion properly holds.

The adoption of Section 574 in 1931 is merely the consolidation, reenactment or continuation of similar sections of the Code of Civil Procedure, which had been the law of this state for many years. The only material change was the substitution of the word "property" for the former words "goods and chattels." That statute authorizes, as I think it always has, the maintenance of an action by the representatives of an estate against the estate of a deceased tortfeasor who, in his lifetime, committed trespass upon real property, or who "has wasted, destroyed, taken, or carried away, or converted to his own use," real or personal property. It seems to me that section clearly contemplates a remedy against a deceased tortfeasor for damage to tangible property in actual existence at the time of the wrongful acts complained of.

It seems clear to me that, by the substitution of the word "property" for those of "goods and chattels", the legislature did not intend to abolish the general rule of abatement of a suit upon the death of the tort-feasor. The majority decision in the Hunt case states that for several recent sessions of the legislature bills have been repeatedly presented to that body to abolish that rule, and that each of them failed to pass. If the legislature had intended to abolish that rule of law it certainly would have adopted a bill which was presented for that purpose. The minority opinion therefore appropriately suggests that the decision in the Hunt case results in a judicial invasion of the legislative authorty.

The case of Nash v. Wright, 82 Cal.App.2d 475, 186 P.2d 691, which is heretofore cited, appears to be inapplicable. That was a suit, under Section 377 of the Code of Civil Procedure for the wrongful death of plaintiff's intestate. The abatement of the cause on account of the death of the tortfeasor was not there involved. He was still alive. The authorities make a clear distinction between cases under statutes authorizing suits for wrongful death, and those which involve the doctrine of abatement at the death of the tortfeasor. In 4 Restatement of the Law of Torts, p. 530, section 900 (a), it is said, "Where a statutory cause of action is created, as for wrongful death, the general survival statute may not apply to cause the action to survive the death of the tortfeasor."

For the sole reason that I am persuaded this court is bound by the majority decision in the Hunt case, I am constrained to concur in this opinion.

87 Cal.App.2d 803

SNIDOW et al. v. HILL et al.

Civ. 16511.

District Court of Appeal, Second District, Division 2, California.

Oct. 5, 1948.

1. Vendor and purchaser 🔑198

Under contract for sale of citrus grove providing that price was to be paid in semiannual installments and that on payment of total price vendors would deliver deed free of encumbrances save and except taxes for current year accrued but not payable, failure of purchasers to pay taxes assessed against property did not constitute a default.

2. Vendor and purchaser 🔑192

Under contract for sale of citrus grove providing that price was to be paid in semiannual installments, and that purchasers were required to reimburse vendors for money advanced for care and operation of property, purchasers were under no obligation properly to care for or cultivate, disc, fertilize and spray the property.

3. Mortgages 🔑278

A mere grant of property subject to a mortgage debt is not sufficient to impose personal liability on grantee to pay debt or perform any of the obligations thereof, but to effect such obligation there must be a distinct assumption of the debt or of contractual obligations thereunder.

4. Vendor and purchaser 🔑192, 198

Under contract for sale of citrus grove providing that price was to be paid in semiannual installments and that terms of agreement were subject to terms of trust deed, provisions of trust deed for payment of taxes and for maintenance and care of property were not sufficiently incorporated into sales agreement by reference to charge purchasers with liability for such obligations.

5. Evidence 🔑450(8)

Where contract for sale of citrus grove provided that price was to be paid in semiannual installments and that vendors were to have right to all proceeds from fruit until obligation was paid, contract was ambiguous and evidence was admissible to resolve the ambiguity.

6. Evidence 🔑467, 468

Where contract for sale of citrus grove provided that price was to be paid in semiannual installments, parol evidence that vendors had received sums in excess of one-half of purchase price prior to filing of action for default and that sums were accepted as payment on the purchase price was competent to prove compliance with agreement and admissible to show waiver of default, if any, on due date.

7. Contracts 🔑305(1)
Evidence 🔑467

Waiver of written contract's terms requiring payment of installments on stated dates can be established either by parol or course of conduct.

8. Appeal and error 🔑1056(1)
Evidence 🔑467

In vendor's action for breach of written contract for sale of citrus grove alleging failure of purchaser to make required semiannual installments on due date, where facts constituting waiver were pleaded as affirmative defense, exclusion of parol evidence to substantiate possible finding of waiver was prejudicial error.

Appeal from Superior Court, Los Angeles County; Kenneth C. Newell, Judge.

Action by Houston A. Snidow and another against Hayden Hill and another, to quiet title to realty. From the judgment, defendants appeal.

Judgment reversed.

See also 191 P.2d 513.

Harry V. Leppek and Barry Sullivan, both of Los Angeles, for appellants.

Allard, Brownsberger & Shelton, of Pomona, for respondents.

MOORE, Presiding Justice.

July 5, 1945, respondents executed a contract for the sale to appellants of a certain 17 acres of land in Los Angeles County for the sum of $55,000 on payments of "not less than $3,000" on the first days of January and June of each year with interest on the deferred balance at 6 per cent per annum.* Deeming appellants to be in default, respondents filed their complaint to quiet title on April 24, 1947. While on that date only three of the semiannual payments were required to be paid, sums aggregating $29,759.17 had in the interim been received by respondents on account of the contract.

After a denial of respondents' right to possession, appellants in their affirmative defenses alleged (1) the execution of the writing and their payment of large sums applicable thereto; (2) the fact of Snidow's legal advice to Hill at the time of the contract; (3) the fiduciary relationship between Snidow and Hill by reason of their partnership in a trailer service, and (4) respondents' possession of "large sums of money from the sale of crops produced" upon the 17 acres, for which appellants claimed to be entitled to a credit upon the contract.

---

* "This agreement made and entered into by and between Houston A. Snidow and Mildred K. Snidow, hereinafter sometimes referred to as the seller, and Hayden Hill and Alice Hill, hereinafter sometimes referred to as the purchaser, of and concerning that certain real property consisting of approximately 17 acres located at 2020 E. Alosta Boulevard, Glendora, California, being property now owned by the sellers hereunder purchased by them from Anson Lisk, fronting approximately 660 feet on Alosta Boulevard, consisting of oranges, lemons, together with house, outbuildings and personal property located thereon, consisting of heaters and fuel oil located therein.

"The sellers hereunder hereby agree that upon the payment to them of the total sum of $55,000.00 together with interest on the deferred balance at the rate of 6% per annum, they will deliver a deed to the purchasers of said property free and clear of all encumbrances as of the date hereof, save and except taxes for the current year, accrued but not payable, title to said property to remain with said sellers until such time as the purchase price is paid in full.

"Sellers hereunder shall have the right to all proceeds from the fruit or other rents, issues and profits therefrom until said obligation is paid.

"Purchasers agree to pay not less than $3,000.00 on the first day of January and the first day of June of each year.

"Should the sellers hereunder advance any money in connection with the care, operation or maintenance of said property, said sum shall be reimbursed by the purchasers out of the first moneys received by the sellers in connection with said transaction.

"Interest on the deferred balance is to be figured on the average unpaid balance as of the 5th day of January and 5th day of July of each year and is to be added to the principal on said dates.

"This agreement is not assignable or transferable and shall not be filed for record in the Office of the County Recorder.

"It is understood that this property is now subject to Deed of Trust in favor of Anson Lisk, et ux, and the terms of this agreement are subject to the terms of said Deed of Trust in addition to the terms herein, said Deed of Trust to be recorded in the Office of the County Recorder of Los Angeles County, reference to which is hereby made for particulars.

"It is understood and agreed that moneys withdrawn from L. A. Trailer Service by either Houston A. Snidow or Hayden Hill may be credited against the amount due hereunder, as their interest may appear.

"In Witness Whereof this document has been executed this 5th day of July, 1945, and the parties hereto agree to be bound by the terms thereof.

"Houston A. Snidow
Sellers
Hayden Hill
Purchasers"

The trial court found that appellants in possession, failed to pay the real estate taxes assessed against the acres for the second half of the year 1946–47 in the sum of $207.25, but that such taxes were paid by respondents, April 20, 1947; that appellants neglected properly to care for, cultivate, disc, fertilize and spray the property as required by the contract of purchase of sale; that appellants did not pay $3,000 due on January 1, 1947, but did pay $600 on February 17, 1947; that no payment was made on June 1, 1947.

On the basis of these findings the court by interlocutory decree adjudged that appellants pay plaintiffs or into court all delinquencies with interest and costs within five days. Such payments not having been made, final judgment was entered from which comes this appeal.

[1] Respondents contend that appellants' failure to pay the taxes and care for the property placed appellants in default. But a careful search of the agreement fails to disclose any obligation on appellants to pay taxes or to care for the property. The only direct reference to taxes is contained in the second paragraph of the agreement to the effect that the sellers "will deliver a deed to the purchasers of said property free and clear of all encumbrances as of the date hereof, save and except taxes for the current year, accrued but not payable. * * *" At most this is an ambiguous provision for the payment of the accrued current taxes as to which there is no dispute.

[2] As a second violation of the agreement the court found that appellants refused properly to care for, cultivate, disc, fertilize and spray the property as called for by the agreement. The writing contains no such obligation. It merely requires appellants to reimburse respondents for any money advanced by the latter for "the care, operation or maintenance" of the property "out of the first moneys received by the sellers in connection with said transaction." No advances were alleged to have been made by respondents.

[3, 4] Respondents contend that paragraph eight of the agreement incorporates by reference all the terms of an outstanding trust deed to third parties. While that encumbrance does contain provisions for the payment of taxes by respondents and for the maintenance and care of the property, the agreement of purchase contains no provision whereby appellant assumed the obligations of the trustor, nor was there an allegation to such effect. On the contrary they agreed to buy the land "subject to" the deed of trust. Even assuming that the transfer of the property pursuant to the agreement was subject to the trust deed, it does not follow that appellants by the agreement thereby assumed to perform all the obligations of the trust deed. A mere grant of the property subject to a mortgage debt is not sufficient to impose any personal liability on the grantee to pay the debt or perform any of the obligations thereof. To effect such obligation there must be a distinct assumption of the debt or of the contractual obligations thereunder. Hibernia Savings and Loan Society v. Dickinson, 167 Cal. 616, 623, 140 P. 265; 8 Cal.Law Rev. 447. The doctrine of incorporation by reference cannot thus be tortured into the imposition of obligations which a contractee clearly did not assume.

[5] Respondents' main contention is that appellants were in default under paragraph four of the agreement: "Purchasers agree to pay not less than $3,000.00 on the first day of January and the first day of June of each year." At the trial they insisted that the only question was whether there was a default on January 1, 1947. Appellants attempted to introduce evidence of payments of large sums prior to that date, but such evidence was excluded on respondents' objection that any payments prior to the alleged default were immaterial.

Two paragraphs of the agreement specified the sources from which payment might be made:

"Sellers hereunder shall have the right to all proceeds from the fruit or other rents, issues and profits therefrom until said obligation is paid.

"It is understood and agreed that moneys withdrawn from L. A. Trailer Service by either Houston A. Snidow or Hayden Hill may be credited against the amount due hereunder, as their interest may appear."

By various credits prior to January 1, 1947, approximately one half the contract price had been paid. Although none of the payments was made on the due dates, yet no default was declared with respect to any payment prior to that of January, 1947. Appellants attempted to introduce evidence that after June 1, 1946, an amount in excess of $10,000 was credited on the contract price by respondents. Appellants' express purposes were to show that respondents' acceptance of sums in excess of $3,000 prior to January 1, 1947, was in accordance with the contract provision requiring payment of $3,000 on January 1, 1947, or to show that by acceptance respondents waived the requirement. The evidence should have been admitted as proof of either purpose. To prove compliance with the terms of the contract would not have violated the parol evidence rule. Paragraph 3, giving respondents the right to all proceeds from the fruit *"until said obligation is paid,"* is clearly ambiguous since it might imply that respondents were entitled to the profits as their own property or that they were obliged to apply such revenues to appellants' debt under the agreement. Therefore evidence that respondents had consistently applied all profits from the fruit to the contract price was admissible to resolve this ambiguity. Universal Sales Corp v. California Press Mfg. Co., 20 Cal.2d 751, 776, 128 P.2d 665; Wachs v. Wachs, 11 Cal.2d 322, 325, 79 P.2d 1085.

[6-8] Since respondents had received sums aggregating in excess of $29,750 prior to the filing of the action, evidence that such receipts were accepted on the purchase price was competent to prove appellants' compliance with the agreement. The amounts thereof were also admissible to show waiver of default, if any, on such due dates. The exclusion of such evidence precluded appellants from showing waiver, which may be established either by parol or by a course of conduct. Singh v. Cross, 60 Cal.App. 309, 317, 212 P. 946. The facts constituting waiver having been pleaded in an affirmative defense, evidence thereof should have been admitted to substantiate a possible finding of waiver. Erskine v. Upham, 56 Cal.App.2d 235, 247, 132 P.2d 219. The exclusion of such evidence therefore constituted prejudicial error whereby a fair trial was defeated.

The judgment is reversed.

McCOMB and WILSON, JJ., concur.

---

87 Cal.App.2d 853

PEOPLE v. PARRISH.

Cr. 4227.

District Court of Appeal, Second District, Division 2, California.
Oct. 6, 1948.

1. Criminal law 🔑1144(13)

On defendant's appeal District Court of Appeal would view evidence in light most favorable to prosecution.

2. Homicide 🔑25

Elements required for proof of crime of "attempted murder" are specific intent to commit the crime and a direct ineffectual act done toward its commission.

See Words and Phrases, Permanent Edition, for all other definitions of "Attempted Murder".

3. Criminal law 🔑44

Overt act necessary to constitute an attempt need not be last proximate act prior to commission of crime itself.

4. Homicide 🔑25

After preparation for commission of crime of murder, if defendant performs acts which amount to commencement of accomplishment of intended offense, such acts constitute overt acts sufficient to meet requirement that a direct ineffectual act be done toward commission of murder to constitute crime of attempted murder.

5. Homicide ⚿256

Evidence supported conviction for attempted murder as against contention that acts of defendant and feigned accomplice did not go beyond mere preparation for crime.

◆

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Nathan Parrish was convicted of attempted murder, and he appeals.

Judgment affirmed.

Gladys Towles Root, of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen. and James A. Doherty, Deputy Atty. Gen., for respondent.

McCOMB, Justice.

From a judgment of guilty of attempted murder, after trial before the court without a jury, defendant appeals. There is also an appeal from the order denying his motion for a new trial.

[1] The evidence being viewed in the light most favorable to the people (respondent), discloses the following facts:

On the evening of September 13, 1947, defendant introduced himself to Mr. Thomas who feigned as an accomplice throughout the events herein described. Defendant told Mr. Thomas he had a deal which would result in obtaining for him $2600.00 from defendant's wife, and that he (defendant) did not want any part of it; that all he wanted was some valuable papers, particularly life insurance of his wife. Defendant stated that he intended to kill his wife with a .22 caliber rifle which he owned, and that after she was dead he would inherit her property and would no longer have to pay her alimony. He suggested that Mr. Thomas go with him to Mrs. Parrish's house where Mr. Thomas, under the pretext of being interested in buying property in the area was to gain admission. Defendant would follow him into the house and "do the rest".

Mr. Thomas made an appointment with defendant to meet him in the 800 block on Fair Oaks Avenue in Pasadena between 7:00 and 7:30 p. m. on the following Monday, September 15, 1947. Before this date Mr. Thomas learned the address of defendant's wife and communicated the plan to her. She in turn told the local police officers about the scheme. Mr. Thomas and defendant met at the appointed place on Monday night, but defendant said he had to take a lady to the hospital and it would be too late thereafter to execute the plan. He therefore arranged to meet Mr. Thomas the following night, on Tuesday, at the same time and place. This fact Mr. Thomas in turn communicated to defendant's wife.

Mr. Thomas and defendant met as planned, whereupon they proceeded in Mr. Thomas's car to the home of Mrs. Parrish. When defendant met Mr. Thomas he was carrying a .22 rifle under his sweater. When they entered Mr. Thomas's car this rifle was placed in the back of the car. Defendant gave the directions to his wife's home and en route asked if Mr. Thomas had any gloves, stating "We can't have no fingerprints." Defendant at the time had a pair of gloves in his hand and stated that he was taking the gun along in order to kill his wife.

The car was parked approximately three blocks from Mrs. Parrish's home. The two men then walked to the house and defendant explained to Mr. Thomas the arrangement of the rooms in it. They listened to see if anyone else was in the house and then returned to the parked car. Thereafter they entered the car which was driven to the front of Mrs. Parrish's home and parked immediately to the west thereof at about 8:15 p. m. Defendant then stated, "I tell you what we do. When you go there and use the method of going into the house that I told you and you get her in the bedroom, you choke her." Mr. Thomas asked what defendant was going to do and he said, "When you do that I will come right in and you leave at that point."

Mr. Thomas then left the car and went into the house while defendant remained in the front seat. Two police officers who were in the home left by the back door and found defendant seated in the front seat with the .22 rifle in the rear of the car, which rifle was loaded with one shell in the chamber and 6 in the magazine. The officers then arrested defendant.

Defendant relies for reversal of the judgment on the proposition that *the evidence is insufficient to sustain the judgment of guilty for the reason that the evidence discloses that the acts of defendant and his feigned accomplice did not go beyond mere preparation for the commission of the crime.*

[2-4] This proposition is untenable. The essential elements required for the proof of the crime of attempted murder are a (1) specific intent to commit the crime, and (2) a direct ineffectual act done towards its commission. (People v. Miller, 2 Cal.2d 527, 530, 42 P.2d 308, 98 A.L.R. 913.)

(1) There is no question that the evidence is ample to sustain the trial judge's finding that defendant possessed the first element, that is, the intent to murder his wife, since the testimony disclosed that defendant had stated that he intended to kill his wife.

(2) The second element of the crime of attempted murder is likewise present. It is settled that the overt act necessary to supply the second element need not be the last proximate act prior to the commission of the crime itself. (People v. Fiegelman, 33 Cal.App.2d 100, 104, 91 P.2d 156.) After preparation for the commission of the crime, if a defendant performs acts which amount to the commencement of the accomplishment of the intended offense, such acts constitute overt acts sufficient to meet the requirements of the second element above set forth for the commission of the crime of attempted murder. (People v. Lanzit, 70 Cal.App. 498, 505, 233 P. 816.)

[5] In the present case, when defendant entered Mr. Thomas's car on the evening of September 16, 1947, possessed of a loaded gun with plans to kill his wife, drove to her home, listened to see if there was any person present in her house, and sent Mr. Thomas into the house so that he, defendant, might gain entrance and kill his wife, such acts constituted overt acts toward the commission of the crime sufficient to sustain the trial court's findings to that effect. (Stokes v. State, 92 Miss. 415, 46 So. 627, 628 et seq., 21 L.R.A.,N.S., 898; People v. Stites, 75 Cal. 570, 576, 17 P. 693. See also People v. Miller, 2 Cal.2d 527, 532, 42 P.2d 308, 98 A.L.R. 913.)

The following cases relied on by defendant are readily distinguishable from the present case. In People v. Collins, 53 Cal. 185, defendant was convicted of burglary. The entry relied on to sustain the conviction was by a feigned accomplice who lacked the necessary intent for the commission of the crime. Hence, since there was no intent to commit a crime there could be no attempt to commit it. In the case at bar the evidence discloses that defendant had the intent to murder his wife.

In People v. Murray, 14 Cal. 159, an uncle who had eloped with his niece sent for a magistrate to marry them. It was held that defendant had performed only a preparatory act rather than one in furtherance of the crime of incest. It is clear that this is a case verging on the border line, and one which carries the doctrine of preparatory act to the extreme limit.

People v. Miller, 2 Cal.2d 527, 42 P.2d 308, 98 A.L.R. 913, is distinguishable from the present case on two grounds: (1) In the cited case the first element of the crime of attempted murder, specific intent to commit a crime, was not proved. (See page 532 of the opinion in 2 Cal.2d, page 310 of the opinion in 42 P.2d.) (2) The trial court had read prejudicial instructions to the jury. Neither of these situations is present in this case.

People v. Werner, 16 Cal.2d 216, 105 P.2d 927, is clearly inapplicable to the present case since the acts of the defendant in such case were obviously preparatory, the defendant, E. P. Werner, not intending to commit any overt acts until the day following the performance of the acts urged as overt acts.

Since the record appears to be free from error the judgment and order are and each is affirmed.

MOORE, P. J., and WILSON, J., concur.

87 Cal.App.2d 711

HUNTER v. SPARLING, State Superintendent of Banks, etc.

Civ. 13724.

District Court of Appeal, First District,
Division 1, California.

Sept. 28, 1948.

Hearing Denied Nov. 22, 1948.

1. Appeal and error 🔑842(8)

Whether, under the facts found, there was a contract to pay employee retirement allowance or a completed gift with partial delivery and express trust as to the balance, or any other legally enforceable obligation, was a "question of law" and not of "fact", and trial court's finding that rules relating to retirement formed no part of contract of employment, though labeled a "finding of fact", was in reality a "conclusion of law" which must be disregarded if not supported by the facts found.

See Words and Phrases, Permanent Edition, for all other definitions of "Conclusion of Law", "Finding of Fact", "Question of Fact" and "Question of Law".

2. Master and servant 🔑78

Where employer has a pension plan and employee knows of it, continued employment constitutes consideration for the promise to pay pension.

3. Constitutional law 🔑102(2)
States 🔑119

A public pension is not a "gratuity" prohibited by Constitution, but, after the services have been performed, it is a vested contract right of the employee. Const. art. 4, § 31.

See Words and Phrases, Permanent Edition, for all other definitions of "Gratuity".

4. Master and servant 🔑78

Benefit plan offered by employer to all employees and impliedly accepted by them through remaining in the employment constitutes a contract between employer and employee, the services rendered by employee being a sufficient consideration to support employer's promise to pay benefits.

5. Master and servant 🔑78

Where bank offered to pay cash retirement allowance according to a fixed formula, whose terms were capable of ascertainment by conduct of the parties or otherwise, to all employees who remained in bank's employ for more than 10 years and voluntarily retired, acceptance of such offer by remaining in employ of bank for 49 years, during 23 of which employee had knowledge of offer, though precise terms of formula were not known to him, established an enforceable contract for payment of retirement allowance.

6. Contracts 🔑9(1)

An offer, too uncertain to create a bilateral contract if accepted, may, by performance by the offeree, create a unilateral contract.

7. Estoppel 🔑85

Where bank employee rejected several offers of other employment in reliance on employer's promise to pay a retirement allowance, such promise was enforceable under doctrine of "promissory estoppel".

See Words and Phrases, Permanent Edition, for all other definitions of "Promissory Estoppel".

8. Estoppel 🔑85

A promise which promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of promisee, and which does induce such action or forbearance, is binding under doctrine of "promissory estoppel", if injustice can be avoided only by enforcement of the promise.

9. Banks and banking 🔑18

Evidence sustained finding that, though orders relating to payment of pensions to retiring employees of San Francisco branch of Japanese bank originated in Japan, payment of such pension was an obligation of San Francisco bank payable by liquidator out of assets of such bank, since contract for payment of pension to retiring employee originated in San Francisco where services constituting acceptance of offer to pay such pension were rendered and pension merely represented deferred compensation and as such was an obligation of the San Francisco bank. Gen.Laws, Act 652, § 7.

Appeal from Superior Court, City and County of San Francisco; Jas. G. Conlan, Judge.

Action by Robert Arnold Hunter against Maurice C. Sparling, State Superintendent of Banks and Liquidator of the Yokohama Specie Bank, Limited, to recover balance due plaintiff on his retirement allowance. Judgment for plaintiff, and defendant appeals.

Judgment affirmed.

Shirley, Saroyan, Shearer & Sullivan and S. M. Saroyan, all of San Francisco, for appellant.

Cushing, Cullinan, Trowbridge, Duniway & Gorrill, Delger Trowbridge, and John H. Murray, all of San Francisco, for respondent.

PETERS, Presiding Justice.

Plaintiff brought this action against the state superintendent of banks acting as liquidator of the Yokohama Specie Bank, Ltd., to recover from the bank the sum of $20,835.50 allegedly due from the bank to plaintiff as the balance due on his retirement allowance. From a judgment in favor of plaintiff defendant appeals.

It is admitted that plaintiff worked for the bank, located in San Francisco, from 1892 to 1941; that in November of 1941 plaintiff contemplated retiring from his employment; that at that time plaintiff was informed, in writing, that the bank would pay him, as a retirement payment, $35,535.50, plus $5,300 for certain expenses hereafter described; that, had the plaintiff so desired, the bank would have paid him the full sum on November 28, 1941, but that on that date, at plaintiff's request, the bank paid him but $20,000, promising to pay the balance of $20,835.50 in February, 1942. This was done in order that the payments would be made in two years and would thus, according to the belief of plaintiff, reduce the amount of the federal income tax payable on the transaction. After the $20,000 had been paid, the war intervened and the bank was taken over by the alien property custodian and the state superintendent of banks and ultimately placed on the latter's hands as liquidator. Plaintiff filed a claim with the liquidator for the balance claimed to be due within the time and in the manner provided by law, and, upon its rejection, instituted this suit.

The basic problem involved in this litigation is whether the promise of the bank to pay the balance of $20,835.50 is legally enforceable, or whether it was a mere unenforceable promise to make a gift.

The complaint alleges that the bank is a foreign corporation organized under the laws of Japan, with its principal place of business in San Francisco; that on December 8, 1941, the then state superintendent of banks took possession of the business and property of the bank and placed the bank in conservatorship; that on March 13, 1945, the then superintendent of banks became liquidator of the bank; that plaintiff was employed by the bank in San Francisco from November 2, 1892, to November 28, 1941; that for 27 years prior to 1941 the bank had rules and regulations providing for the payment of pensions or allowances to its employees in its San Francisco office upon retirement, and that plaintiff had knowledge of such rules and regulations; that plaintiff's knowledge of the existence of such rules and regulations was one of the principal reasons and inducements why plaintiff continued in the employ of the bank after securing such knowledge; that plaintiff was retired by the bank on November 28, 1941; that on that day the bank executed and delivered to plaintiff, in consideration of his long services and pursuant to its rules and regulations, its check for $20,000 and a certain writing which is attached to the complaint as an exhibit; that the payment of $20,000 was a partial payment on account of the sum of $40,835.50 referred to in the exhibit; that in said exhibit the bank agreed to pay the balance of $20,835.50 in February, 1942.

During the trial the due execution and delivery of this exhibit by the bank was admitted by defendant. It is in the form of a letter on the letterhead of the San Francisco bank and is dated November 28, 1941. It is signed:

"The Yokohama Specie Bank Ltd.
"/s/ M. Motoyoshi
"Manager."

In it the manager first praises plaintiff, in the most laudatory language, for his many years of faithful services to the bank. The letter then continues as follows:

"At this time, it is my very greatest pleasure to present you with a Cashier's Check for $20,000.00, a partial payment of the $40,835.50, which I have been instructed by the President['s] Office in Tokyo to pay to you as a retiring allowance from this Bank, particulars as noted hereunder.

"In this connection, I wish to convey to you the good will of the Board of Directors, whose intention it was to offer you an invitation to visit Japan in appreciation of the fathomless services and your untiring efforts rendered to this Bank. Unfortunately, this plan being impossible due to the present unsettled situation, they have decided to offer you $2,000.00 in cash in lieu of the Travel you were to be bestowed. Moreover, they took into consideration with deep sympathy, the problem of the heavy taxes that will be incurred in presenting this gratuity and have added a subsidiary sum of $3,300.00 to defray the expenses of taxes. These two amounts are to be considered as merely an extra presentation aside from the gratuity ordinarily calculated in accordance to the rules and regulations of this Bank. It has been specially called to my attention that such subsidiary gratuity is an unprecedented case, and that the remainder of the gratuity proper shall be presented to you in February of 1942.

Gratuity	$35,535.50
Travelling Expense	2,000.00
Tax Subsidy	3,300.00
	$40.835.50
Less [check enclosed]	20,000.00
Remainder	$20,835.50 (February 1942)"

The complaint further alleges that in November, 1941, the bank's books showed the "sum of $40,835.50 as money so to be paid to the plaintiff, and showing the payment of the sum of $20,000 as the first payment on account thereof." Attached to the complaint is an exhibit purporting to support this allegation.

At the trial it developed that the only entry on the books of the company purporting to show a $40,835.50 indebtedness to plaintiff was this exhibit—a document entitled "Transfer Voucher." It was in the form of a printed slip kept by the clerk for the purpose of accounting for money paid out by him. It shows a $20,000 payment and recites that this was the "First payment of Robert Arnold Hunter, Retirement Pension for $40,835.50."

The complaint further alleges that on October 10, 1941, the bank prepared and filed with the Secretary of the Treasury an application for a license to pay to the plaintiff the sum of $40,835.50, of which $20,000 was to be paid at once and the balance three months thereafter, and that on November 25, 1941, the Federal Reserve Bank of San Francisco, by direction of the Secretary of the Treasury, issued its license to the bank. It is admitted that such application and license were necessary under federal executive orders requiring permission for any banks in which Japan had an interest to pay out money. The application is on a form supplied by the treasury department and contains certain formal information. It is signed by the "Sub Manager" of the bank. Under the printed statement "The applicant desires a license in order to: (State in detail the nature, purpose and amount of the transaction. * * *)" appears the following in typewriting admittedly inserted by the bank:

"Mr. Robert Arnold Hunter, a citizen of the United States, entered our employment on November 2, 1892 and since then he has been continuously employed by this Bank. (Approximately 49 years)

"Mr. Robert Arnold Hunter has expressed his desire to retire and has proposed to be relieved of his duty from this Bank.

"The Bank desires to compensate Mr. Robert Arnold Hunter for his long service to this Bank as set forth in our retirement regulations by paying the sum of $40,835.50 to him as a retiring pension, of which it is proposed to pay the sum of $20,000—in October, 1941 and the balance of $20,835.50 three months thereafter, that is in January, 1942.

"We, therefore, desire to apply for a Special License for said amount so that we may hand same to Mr. Robert Arnold Hunter.

"We shall charge the above-mentioned amount to our Profit and Loss Account and issue our Cashier's Checks in favor of Mr. Robert Arnold Hunter, as specified above."

The license issued by the Federal Reserve Bank of San Francisco under the authority of the Secretary of the Treasury authorized the bank to: "Charge not to exceed the total sum of $40,835.50 to your profit and loss account and pay a like total amount (in two installments) by cashier's checks to Robert Arnold Hunter (U. S. citizen) as a retirement pension accruing from his services extending over nearly half a century as an employee of your bank."

Defendant's demurrer was overruled, and thereupon he filed an answer and cross-complaint. By the cross-complaint defendant sought to recover the $20,000 admittedly paid to plaintiff on November 28, 1941, on the theory that it was paid without authority. No evidence was introduced to support these allegations, and the cross-complaint was dismissed by stipulation during the trial.

The answer of defendant denies, on information and belief, that plaintiff for 27 years, or any other period, had any knowledge of the rules and regulations of the bank providing for the payment of a retirement allowance; denies that the existence of such rules or regulations induced plaintiff to remain in the employ of the bank; alleges that any rules and regulations relating to retirement were under the control of the home office in Japan and had no relation to the San Francisco branch of the bank; alleges that the $2,000 traveling allowance and the $3,300 tax subsidy were no part of the rules and regulations of the bank; admits the payment to plaintiff of $20,000, but alleges that such payment was made for the account of the home office and was charged to that office; that the obligation, if any, to pay the balance of $20,835.50 was the obligation of the Tokyo office of said bank and not of the San Francisco office; denies that any account was ever set up on the books of the bank showing an indebtedness to plaintiff of $40,835.50, or a balance of $20,835.50; alleges that the retirement rules and regulations did not form any part of plaintiff's contract of employment; alleges that the promise of the bank to pay plaintiff a retirement allowance was wholly without, and unsupported by, consideration and constituted a mere promise to make a gift.

In his opening statement counsel for plaintiff stated that he was proceeding on two theories—express contract, and an account stated. During the trial the judge indicated, in no uncertain fashion, that, in his opinion, the promise of the bank did not create a contract.[1] The court did indicate however, that, in its opinion, the evidence might support the theory of a completed gift based upon consideration with delivery of the $20,000, and an express trust created for the balance. After the judge had indicated his thoughts on this subject, plaintiff was recalled to the stand and testified that prior to his retirement he discussed the question of the amount of the allowance and the method of its payment with Motoyoshi, the manager of the San Francisco branch. He testified that he requested that the allowance be paid to him in two payments, one in 1941 and one in 1942, in order to avoid too heavy an income tax; that Motoyoshi "agreed with the request and he gave instructions to make the first payment of $20,000, which he did, and agreed that the balance would be held for my account and paid in February of 1942."[2] Based on this testimony plaintiff was permitted to amend his complaint to conform to the proof. This amendment is as follows: "Before and at the time of delivery of said writing [the letter of November 28, 1941—Exhibit 'A' to complaint] it was agreed between the plaintiff and said bank that the sum of $40,835.50 was then and there due and payable to plaintiff in cash. Said bank paid said plaintiff the sum of $20,000 in cash at said time and agreed, at the special instance and request of plaintiff, to hold thereafter the balance of $20,835.50 for plaintiff, as trustee for him, and to pay him said balance some time during the month of February, 1942."

---

[1] Some of these comments are as follows:

(R.T. 80) "The Court: There has been no testimony in the record so far that this plaintiff or any of the employees had an enforceable contract with the bank that upon retirement they would get this amount of money."

(R.T. 90) "The Court: There is no legal liability to pay this; it was more or less of a donation for faithful service."

(R.T. 198) "The Court: I take it the only difficulty was they gave him the total and he only took half and left the balance of the money in trust. Now, if he cannot win on that theory, he can't win. There was no obligation on them to pay him.

"Mr. Saroyan: In other words, your Honor's position in this case is that there was a completed gift and a trust account set up?

"The Court: Yes.

"Mr. Saroyan: There isn't any evidence a trust account was set up.

"The Court: The circumstances show that."

(R.T. 201) "The Court: I wouldn't say there was no consideration as to a completed gift, he certainly had no contract he could sue under. Assuming he could sue for this gratuity, I don't believe he could recover unless the money was given to him. * * *"

The evidence was not in substantial conflict and, in general, supported the facts as alleged in the complaint. In addition to what has already been said about the evidence, the record shows that plaintiff first learned that the San Francisco bank had a retirement plan "Some years before 1918," and it was particularly called to his attention in that year when one of his fellow employees retired and received a flat sum allowance. Thereafter, several other employees retired and were similarly treated, and plaintiff knew it. The record also shows that from 1918 to 1941 the plaintiff discussed the question of retirement allowances at various times with the various managers and submanagers of the bank and from them learned most of the basic provisions of the plan. It was common knowledge among the employees of the bank that such a plan existed. The plaintiff also testified that after he learned that the bank had such a plan he received certain offers of employment from other banks but turned them down and remained in the employ of the Yokohama Specie Bank because he felt that it would be to his advantage to so remain in view of the retirement plan available to him. He admitted that he did not learn the exact formula that was used by the bank until 1940, but prior to then he was told that he would get a "substantial," or a "large" sum of money in a "lump sum." He was told the details of the actual formula in 1940, but did not know until 1941 what base pay was to be used when applying the formula. The bank had printed rules and regulations formulated by the home office applicable to retirement of its employees, but they were written in Japanese and plaintiff was unable to read Japanese. Various letters between the San Francisco and home office relating to Hunter's allowance were introduced. In one of them the home office computed the allowance at $35,535.50 and referred to it as "Retirement pension according to the regulation."

On these facts, most of which are not in dispute, findings were made that are repetitious and, in some respects, inconsistent. The exact theory upon which they are based is somewhat difficult to ascertain. The court found the facts in reference to plaintiff's employment and then found that for 23 years prior to 1941 the bank had rules and regulations, not published in writing but known to the employees, relating to the payment of retirement allowances to its employees, and that, during such period, such rules and regulations were systematically followed and carried out by the bank; that during such period plaintiff knew of these rules and regulations, they having been communicated to plaintiff by officers of the bank; that the existence of such rules was one of the reasons why plaintiff continued in the employ of the bank from 1918 to November 28, 1941. These findings are amply supported by the evidence.

---

[2] There is some other testimony on this issue developed on the cross-examination of plaintiff. After admitting that the only written evidence of the transaction that he received was the $20,000 check and the letter of November 28, 1941, he was asked if he had any discussion with Motoyoshi "in respect to setting up an account or a deposit at the bank." He replied: "I simply requested, as I have testified before, payment of the $20,000 and the balance to be held for my account, to be paid in February * * * he agreed to comply with my request." It was then stipulated that the transfer voucher, the license application, the license, and the letter of November 28, 1941, were the only written evidences of the transaction, and that no special account was set up for the balance owing.

The court then found that plaintiff was retired on November 28, 1941, and that on that date the bank executed and delivered to plaintiff the letter heretofore discussed; that "Before and at the time of delivery of said writing it was agreed between the plaintiff and said bank that the sum of $40,835.50 was then and there payable as a retirement pension or allowance to plaintiff in cash pursuant to said rules, regulations and long continued custom. Said bank paid said plaintiff the sum of $20,000 in cash at said time and agreed, at the special instance and request of plaintiff, to hold thereafter the balance of $20,835.50 for plaintiff and to pay him said balance some time during the month of February, 1942." These findings were in support of the trial court's theory of a completed gift, partial delivery, and a declaration of trust as to the balance.

The court then found the facts in reference to the transfer voucher; found, in accordance with the evidence, that such vouchers were always countersigned by a manager of the bank and were preserved and recognized as the original entries of the transactions described therein. The facts in reference to the application for and issuance of the license and the filing of the claim are then found by the court. It is then found that no part of the sum of $20,835.50 has been paid, and that said sum, plus interest, is owing to plaintiff, and that, while the rules and regulations pertaining to retirement were under the control and management of the home office of the bank, such rules and regulations did have application to the employees of the San Francisco branch of the bank.

The court then found that the $2,000 traveling allowance and the $3,300 tax subsidy were gifts that were fully executed on November 26, 1941, and that said gifts were supported by consideration—i. e., plaintiff's long and faithful and continuous service to the bank, which service, in part, was rendered in reliance on securing a paid trip to Japan and in having the bank assume the income tax burden, and that the rules and regulations of the bank did not prohibit such payments. The next finding is to the effect that it is not true that the payment of the $20,000 and the obligation to pay the $20,835.50 were obligations of the Tokyo office of the bank, but that it is true that such obligations were the obligations of the San Francisco office of the bank.

The court then makes a repetitious finding that one of the reasons why plaintiff remained in the employ of the bank was his knowledge of the existence of the rules and regulations of the bank relating to retirement, and the assurances given him by the managers of the San Francisco bank that, upon his retirement, he would receive a substantial lump sum as a retirement allowance. The court then, in view of its findings on consideration, makes this somewhat inconsistent finding: "It is true that the rules and regulations of The Yokohama Specie Bank, Ltd., if any, with respect to retirement pay or allowance form no part of the contract of employment between said bank and the plaintiff, provided, however, that a legal liability arose in favor of the plaintiff on or about November 28, 1941, and against said bank for the amount due the plaintiff as herein determined by reason of all the facts found in these findings of fact.

"It is not true that any promise or agreement made by the Yokohama Specie Bank, Ltd., San Francisco office, or any officer thereof, to pay the retirement allowance set forth in the complaint on file herein, or any part thereof, was wholly or in any part without any consideration whatsoever and wholly or wholly outside and beyond or beyond the power and authority, or authority, of said office or any officer of said bank, but on the contrary the payment of the $20,000 of said retirement allowance on November 26, 1941 and the promise made at the same time to pay the balance thereof, amounting to $20,835.50 in February, 1942, were supported by fully adequate and valid consideration and were entirely within the power and authority of the San Francisco office and officers, and each of them, of said bank."

The court then again finds that the obligation involved was not that of the Tokyo office of the bank, but was that of the San Francisco office, finds against certain defenses of defendant, and then provides in its conclusions of law that: "at no time was there any contract for the payment of a retirement allowance by and between the Yokohama Specie Bank, Ltd., San Francisco office, and plaintiff, sufficient to amount to or to support an account stated"; that when the $20,000 was delivered to plaintiff "there was a completed and executed gift from said bank to plaintiff in the sum of $40,835.50; that the balance of said gift not paid to plaintiff on said 26th day of November, 1941, to wit: the sum of $20,835.50, was retained by said bank in trust and for the benefit of plaintiff herein, and said bank promised and agreed to hold said balance for the account of said plaintiff and to pay the same in full to him during the month of February, 1942."

[1] The pleadings, evidence, findings and conclusions have thus been summarized at some length in order to show that most of the basic facts were not in dispute and were found in favor of the plaintiff. From those basic facts the question is presented, is plaintiff entitled to recover the sum of $20,835.50, plus interest, from the defendant? That is a question of law and not of fact. The question as to whether, from the facts found, there was a contract, or a completed gift with partial delivery and an express trust as to the balance, or any other legally enforceable obligation, is a question of law and not of fact. For that reason the "finding" that the rules and regulations relating to retirement formed no part of plaintiff's contract of employment is not a finding of fact at all, but a misplaced conclusion of law, not supported by the facts found, which facts are practically undisputed. The rule applicable to such a situation is well settled. Where a conclusion of law is not supported by the facts found, the conclusion of law must be disregarded. Falk v. Falk, 48 Cal.App.2d 762, 120 P.2d 714; Schoolcraft v. B. O. Kendall Company, 108 Cal.App. 546, 291 P. 659; McKay v. Gesford, 163 Cal. 243, 124 P. 1016, 41 L.R.A.,N.S., 303, Ann.Cas.1913E, 1253. That rule has peculiar application to the problem here presented. The facts here are not substantially in dispute. The trial judge was presented with the question as to whether, under those facts, a contract or other legally enforceable obligation arose. He undoubtedly concluded that there was no contract, but that there was another form of legal obligation involved. If, as a matter of law, under the admitted facts, he was wrong as to his conclusion that there was no contract, then the ends of justice will best be served by disregarding that erroneous conclusion and applying the correct law to the admitted facts.

With these principles in mind we turn first to a consideration of the question, as to whether, under the facts, there was an enforceable contract between the bank and the plaintiff to pay to plaintiff the full amount of his retirement allowance. The facts show 49 years of employment. They show that about 1918 plaintiff first learned that he would receive a retirement payment when he retired; that after ten years of employment he was entitled to such a payment, and that the payment would be large. Between 1918 and 1941 he talked the matter over with various officers of the bank and learned more about the details of the plan. All during this period the bank had rules and regulations but plaintiff could not read them because they were in Japanese, but plaintiff and other employees knew that such rules existed and knew of their general import. In 1940 one of the officers gave him the formula to compute his allowance, but he misunderstood what salary was to be used as a base. About the end of 1940 he was informed, by one of the officers of the bank, that he would be entitled to about $35,000. It is defendant's main contentions that such facts do not give rise to an enforceable contract because there was no consideration, and second, the contract, if one existed, was too uncertain in its terms to be enforceable.

[2, 3] The point that there was no consideration is clearly without merit. It is well settled in this state that, where the employer has a pension plan and the employee knows of it, continued employment constitutes consideration for the promise to pay the pension. The pension is considered to be deferred compensation. The problem most frequently arises in public pension cases, because, in this state the Constitution prohibits gifts of public money to an individual. Art. IV, § 31. It has consistently been held that a public pension is not a gratuity, but, after the services have been performed, is a vested contract right of the employee. The extent to which this rule has been applied in this state is well illustrated by the recent unanimous opinion of the Supreme Court in Kern v. City of Long Beach, 29 Cal.2d 848, 179 P.2d 799. In that case it appeared that the city of Long Beach for many years had certain pension provisions for its employees. These were amended during his period of service. As amended, they entitled the employee to a pension after twenty years of service. Thirty-two days before the expiration of the employee's twenty years of service the city purported to repeal its pension provisions. The court held, citing many cases, that the right to a pension was a vested right protected by the contract clause of the federal Constitution. Many cases were referred to holding that where services are rendered under a pension plan the pension payments are in fact deferred compensation. The court then stated, 29 Cal.2d page 855, 179 P.2d page 803:

"Insofar as the time of vesting is concerned, there is little reason to make a distinction between the periods before and after the pension payments are due. It is true that an employee does not earn the right to a full pension until he has completed the prescribed period of service, but he has actually earned some pension rights as soon as he has performed substantial services for his employer. See Dryden v. Board of Pension Com'rs, 6 Cal.2d 575, 579, 59 P.2d 104; French v. French, 17 Cal.2d 775, 777, 112 P.2d 235, [134 A.L.R. 366]. He is not fully compensated upon receiving his salary payments because, in addition, he has then earned certain pension benefits, the payment of which is to be made at a future date. While payment of these benefits is deferred, and is subject to the condition that the employee continue to serve for the period required by the statute, the mere fact that performance is in whole or in part dependent upon certain contingencies does not prevent a contract from arising, and the employing governmental body may not deny or impair the contingent liability any more than it can refuse to make the salary payments which are immediately due. Clearly, it cannot do so after all the contingencies have happened, and in our opinion it cannot do so at any time after a contractual duty to make salary payments has arisen, since a part of the compensation which the employee has at that time earned consists of his pension rights * * *

"Accordingly, we conclude that petitioner has a vested pension right and that respondent city, by completely repealing all pension provisions, has attempted to impair its contractual obligations. This it may not constitutionally do, and therefore the repeal is ineffective as to petitioner."

[4] While this precise problem has seldom been considered by the California courts in connection with pension provisions made by private employers, it is the general rule throughout the country that continued service after knowledge of a pension plan, constitutes ample consideration for the employer's promise to pay. The rule, supported by many cases, is thus stated in 56 C.J.S. Master and Servant, § 169, page 828: "A benefit plan offered by an employer to all its employees and impliedly accepted by them through remaining in the employment constitutes a contract between the employer and employee, the service rendered by the employee being a sufficient consideration to support the employer's promise to pay benefits. In such case the plan is not a mere gratuity or charity conferring on the employees and their dependents no legal rights, and payments of benefits under the plan are not mere gratuities to be awarded in the discretion of the corporate employer's officials."

The only case cited by appellant on this issue that requires special notice is Russell v. H. W. Johns-Manville Co., 53 Cal.App. 572, 200 P. 668. In that case the plaintiff was a month-to-month salaried employee. In October, 1918, the employer published a notice to the effect that, in recognition of services rendered, the company would pay, as additional compensation to all salaried employees "who have been in the company's employ for the calendar year of 1918," a specified bonus. Plaintiff was discharged on November 16, 1918, and sought to recover the promised bonus. A judgment for plaintiff was reversed. The exact theory of the reversal is not clear from the opinion. Much is said about the promised bonus being a "grautity," and there is no doubt that the appellate court believed that the notice constituted a mere promise to make a gift. This thought, however, is inconsistent with the holding in the City of Long Beach case, supra, and out of line with the overwhelming weight of authority. The case has been severely criticized (Scott v. J. F. Duthie & Co., 125 Wash. 470, 216 P. 853, 28 A.L.R. 328), no petition for hearing was requested, it has never been cited with approval, and, on at least two occasions, it has been explained away or distinguished by California courts. Redd v. Williams Radiator Co., 112 Cal.App. 353, 358, 296 P. 676, hearing denied; Sieck v. Hall, 139 Cal.App. 279, 294, 34 P.2d 844. The case is readily distinguishable from the present one on its facts. In the Russell case the offer was to pay a bonus to those still in the employ on December 31, 1918. That offer could be accepted only by performing the act requested, namely, remaining in the employ until that date. The employee was fired before that date, so the act required was never performed. The unilateral contract never came into existence. But in the instant case the offer was to pay a cash sum, according to a fixed formula, to all employees who remained in the employ of the bank for over 10 years, and voluntarily retired. Plaintiff accepted that offer by remaining in the employ of the bank for 49 years, during 23 of which he had knowledge of the offer.

[5] This point need not be labored further. It is obvious that, under the admitted facts as found by the trial court, there was an offer to contract which was accepted by the performance of the act required, and that the continued service of plaintiff after knowledge of the offer constituted ample consideration to support the contract.

[6] But, says appellant, if a contract existed, it was too uncertain in its terms to be enforceable. This contention is based upon the admitted fact that plaintiff did not know of the precise formula involved until 1940, and until 1941 was confused as to what base pay was involved in the formula. For 23 years plaintiff knew that there was a formula and knew that, if he remained with the bank, upon retirement he would receive a large cash payment as deferred compensation. The fact that the precise terms of the formula were not known to plaintiff is immaterial as long as such terms were capable of ascertainment by the conduct of the parties or otherwise. Allen v. Cross, 66 Cal.App. 130, 225 P. 765; see Williston on Contracts, Vol. 1, § 49, p. 138; Roy v. Salisbury, 21 Cal.2d 176, 130 P.2d 706. An offer too uncertain to create a bilateral contract if accepted, may, by performance by the offeree, create a unilateral contract. 12 Am.Jur. p. 554, § 64.

We therefore conclude that, under the facts found, there was an enforceable contract amply supported by consideration, and that the conclusion of law to the contrary, erroneously placed in the findings, being contrary to the admitted facts, must be disregarded.

[7, 8] Our conclusion that there was an enforceable obligation to pay the balance of the retirement allowance need not be predicated solely upon the theory that there was an offer and acceptance and consideration. Even if the promise had been originally intended as a promise to make a gift, under the facts here involved, such promise would be enforceable. The undisputed and found facts show that after plaintiff knew of the promise, he received several offers of employment by other banks and turned them down because, if accepted, he would lose his retirement allowance. The promise was one that was designed to accomplish just that result. Under such circumstances the doctrine of promissory estoppel is ap-

plicable. That doctrine is defined as follows in § 90 of the Restatement of Contracts: "A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."

The following illustration is given in the Restatement of a proper application of the section: "A promises B to pay him an annuity during B's life. B thereupon resigns a profitable employment, as A expected that he might. B receives the annuity for some years, in the meantime becoming disqualified from again obtaining good employment. A's promise is binding." See, also, Pomeroy's Equity Jurisprudence, 5th Ed., Vol. III, § 808b, p. 211. The rule is followed in California. Burlingame v. Rowland, 77 Cal. 315, 19 P. 526, 1 L.R.A. 829; Kinsell v. Thomas, 18 Cal.App. 683, 124 P. 220; Churchill v. Russell, 148 Cal. 1, 82 P. 440; Carpy v. Dowdell, 115 Cal. 677, 47 P. 695; Seymour v. Oelrichs, 156 Cal. 782, 106 P. 88, 134 Am.St.Rep. 154; Wilk v. Vencill, 30 Cal.2d 104, 180 P.2d 351. This constitutes an alternative ground for holding that there was a legally enforceable obligation to pay the balance of the retirement allowance. This conclusion makes it unnecessary to determine whether there was an account stated, an open book account, or a trust, three other theories relied upon by plaintiff.

The only other major contention of defendant is that the obligation to pay the balance, if an obligation existed, was that of the home office in Japan and not that of the San Francisco branch, and that, under § 7 of the California Bank Act (1 Deering's California General Laws, Act 652), the liquidator is prohibited from paying the debt out of the assets of the San Francisco bank. This same contention was urged in the trial court, and the court found contrary to it. Defendant admits that § 7 has no application if the obligation was that of the San Francisco bank.

[9] The defendant argues that the regulations relating to retirement came from the home office; that the orders for retirement payments came from that office; that the books show that the $20,000 that was paid was charged to the "profit and loss" account, and from there carried into the "inter-office" or "president's" account, and so became a charge against the home office; that the books show that the assets of the San Francisco office were not charged with the $20,000 payment. It is true that the $20,000 payment was charged against the "profit and loss" account, but so were other expenses of the local bank. All expenses of the local bank reduced the profit ultimately sent to Japan. The real question is not what the books show, but where did the obligation arise, and where and from what assets was plaintiff entitled to be paid? While the regulations pertaining to retirement were framed by the managing officers in Japan, the substance of such regulations was communicated to plaintiff in San Francisco by managers and sub-managers of the San Francisco bank. The regulations were applicable to employees in the San Francisco bank. The services were rendered in San Francisco for the San Francisco bank, and it was the performance of those services that constituted the acceptance of the offer of a unilateral contract. Thus the contract was entered into in San Francisco, the services were rendered here, and the plaintiff was entitled to payment here from the assets of the San Francisco bank. This payment differed in no way from the normal salary payment due plaintiff. It was deferred compensation, and, as such, was the obligation of the San Francisco bank. The finding and conclusion to this effect are amply supported by the evidence, and are sound in law.

The finding to the effect that the rules and regulations of the bank formed no part of plaintiff's contract of employment is stricken from the findings, and the conclusions of law are amended to provide that such rules and regulations were part of plaintiff's contract of employment, and that, under the facts found, a contract existed, amply supported by consideration, to pay to plaintiff his retirement allowance.

The judgment appealed from is affirmed.

WARD and BRAY, JJ., concur.

Hearing denied; SCHAUER, J., dissenting.

87 Cal.App.2d 862

GETTMAN v. CITY OF LOS ANGELES, DEPT. OF WATER & POWER et al.

Civ. 16436.

District Court of Appeal, Second District, Division 1, California.

Oct. 8, 1948.

As Modified Oct. 18, 1948.

1. Husband and wife ⚷254

Where life insurance is paid for partly with community and partly with separate funds, proceeds of policy should be apportioned in same ratio that amount of community funds paid for premiums bears to amount of separate funds paid, as in the case of tangible property purchased partly with community and partly with separate funds.

2. Husband and wife ⚷273(1)

Where employee subject to retirement plan giving employee no control over contributions into fund nor over amount payable on death and granting no loan value or privileges connected therewith, made payments into death benefit and retirement funds both before and after marriage and named son by former marriage as beneficiary to exclusion of second wife, proceeds payable on employee's death were to be apportioned between named beneficiary and second wife in same ratio that amount of payments made after marriage bore to amount of payments made before marriage.

Appeal from a Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action by Wallace A. Gettman against the City of Los Angeles, Department of Water & Power, and Lois Gettman, individually and as administratrix of the estate of Ernest L. Gettman, deceased, to recover proceeds payable upon death of decedent under provisions of the Water & Power Employees' Retirement Plan. From the judgment, defendant Lois Gettman appeals.

Reversed with directions.

Olof G. Hoegstedt and John J. Craig, both of Los Angeles, for appellant.

Emmet A. Tompkins, of Los Angeles, for respondent, Wallace A. Gettman.

Ray L. Chesebro, City Atty., Gillmore Tillman, Chief Asst. Atty., for Water & Power, and Everard L. McMurrin, Deputy City Atty., all of Los Angeles, for respondent City of Los Angeles, Department of Water & Power.

DORAN, Justice.

This appeal involves certain proceeds payable upon the death of Ernest L. Gettman, an employee of the Los Angeles Department of Water and Power, under the provisions of what is referred to as the Water and Power Employees' Retirement Plan. Claiming the entire amount due under an employees' Death Benefit Fund and Retirement Fund, to which the deceased employee had contributed, are the plaintiff, Wallace A. Gettman, decedent's son by a first marriage, denominated by the decedent as beneficiary; and the defendant and cross-complainant Lois Gettman, a second wife of the employee, Ernest L. Gettman, deceased. The trial court rendered judgment giving to the named beneficiary, Wallace A. Gettman, the entire proceeds of these funds. Appellant's motions for a new trial and to set aside the judgment and enter a new and different judgment were denied.

The following statement of facts is based upon the pleadings and stipulations. On August 10, 1938, Ernest L. Gettman "became a member of the Water and Power Employees' Retirement plan, naming Eunice S. Gettman, his then wife, as beneficiary. Eunice S. Gettman died prior to March 8, 1939." On March 8, 1939, Mr. Gettman changed the named beneficiary to Wallace A. Gettman, decedent's son, respondent herein. On March 11, 1944, Ernest L. Gettman married a second wife, Lois Gettman, appellant; and on May 30, 1946, Gettman died intestate, leaving the widow Lois Gettman, Wallace A. Gettman, adult son by the first marriage, and Wendla Gettman, a two-year old daughter by the decedent's second marriage. Lois Gettman was duly appointed administratrix, and both the widow and the son filed claims to the proceeds due under the above mentioned retirement plan.

It was further stipulated that the Death Benefit involved herein amounts to $2,750; that the total amount paid by decedent into the Death Benefit Fund was $71.55, of which amount 72.83% was paid previous to decedent's marriage to appellant Lois Gettman, and 27.17% was paid after said marriage. According to the stipulation, "payments into the Retirement Fund are separate and distinct from the payments into the Death Benefit Fund and are payable to the member upon either his retirement or his leaving the employ of the Department of Water & Power of the City of Los Angeles. That the payments into the Retirement Fund in the event of death prior to retirement, in effect, represent an account of the member and that interest is paid thereon."

The trial court found that the total amount paid into the Retirement Fund, including interest, to the date of Gettman's death was $914.10; 57.46% of Gettman's contributions thereto were made prior to the second marriage of March 11, 1944, and 42.54% after said marriage. As hereinbefore indicated, the trial court concluded that the son and named beneficiary, "is entitled to the sum of $3,664.10 (the total amount) due from the Department", and gave judgment accordingly.

It is argued in appellant's brief that, (1) "The Conclusions of Law and Judgment are not supported by the evidence and the Findings of Fact"; (2) that Lois Gettman, as administratrix, is entitled to that portion of the Retirement Fund which was contributed to out of Gettman's earnings, with interest, namely $525.29, "which was the separate property of Ernest L. Gettman prior to his marriage to Lois Gettman * * *"; (3) "That the widow, Lois Gettman, is entitled to that portion of the Retirement Fund which was contributed to out of (Gettman's) salary or earnings", with interest, namely $388.51, "which was the community property of Ernest L. Gettman and Lois Gettman during their marriage"; and (4) that the widow is entitled to the entire Death Benefit Fund of $2,750 "inasmuch as the last contribution for said Death Benefit was paid out of the salary or earnings of Ernest L. Gettman" during said marriage, "and which contribution paid for a specified period of future protection and the amount collectible under said Death Benefit was fixed and determined by the rate of earnings of Ernest L. Gettman immediately prior to his death".

The respondent Wallace A. Gettman, decedent's son and named beneficiary, contends that if the court "awarded Lois Gettman any of the funds due * * * under the Retirement Fund, the court would be making a new contract for the deceased", and that such holding "would overrule the provisions of the Retirement system * * * that the employee may designate his beneficiary", which designation was made in this case.

Still another view is presented in a brief filed by the respondent Los Angeles Department of Water & Power. After a discussion of the provisions and purposes of the Retirement Plan, and the law in reference to community property, the Department brief attacks the trial court's finding that the entire sum payable "was and is the separate property of the deceased, Ernest L. Gettman". It is there pointed out that "the record shows without conflict that the contributions with which the death benefits were purchased were deducted from the earnings of the decedent and paid into the Retirement Fund and Death Benefit Fund both before and after his marriage to Lois Gettman. Therefore the payment of all such contributions prior to said marriage constituted an investment of separate property, and the payment of all such contributions subsequent to said marriage represented an investment of community assets". On this theory the widow, Lois Gettman, as survivor of the community, would be entitled to one-half of that portion of the benefits which were purchased with community funds, the balance being payable to Wallace A. Gettman, decedent's named beneficiary. The exact result of this computation is that the widow should receive $373.59 from the Death Benefit Fund, and $194.43 from the Retirement Fund, or a total of $568.02, with the balance payable to Wallace A. Gettman.

The Department's theory is, of course, unacceptable to either the widow, appellant herein, or to the son, Wallace A. Gettman, respondent.

[1, 2] Under the existing law of community property and the decisions concerning proceeds from insurance purchased with community and separate money, the judgment of the trial court giving the entire death and retirement funds to the named beneficiary must be reversed. The stipulated facts concerning contributions to these funds require an equitable division thereof in accordance with the theory set forth in the brief of the Department of Water and Power to which reference has heretofore been made. In this connection it may be mentioned that the Department has no possible interest in the disposition of the amount payable other than securing the protection resulting from a judicial determination in respect to rights of the rival claimants.

The appellant's contention that since the last month of protection was purchased with community money the entire amount payable from the Death Benefit Fund constitutes community assets which would pass to the widow, is clearly untenable. In Modern Woodmen of America v. Gray, 113 Cal.App. 729, 733, 299 P. 754, 755, the insured had paid premiums from 1898 to 1923, naming a first wife as beneficiary. Later there was a change of beneficiary as in the instant case, and a second marriage during which four quarterly premiums were paid from community funds. Upon the insured's death, the second wife, as in the present case, claimed the entire proceeds upon theories similar to those here advanced. The court there said: "Where, as here, the life insurance is paid for partly with community and partly with separate funds, the proceeds of the policy should in our judgment be apportioned in the same ratio that the amount of such community funds paid for premiums bears to the amount of separate funds paid for such purpose. This is the rule applied to tangible property purchased partly with community and partly with separate funds", citing Vieux v. Vieux, 80 Cal.App. 222, 229, 251 P. 640, and other cases. And in McBride v. McBride, 11 Cal.App.2d 521, 524, 54 P.2d 480, 481, the additional observation was made: "It is also argued that because the insurer was a so-called assessment company, each new premium payment initiated a new policy of insurance. There is no merit in these contentions."

The appellant's brief seeks to escape the consequence of the above holdings by the claim that "The Death Benefit * * * is not an insurance policy in that Ernest L. Gettman had no control over his contributions into said fund; he had no control over the amount payable upon his death inasmuch as such amount was based upon the compensation received by him immediately prior to his death; he had no loan value or privileges connected therewith." But, by whatever name the benefit in question may be called, the analogy is clear and unassailable. Since both community and separate funds went into the creation of the benefit, no equitable division is possible other than that sanctioned in the decisions mentioned.

The case of Cheney v. City and County of San Francisco, 7 Cal.2d 565, 569, 61 P.2d 754, 756, has been cited by all parties to this appeal in support of the several arguments. The Cheney case, however, involved factual elements not here present, namely a prenuptial agreement, and an interlocutory decree of divorce. But the retirement fund with which that case was concerned was not dissimilar to the one here under discussion, and the reviewing court there said: "We are perforce committed to the view that the amount payable from the employees retirement system upon the husband's death represented earnings. As such it was community property unless the agreement executed by the husband and wife providing otherwise was still in force." Since the agreement providing that "earnings" of each party should be deemed separate property of that party, was still in force, the husband's nominated beneficiary was held entitled to the entire fund,—the husband's separate property by virtue of the agreement. There is nothing in the Cheney case nor in any other decision cited, contrary to the view hereinbefore expressed.

The judgment of trial court is reversed with directions to enter a judgment in favor of the appellant Lois Gettman in the total sum of $568.02, representing $373.59 from the Death Benefit Fund and $194.43 from the Retirement Fund; and in favor of respondent Wallace A. Gettman in the total sum of $3,096.08, representing $2,376.41 as the balance from said Death Benefit Fund, and $719.67 as the balance from said Retirement Fund.

YORK P. J., and WHITE J., concur.

---

87 Cal.App.2d 848

In re GUARDIANSHIP OF SIMPSON et al.

KOEBRICH v. SIMPSON.

Civ. 16497.

District Court of Appeal, Second District, Division 2, California.

Oct. 6, 1948.

1. Divorce 🔑332

Where there is a valid divorce decree by court of sister state fixing custody of child, California courts will give full force and effect to such decree when child is not domiciled in, but is temporarily sojourning in, California.

2. Divorce 🔑332

Where New Mexico divorce decree was modified to award father complete custody of son but mother brought son to California for purpose of circumventing the New Mexico decree and filed application for custody of son, the son was not domiciled in California; California court properly gave full faith and credit to New Mexico decree and properly declined jurisdiction.

◆

Appeal from Superior Court, Los Angeles County; Joseph M. Maltby, Judge.

Proceeding in the matter of the guardianship of Donald Lake Simpson and another, by Lenore Koebrich against Donald Herbert Simpson. From judgment refusing to grant custody, petitioner appeals.

Affirmed.

Fred M. Riedman, of Long Beach, for appellant.

W. Peter McAtee, of Albuquerque, N. M., for respondent.

McCOMB, Justice.

From a judgment after trial before the court without a jury refusing to grant petitioner, Lenore Koebrich, the custody of Donald Lake Simpson, the minor child of petitioner and Donald Herbert Simpson, she appeals.

Chronology.

In September of 1941, petitioner and Donald Herbert Simpson, contestant, were divorced in the state of New Mexico. There were two children, issue of such marriage, Kathleen Simpson and Donald Lake Simpson. The decree awarded the custody of the children to petitioner with the right in Mr. Simpson to have them over weekends and during holidays and school vacation periods. Petitioner then moved to the state of Arizona.

Mr. Simpson peaceably secured possession of his son in Arizona and took him back to the state of New Mexico, and thereafter on June 23, 1943, after a hearing at which petitioner (Mrs. Simpson) was represented, obtained an order of the court in New Mexico awarding him the complete care and custody of his son until the further order of the court. On November 9, 1943, petitioner kidnapped the minor son of the parties and took him from the state of New Mexico to the state of Arizona. On February 25, 1944, she obtained an order from the superior court of the state of Arizona awarding her the custody of Donald Lake Simpson. On October 4, 1946, the Arizona court vacated its order awarding the custody of said son to petitioner and held petitioner in contempt of court, finding that she had fled from the jurisdiction of the court and concealed her whereabouts in order to prevent Mr. Simpson from exercising his right of visiting his son in accordance with the court's order.

Thereafter petitioner brought her son to the state of California and filed an application to be appointed his guardian, requesting that his custody be awarded to her. This the trial judge refused to do on the ground that the courts of California should give full faith and credit to the prior decree of the New Mexico court awarding the custody of the child to Mr. Simpson.

Question.

When there is a valid divorce decree fixing the custody of a child by a sister state, will the courts of California give full force and effect to such decree when the child is not domiciled in, but is temporarily sojourning in the state of California?

[1] This question must be answered in the affirmative. The full faith and credit clause of the Federal Constitution precludes the courts of California from awarding to a mother the custody of a child who is not domiciled here when there is in existence a valid order of a court of a sister state awarding the custody of such child to its father. (Foster v. Foster, 8 Cal.2d 719, 727 et seq., 68 P.2d 719; Chapman v. Walker, 144 Okl. 83, 289 P. 740, 741; State v. Superior Court for Jefferson County, 25 Wash.2d 125, 169 P.2d 626, 628; McMillin v. McMillin, 114 Colo. 247, 158 P.2d 444, 445, 160 A.L.R. 396; Jones v. McCloud, 19 Wash.2d 314, 142 P.2d 397, 401.

[2] From the facts in the instant case, it is clear that Donald Lake Simpson was not domiciled in the state of California at the time the present petition was filed, but had been brought here wrongfully by petitioner for the purpose of avoiding and circumventing the decree of the New Mexico court. Therefore, under the rule above stated, the courts of California are bound to give full faith and credit to the decree of the New Mexico court awarding custody of the minor child to his father, and the trial judge in the instant case properly declined to entertain jurisdiction of the matter for the purpose of changing the order awarding custody of said child.

Foster v. Foster, 8 Cal.2d 719, 68 P.2d 719, in so far as it is relied on to support petitioner's contention, is inapplicable to the present case for the reason that the minor child involved in such case was brought into the state of California legally and was domiciled here. Such are not the facts in the case at bar, as the minor was not domiciled in California.

For the reasons above stated the judgment is affirmed.

MOORE, P. J., and WILSON, J., concur.

---

87 Cal.App.2d 809

STRATTON v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.

Civ. 16622.

District Court of Appeal, Second District, Division 2, California.

Oct. 5, 1948.

Hearing Denied Dec. 2, 1948.

1. Mandamus 🔑31

When court refuses to pass on matter before it on ground that it is without jurisdiction, mandamus is proper remedy to compel court to act, if proceeding is one of which court has jurisdiction.

2. Husband and wife 🔑268(1)

Community property is liable for husband's debts, whether contracted for community's benefit or for his personal benefit.

3. Courts 🔑200½

The superior court, sitting in probate, has jurisdiction to determine title to property claimed by representative of incompetent owner's estate in individual capacity, but is without jurisdiction to determine adverse rights to such property as between estate and strangers thereto.

4. Insane persons 🔑91

In proceeding to require guardian of estate of petitioner's incompetent wife to apply community property in payment of alleged community debt and direct delivery of such property to petitioner, where guardian denied that property was community property and alleged that petitioner and ward held property as tenants in common, superior court properly refused to determine issues raised by petition and guardian's objections. Probate Code §§ 1435 et seq., 1435.8.

5. Mandamus 🔑4(3)

An order refusing to instruct guardian of incompetent wife's estate to apply community property in payment of alleged community debt and deliver it to ward's husband, after sustaining demurrer to his petitions for such relief, was appealable order, so as to bar mandamus to compel superior court to take jurisdiction of petitions and grant such relief. Probate Code §§ 1435 et seq., 1435.8, 1630.

◆

Proceeding by G. W. Stratton for a writ of mandate to compel the Superior Court in and for the County of Los Angeles to take jurisdiction of and grant petitions to require the Security-First National Bank of Los Angeles, as guardian of the estate of petitioner's incompetent wife, to apply community property in payment of an alleged community debt.

Petition for peremptory writ denied, and alternative writ discharged.

Leo V. Silverstein and Fleming, Robbins & Tinsman, all of Los Angeles, for petitioner.

Harold W. Kennedy, County Counsel, and James A. Cobey, Deputy County Counsel, both of Los Angeles, for respondent.

Geo. W. Dryer, Stanley C. Lagerlof and Herbert V. Walker, all of Los Angeles, for Security-First Nat. Bank of Los Angeles, guardian, real party in interest.

WILSON, Justice.

Petitioner is the husband of Cora L. Stratton, an incompetent person, of whose estate Security-First National Bank of Los Angeles is guardian. The guardian and the petitioner sold two parcels of real property alleged by petitioner to have been community property but the guardian asserted it to have been owned by them as tenants in common. Petitioner presented his amended petitions to the superior court sitting in probate for an order requiring the guardian to apply community property held by it in payment of an alleged community debt and for hospitalization of the incompetent and for an order directing delivery to petitioner of community property held by the guardian. A demurrer was filed by the guardian, together with objections raising issues of fact as to the character of the property and the indebtedness. The demurrer was sustained without leave to amend, after which judgment was entered reciting that the court found that the amended petitions did not state sufficient facts to constitute a cause of action and dismissing them for lack of jurisdiction.

Petitioner seeks a writ of mandate to compel the superior court to take jurisdiction of and to determine the controversy between petitioner and the guardian of his wife's estate.

Petitioner maintains not only that the superior court sitting in probate should have entertained jurisdiction of his petitions but that it should have ordered the guardian to apply the funds in its possession as he requested for the reason that such funds were community property and therefore should be devoted to the satisfaction of the community indebtedness.

The guardian's demurrer to the petition and its objections thereto filed in the superior court raised two issues: (1) whether the property held by the guardian is community property of the petitioner and the ward, and (2) whether the estate held by it is liable for the payment of the indebtedness and expenditures mentioned in the petition, and at the same time challenged the jurisdiction of the probate court to determine the question of title to the funds or any issue as to the character of the indebtedness. The question before us is: Had the court power to determine those issues in a guardianship proceeding, or must they be presented in an adversative action on the civil side of the court?

[1] When the court mistakenly refuses to pass upon a matter before it on the ground that it is without jurisdiction, mandamus is the proper remedy to compel the court to act, provided the proceeding is actually one of which the court has jurisdiction. Lissner v. Superior Court, 23 Cal.2d 711, 717, 146 P.2d 232; Katenkamp v. Su-

perior Court, 16 Cal.2d 696, 698, 108 P.2d 1. If the matter is not within the jurisdiction of the court manifestly it cannot be required to act.

[2] Sections 1435 et seq. of the Probate Code, including section 1435.8 relied on by petitioner, are in a chapter titled "Community Real Property and Homestead Property of Insane or Incompetent Persons." The text of those sections refers and is applicable only to community property. Since the community property is liable for the debts of the husband, whether contracted for the benefit of the community or for the husband's personal benefit (Grolemund v. Cafferata, 17 Cal.2d 679, 688, 111 P.2d 641; Estate of Coffee, 19 Cal.2d 248, 252,120 P.2d 661; Brunvold v. Victor Johnson & Co., Inc., 59 Cal.App.2d 75, 80, 138 P.2d 32), it will be assumed that if the funds in question in this proceeding had been admitted to be community property the petitions would have been granted by the probate court. The guardian denied the community character of the assets of the guardianship.

[3] Although the superior court sitting in probate has jurisdiction to determine title to property when it is claimed by a representative of the estate in his individual capacity (Estate of Boggs, 33 Cal.App.2d 30, 34, 90 P.2d 814; Bauer v. Bauer, 201 Cal. 267, 271, 256 P. 820) it is without jurisdiction to determine adverse rights to such property as between the estate and strangers thereto. Guardianship of Vucinich, 3 Cal.2d 235, 243, 44 P.2d 567; Estate of Dalton, 87 Cal.App.2d 333, 197 P.2d 62. Where the decedent and another party were tenants in common the probate court was held to be without power to determine adverse rights to the property. McCarthy v. McCarthy, 205 Cal. 184, 185, 270 P. 211. The case of Colden v. Costello, 50 Cal.App.2d 363, 122 P.2d 959, cited by petitioner, is factually different from the instant proceeding and is not in point.

[4, 5] Since petitioner is not a representative of the guardianship estate but is a stranger to the proceedings making a claim to the property in possession of the guardian, and since the guardian denies that such property is community property of petitioner and the ward but that they hold it as tenants in common, the trial court rightly refused to determine the issues raised by the petition and the guardian's objections. Furthermore, the order refusing to instruct the guardian which followed the sustaining of the demurrer is an appealable order (Prob. Code, sec. 1630), hence there would be no occasion for a writ of mandate if the court had erred in its ruling.

The petition for a peremptory writ of mandate is denied and the alternative writ is discharged.

MOORE, P. J., and McCOMB, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

87 Cal.App.2d 735

PEOPLE v. BUNDTE et al.

Crim. 2024.

District Court of Appeal, Third District, California.

Sept. 28, 1948.

As Modified on Denial of Rehearing Oct. 13, 1948.

Hearing Denied Oct. 25, 1948.

1. Indictment and Information 🔑129(4), 131

Where there was proof that each of offenses charged in indictment grew out of same series of connected transactions and that they were inspired by common purpose on part of defendants and their associate strikers, and there was also proof that riots and assaults charged were offenses of same class or character and that they were all perpetrated by same group of pickets, acting together to win strike by force, several offenses were properly united in one indictment, notwithstanding that counts of riot charged only misdemeanors while counts of assaults to commit bodily injuries charged felonies. Pen.Code, §§ 245, 404, 954.

2. Riot 🔑1

Where force and violence alleged in counts of indictment charging riot was throwing of large stones by defendants and their associate strikers at nonunion workmen, it was not necessary that previous agreement between the aggressors should have been alleged, or have existed, to bring such offenses within inhibitions of statute defining riot. Pen.Code, § 404.

3. Riot 🔑1

Even if defendants and their associate strikers met lawfully for peaceable picketing, if defendants and their associates afterwards co-operated and acted together for unlawful purpose of using force and violence to disturb public peace, they would be guilty of riot under statute. Pen.Code, § 404.

4. Riot 🔑1

The concurrence of defendants, unlawfully acting together and with their striking associates, in use or threat to unlawfully use force or violence against nonunion workmen constituted offenses of "riot" within statute, regardless of whether there existed a previous agreement of parties to exercise force or violence. Pen.Code, § 404.

See Words and Phrases, Permanent Edition, for all other definitions of "Riot".

5. Indictment and Information 🔑131

In absence of statute to contrary, where under indictment for felony defendant may be convicted of misdemeanor, separate counts for the two offenses, regardless of whether they are misdemeanors or felonies, may be joined in one indictment provided they grow out of same transaction or belong to same general class of offenses which are corollary in nature.

6. Indictment and Information 🔑130

The joining of counts of indictment were valid provided offenses charged were of same class or if there was a common element of substantial importance in their commission. Pen.Code, § 954.

7. Riot 🔑3

All who encourage, incite, promote or take part in riot are guilty of riot as "principals", and a person to be guilty as a rioter need not be actively engaged, but if present, and giving support, countenance, etc., it is sufficient, but mere presence alone is not sufficient to constitute one a rioter.

See Words and Phrases, Permanent Edition, for all other definitions of "Principal".

8. Indictment and Information 🔑127

Where demurrer to indictment was to asserted invalidity of instrument as a whole and did not apply to any particular count, misjoinder of offenses separately charged would not invalidate indictment as a whole, if any single count therein was sufficient in form and substance to charge a public offense.

9. Riot 🔑6

Evidence supported finding that defendants were guilty of riot under statute by acting together and disturbing public peace by throwing of large rocks at persons and automobiles of nonunion worker while serving as pickets during strike. Pen.Code, §§ 31, 404.

10. Criminal law 🔑622(1)

A defendant jointly charged with another or others with any public offense is not entitled as matter of right to a separate trial. Pen.Code, § 1098.

11. Criminal law 🔑622(1), 1152(1)

The question of right to a severance of trial by one who has been jointly indicted with another or others is addressed to trial court's discretion, with which decision appellate court may not interfere except upon a clear abuse of that discretion. Pen. Code, § 1098.

12. Criminal law 🔑622(2)

Denial of application for separate trials by defendants who had been jointly indicted on charges of participating in riots and of assaults committed upon different named persons by means likely to produce great bodily injury was not abuse of discretion. Pen.Code, § 1098.

13. Criminal law 🔑808½

An instruction in language of statute that if defendants aided, abetted or encouraged commission of assaults upon nonunion workmen with rocks by other strikers they would be deemed to be principals in the assaults, even though there was an absence of proof that defendants themselves actually threw the rocks, was proper, notwithstanding that counts in indictment charged defendants with throwing the rocks. Pen.Code, §§ 31, 245.

14. Assault and battery ⇨83
Criminal law ⇨404(3)

In prosecution for assaults by means of force likely to produce great bodily injuries, by throwing rocks at certain persons, prosecution was not precluded from showing that defendants aided, abetted and encouraged other strikers to commit the assault by throwing rocks and that they were therefore guilty as principals, even though in some instances throwers of the rocks were not identified, and, hence receiving in evidence the rocks so thrown without proof that defendants personally threw them was not error. Pen.Code, §§ 31, 245.

15. Crimianl law ⇨404(3)

In prosecution for assaults by means of force likely to produce great bodily injuries by throwing rocks at enumerated nonunion workmen, where rocks which were introduced in evidence were identified as those which shattered windows of automobiles of nonunion workmen and were found in such automobiles or upon running boards thereof, rocks were sufficiently identified to be admissible. Pen.Code, §§ 31, 245.

16. Assault and battery ⇨92

Evidence supported finding that defendants were guilty of assaults by means of force likely to produce great bodily injuries, by throwing rocks at enumerated nonunion workmen as principals, notwithstanding that defendants, in three or four instances, were not definitely identified as the particular persons who threw the rocks. Pen.Code, §§ 31, 245.

17. Criminal law ⇨438

In prosecution for assaults by means of force likely to produce great bodily injuries, by throwing rocks at enumerated nonunion workmen in attempt to intimidate them from pursuing their lawful employment, photographs of automobiles of nonunion workmen taken immediately after the assaults occurred were competent. Pen. Code, § 245.

18. Criminal law ⇨444, 1153(6)

The sufficiency of preliminary proof for admission of a photograph is within trial judge's discretion, and where there is substantial evidence of adequate foundation for its admission, that discretion will not be interfered with upon appeal.

19. Criminal law ⇨438

Photographs are competent for same reason that diagrams and maps are admissible to show the relative location of objects and surrounding physical conditions, and photographs of weapons, instruments and objects involved in the issues are likewise admissible for similar purpose.

Appeal from Superior Court, Mendocino County; Lilburn Gibson, Judge.

John Bundte and William Phillips were convicted of participating in riots and of assaults committed upon different named persons by means likely to produce great bodily injuries, to wit, by the hurling of rocks; and they appeal.

Affirmed.

Clarence E. Todd, George E. Flood, Henry C. Todd, and Gordon W. Mallatratt, all of San Francisco, for appellants.

Fred N. Howser, Atty. Gen., and Doris H. Maier, Deputy Atty. Gen., for respondent.

THOMPSON, Justice.

The defendants were jointly indicted in three counts under Section 404 of the Penal Code for participating in riots, and in nine counts under Section 245 of that code for assaults committed upon different named persons by means likely to produce great bodily injuries, to-wit, by the hurling of rocks. They were tried by jury and convicted of all counts, except that William Phillips was acquitted of the assault charged in the fourth count. The riots charged in the first two counts occurred on January 30, 1947, and the riot charged in count three, together with the assaults charged in the nine remaining counts occurred February 4, 1947. All offenses grew out of a labor dispute. The defendants, together with 30 or more union labor men, were engaged in picketing two adjacent lumber mills near Willits in Mendocino County. The assaults were made on non-union employees of the mills and upon one driver of a truck who was hauling lumber from another mill to Oakland. The assaults were made by the defendants and their associate pickets, acting together, upon the non-union workmen, by hurling rocks at them. Several of the workmen were seriously injured.

A demurrer to the indictment was overruled. Motions for a directed verdict and for a new trial were denied. The trial commenced on April 14, 1947. Separate verdicts were returned against each defendant. Judgment was rendered accordingly. The defendants were sentenced upon each conviction of riot to the county jail for the term of 180 days, such sentences to run concurrently. They were also sentenced upon each assault of which they were convicted to state prison for the term prescribed by law, said sentences to begin at the expiration of the county jail sentences, and to also run concurrently. From said judgment the defendants have appealed.

The appellants contend that the counts for riots under Section 404 of the Penal Code, which are misdemeanors, Penal Code, sec. 405, were improperly joined in the indictment with the remaining counts of assaults to commit bodily injuries under Section 245 of that code, which are felonies. They therefore assert that the court erred in overruling their demurrer, and their motions for a directed verdict and for new trial, on that ground, and because of a lack of evidence showing that the defendants *acted together* in committing the riots to disturb the public peace *by means of force or violence;* that the evidence fails to show that the defendants personally threw the rocks that injured some of the workmen or damaged their automobiles; that the evidence fails to show they cooperated with the other strikers in commission of the offenses; that they should not have been found guilty of certain assaults in which they were not identified as personally hurling rocks, on the mere theory that they aided and abetted their associate strikers in committing the offenses; that section 31 of the Penal Code has no application to the circumstances of this case; that the court erred in instructing the jury in that regard, and that the court erred in admitting in evidence photographs of the rocks thrown and the automobiles damaged in said assaults.

The transcript contains 1,000 pages of evidence. There is much conflict of testimony on the essential issues. The strike of union labor employees commenced about a month prior to the commission of the offenses in question, at two adjacent lumber mills near Willits in Mendocino County. It continued to the time of the commission of the offenses. The riots charged in counts one and two occurred January 30, 1947, at the Hollow Tree Lumber Company mill located nine miles east of Rockport on the highway from Willits to Fort Bragg. The riot charged in count three and the assaults charged in the remaining counts occurred February 4, 1947, at Richardson Lumber Company mill situated on said highway two miles west of Willits. At the time of the affrays both mills were being operated by non-union workmen. Both mills were then picketed by a small number of men estimated at not more than 10 men. At the time of the disturbances in question the number of pickets had been increased to 30 or 35 men. Most of the same pickets were engaged in all the affrays. The defendants were among those assailing pickets, and active in all offenses charged at both mills. When the foreman and non-union employees left the Hollow Tree Lumber Company mill at noon to go to lunch at the cook-house, some distance down the roadway, they were compelled to pass through the picket line, consisting of 30 to 35 men who had congregated at the entrance to the mill. The defendants were then among those pickets. An open lane was forced by a deputy sheriff through the crowd of pickets, along which the non-union workmen passed. The defendant Bundte held in his hand a switch which he was flipping back and forth to intimidate the passing workmen. The officer warned him not to strike anyone with it. No one was struck. The attitude of the pickets was clearly antagonistic. But the workmen passed the picket line without an assault. When they reached a point about 100 yards down the roadway, George Sherrard, one of the strikers who had evidently been hiding there, suddenly stepped from behind a clump of bushes and hastened toward them. He was muttering and using "some pretty bad language." He bumped against Mr. Smith, who was in the lead, and deliberately "reached out and struck" in the face, or slapped Charles Scaife, the mill foreman. Sherrard and Scaife then clinched and a scuffle ensued. They fell to the ground. Scaife's brother James tried to separate them. Sherrard "jumped on top of Scaife." Observing the affray, a large group of the strikers ran down there. "Some of them had rocks and things in their hands." The defendants, Bundte and Phillips, were among them. The deputy sheriff also ran to the scene of the affray. "They all more or less arrived at the same time." "There were several remarks passed by them [the strikers] about getting the S.O.B. and words to that effect." William Smith testified, "The pickets came charging down the road, and there were sticks and stones in some of their hands. And they said 'Let's take the bastards' or words to that effect. * * * Mr. Bartolomei and John Bundte were one of the first there." The deputy sheriff testified that he heard the defendant Phillips say "I hope George [Sherrard] gets the bastard," and that Bundte said to Sherrard "Poke the —— ——, George." He said he saw Sherrard when "Scaife had [received] this more or less of a haymaker"; that "Bundte reached down awful low * * * and he says * * * 'Reno, you seen who started this,'" to which the officer replied "Yes, I seen who started this." The sheriff stopped the fight and told Bundte "You tell your men that there will be no more of this," to which Bundte responded by saying, "Men, there will be no more of this—*just as much.*" The inference is that Bundte thereby purposely encouraged "his men", the strikers, to continue the use of force and violence "just as much" as they desired. The strikers then returned to the mill, while the non-union workmen proceeded to the cook-house.

About two o'clock on the afternoon of January 30th, Ed Sands, who had been driving a truck for an Oakland firm for about eight years, reached the Hollow Tree Lumber Company mill with a heavy load of lumber chained to his truck and trailer, which he was hauling from Rockport to Oakland. He said he had been carrying a revolver, by permission, "ever since they tampered with the brakes in one of the other trucks." He was then driving along the highway past the entrance to the Hollow Tree Lumber Company mill at the rate of about 25 miles per hour. Robert Schenk, the treasurer of the last mentioned company, heard Sands' truck approaching. He said, "Apparently the pickets heard it too, because there were a number of shouts or statements that I heard that 'Here comes the truck.' * * * The ones around the fire, and the others started to climb out of their cars. And there was lots of scurrying around and picking up of rocks, * * *." The strikers formed on either side of the highway in two groups. They were armed with rocks. Schenk said that he saw 30 of them on his side of the road, and that "I didn't see anyone on my side that didn't throw rocks." Sands testified that he saw 40 or 45 pickets waiting for him at that place. He saw them reach down and pick up rocks. He anticipated trouble, and he reduced the speed of his machine, threw a shell into his automatic revolver and laid it on the cushion by his side. When he reached a point about 15 feet from the strikers, he said "they all started throwing rocks." A large stone crashed through the window of his cab and struck him with great force in the face. It broke his nose, cut his check, blackened his eye and stunned him. He was dazed, partially blinded and angry. He claimed that he identified the defendant Bundte as the man who threw that stone. He suddenly applied the brakes with such force that the cables which bound the lumber to the truck were loosened and the load slid forward, damaging his cab and jamming the doors. He seized the revolver and fired two shots toward Bundte without injuring anyone. He crawled through a window of his cab, with his revolver in hand, and proceeded to round up the assailants. Great commotion and wrangling ensued. The deputy sheriff soon arrived and quelled the disturbance. Sands stated that both Bundte and Phillips were among the pickets who attacked him, and charged Bundte with throwing the rock which struck him in the face, but Bundte called him a liar. Upon request, Sands promptly delivered his revolver to the officer, admitting that he fired the two shots after he had been struck. Two large rocks were found in his cab. They were identified and received in evidence. The rocks varied from the size of an egg to that of a cocoanut. That was the last assault on that day. All the pickets who were present participated in the assault upon Sands with rocks. Bundte and Sherrard appeared to be leaders in the affrays. Clearly, the strikers were the aggressors in both affrays, and the assaults appeared to have been deliberately planned with a common purpose to intimidate the non-union workmen and to win their strike. Those episodes may not be defended on the theory of the right of peaceable picketing. They were unprovoked assaults by unlawfully hurling deadly rocks with the intent to inflict great bodily injuries and to damage machines. The picketing force had been greatly increased the morning of the first affray. When one of the defendants was afterward inferentially charged with throwing one of the rocks, he said they ought to have done it long before that time.

The third count charged defendants with the commission of a riot on February 4th, at Richardson Lumber Company mill. Each of the remaining nine counts charged them with assaults upon different named persons, at the same time and place, committed by the hurling of rocks. As the non-union men drove in their separate machines to the mill to go to work that morning about 8 o'clock, they were met at the entrance by 25 or 30 pickets who were armed with rocks and were lined up on either side of the road. The defendants, Bundte and Phillips, were among them, and they actively participated in the assaults which followed. Some of the strikers were heard to exclaim "there goes another one of them s-of-b * * * scabs," and expressions of like import. Rocks were thrown by the strikers at all passing cars. Windshields and windows were shattered and the cars were otherwise damaged. Half a dozen of the workmen were seriously injured and sent to the hospital for treatment on that account. Pat Gibson, a truck driver for that company, operated the third car that arrived that morning. He testified that at least twelve rocks were thrown at him as he drove into the premises, most of which struck his machine. One rock broke his windshield and struck him in the head, seriously injuring him. He identified Bundte, Phillips, Sherrard, Moore, McCoard and Pimentel, among the other pickets who threw stones at him. After running the gantlet, he parked his car and, in company with another workman, watched, from behind a pile of lumber, the stoning of other machines of non-union workmen as they arrived that day. Stanley Richardson, one of the mill owners, testified that he arrived just behind the car of Sherman Schwartz and saw both Bundte and Phillips throw rocks at him. Richardson also identified Bundte as one of the men who threw rocks at him as he entered the premises. He also watched other workmen as they arrived, and said that each of them was stoned. There were only 14 mill employees at that time and they were greatly outnumbered by the strikers. Richardson told them to remain out of sight, while he went to summon an officer. He left from the rear of the building, and, keeping out of sight, he walked a quarter of a mile to the home of Mr. Sorensen where he telephoned to Willits for a taxicab and an officer. In about one hour the deputy sheriff arrived, and the disturbance was quelled.

[1] The first contention of appellants is that the court erred in overruling their demurrer to the indictment, on the chief ground that three counts of riots under Section 404 of the Penal Code, which are misdemeanors, were illegally joined with nine counts of assaults to commit bodily injuries under Section 245 of that code which are felonies. It is asserted those offenses were improperly joined in the indictment under Section 954 of the Penal

Code, because it was not alleged that they grew out of the same transaction, or that they belong to the "same *class* of crimes or offenses."

There is ample evidence to show that each of the offenses charged in the indictment grew out of the same series of connected transactions and that they were inspired by a common purpose on the part of the defendants and their associate strikers to perpetrate the riots and commit the assaults with rocks, of which the defendants were charged. We also think there is adequate proof that the riots and the assaults charged are offenses of the same class or character. They were all perpetrated by the same group of pickets, acting together to win a labor strike by means of force, violence and intimidation, consisting of stoning the non-union workmen with rocks.

We are therefore of the opinion the several offenses were legally united in the indictment, and that the demurrer was properly overruled.

It is true that the first two counts which charged defendants with participating in riots were committed five days before the riot occurred which is charged in count three, and that the assaults to commit great bodily injuries also occurred on February 4th. It is also true that the last mentioned riot and all of the assaults were committed at a mill owned by a company other than the one which owned the mill where the first two riots occurred. But the same labor troubles existed at both mills which are located in the same vicinity. Strikes existed in both mills. Picket lines had been maintained for the same period of time at both mills. The same group of pickets operated similarly and together at both mills in all the offenses charged. They were all actively engaged together for the same common purpose. All offenses were committed in the same manner by the same means of hurling rocks. We therefore conclude that all offenses charged grew out of the same series of connected transactions, and that they belong to the same class or character of offenses, and were therefore properly united in the indictment.

[2, 3] The general character of the offenses was the same. The riots were alleged in the language of the statute to have occurred, contrary to Section 404 of the Penal Code, by the defendants unlawfully "acting together" to disturb the *public peace* by the use of "force and violence." That force and violence was the throwing of large stones. It was not necessary that a previous agreement between the aggressors should have been alleged, or have existed, to bring such offenses within the inhibitions of Section 404. The strikers might have met lawfully for the purpose of "peaceable picketing", but if the defendants and their associates afterward cooperated and acted together for the unlawful purpose of using force and violence to disturb the public peace, they would nevertheless be guilty of a riot under that section. State v. Stalcup, 23 N.C. 30, 35 Am. Dec. 732; 8 R.C.L. p. 331, sec. 361. Section 404 defines a riot as: "Any use of force or violence, disturbing the public peace, or any threat to use such force or violence, if accompanied by immediate power of execution, by two or more persons acting together, and without authority of law, is a riot."

[4, 5] It is the concurrence of the defendants, unlawfully acting together and with their striking associates, in the use, or threat to unlawfully use force or violence, that constituted the offenses of riots. That section does not depend upon a previous agreement of the parties to exercise force or violence. 54 C.J. p. 832, sec. 6, and cases cited. Section 954, upon which appellants rely, authorizes the uniting in an indictment of "two or more different offenses connected together in their commission," or of "two or more *different offenses of the same class* of crimes or offenses." The statute makes no distinction between misdemeanors and felonies. A misdemeanor and a felony may belong to the same general class of offenses. In the absence of a statute to the contrary, in jurisdictions where, under an indictment for a felony, the defendant may be convicted of a misdemeanor, as he may in California, separate counts for the two offenses, regardless of whether they are misdemeanors

or felonies, may be joined in one indictment provided they grow out of the same transaction or belong to the same general class of offenses which are corollary in nature. 42 C.J.S., Indictments and Informations, § 180, page 1140; 27 Am.Jur., p. 690, sec 132. In the text last cited it is said: "Where * * * on an indictment for a felony a conviction for a misdemeanor is allowable, counts for felony and misdemeanor, growing out of the same transaction and of the same general nature and course of trial, may be joined."

And at page 688, section 130, of the last cited authority it is said in that regard: "* * * It is the general rule, * * *, that two or more offenses committed by the same person may be joined in the same indictment or information, to meet the exigencies of the evidence, where they are of the same general nature or class of crimes, * * * and where all the offenses grow out of the same transaction *or series of transactions or connected transactions,* even though the property forming the subject matter of the offense belonged to several different persons." (Italics added.)

It is likewise said in 42 Corpus Juris Secundum, Indictments and Informations, § 180, at page 1140: "Felonies and misdemeanors may, in some jurisdictions, be joined where charges relate to the same transaction, especially where the misdemeanor is in the nature of a corollary to the felony."

And the following paragraph adds that this may be done "although the offenses are of different grades and call for different punishments." (citing numerous authorities.)

The superior court had jurisdiction of misdemeanors constituting riots since the penalty is punishable by a fine in excess of $1,000 and by imprisonment not exceeding six months. Penal Code, sec. 1425; Const. art. 6, § 5; People v. Brenta, 64 Cal.App. 91, 220 P. 447. The penalty for riots is imprisonment not exceeding two years, or a fine not exceeding $2,000. Penal Code, sec. 405.

[6] It was not necessary that all of the charged offenses should have grown out of the same transaction, that they should have occurred on the same date, or that they were perpetrated against the same person or company. It was sufficient to render the joining of the counts of the indictment valid provided the offenses were *of the same class*, or as the Supreme Court recently said, "if there is a common element of substantial importance in their commission." In re Pearson, 30 Cal.2d 871, 186 P.2d 401, 402. In the case last cited the defendant was charged in one information with thirteen separate counts of different offenses, consisting of kidnapping, robbery and assaults with deadly weapons, committed on different dates and upon different persons. He was convicted of all felonies. On petition to the Supreme Court for a writ of habeas corpus, he contended that the judgment was void because there was a lack of authority to unite in one information under Section 954 of the Penal Code such "unrelated felony counts." The writ was discharged. In response to petitioner's contention, the court held that the various offenses were properly united in different counts of the same information. It said: "* * * Even on appeal, it appears, they would not have been cause for reversal. Joinder of distinct offenses is proper *'if there is a common element of substantial importance in their commission.'* People v. Scott, 1944, 24 Cal.2d 774, 778, 151 P.2d 517, 519. The consolidation of a group of charges similar to those against petitioner was upheld in People v. Duane, 1942, 21 Cal.2d 71, 74-77, 130 P.2d 123, where the 'common element" was a plan to rob managers of Safeway Stores. In any event the question of consolidation or severance is procedural and not, as petitioner contends, jurisdictional." (Italics added.)

[7] Regarding the guilt of all who participate in, or who promote or encourage, a riot, it is said in 8 Ruling Case Law, page 331, section 361, supported by authorities, that: "* * * All who encourage, incite, promote, or take part in a riot are guilty of riot as principals; and a person, to be guilty as a rioter, need not be actively engaged, but if present giving support, countenance, etc., it is suffi-

cient; but mere presence alone is not sufficient to constitute one a rioter."

[8] Moreover, the demurrer to the indictment in this case was to the asserted invalidity of the instrument as a whole. It did not apply to any particular count. The misjoinder of offenses separately charged will not invalidate the indictment as a whole, if any single count therein is sufficient in form and substance to charge a public offense. Culjak v. United States, 9 Cir., 53 F.2d 554, 82 A.L.R. 480, at page 482; 27 Am.Jur., p. 687, sec. 129. In this case the defendants were not prejudiced by the joining of the various counts. All of the evidence with respect to each count applied to both defendants. The evidence of the throwing of stones and of participation in the riots by other striking associates was competent, since there is adequate proof that the defendants were present during all of the affrays and not only threw stones themselves, but also aided and encouraged the other strikers by their conduct, statements and active participation in the force and violence which was exercised. In our judgment, the demurrer was therefore properly overruled. There is nothing in the authorities cited by appellants in conflict with the foregoing conclusion with respect to the proper joining of the different offenses in the indictment.

[9] For the foregoing reasons, we are of the opinion the defendants' motion for directed verdicts was also properly denied. We think there is adequate evidence to show that the defendants were guilty of the riots charged under Section 404 of the Penal Code by "acting together" in disturbing the public peace by the concerted use of force and violence, to-wit, the throwing of large rocks at the persons and automobiles of the employees of the mills. There is substantial evidence that the defendants aided, abetted and encouraged their striking associates in attacking the employees and in threatening and attempting to intimidate them from pursuing their lawful employment in the mills. Section 31 of the Penal Code makes all persons concerned in the commission of either a misdemeanor or a felony guilty as principals, if they directly commit the offense or aid, abet or encourage its commission.

[10-12] There is no merit in appellants' contention that the court erred in denying their application for separate trials. Section 1098 of the Penal Code provides in part: "When two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be tried jointly, unless the court order separate trials." It has been repeatedly held that a defendant so charged is not entitled as a matter of right to a separate trial. The question of the right to a severance of trial is addressed to the sound discretion of the trial court, with which decision we may not interfere, except upon a clear abuse of that discretion. People v. Isby, 30 Cal.2d 879, 897, 186 P.2d 405; People v. Goold, 215 Cal. 763, 12 P.2d 958; 4 Cal.Jur., Ten-Year Supp. 718, sec. 268; 104 A.L.R. 1519, note.

[13-16] The appellants contend that the court erred in receiving evidence under some of the separate counts charging them with assaults on February 4th, "by means of force likely to produce great bodily injury, to-wit, by throwing rocks at said ——— ———", and in receiving in evidence the rocks so thrown, without proof that the defendants personally threw them. It is argued that in charging the defendants, as principals, with actually throwing the rocks the prosecution was bound by such allegations and must prove that the defendants themselves threw the rocks, and that evidence of other strikers throwing rocks, on the theory that the defendants aided and abetted the commission of the assaults, or otherwise, was incompetent, citing People v. Carson, 155 Cal. 164, 99 P. 970, 973, and other similar cases. For the same reason, the appellants claim that the court erred in instructing the jury, in the language of Section 31 of the Penal Code, that if the defendants aided, abetted or encouraged the commission of the assaults with rocks by other strikers, they would be deemed to be principals in the assaults, even though there was an absence of proof that the defendants themselves actually threw the rocks. It is asserted Section 31 is not applicable

to this case in view of the allegations of the indictment. We cannot agree with appellants' contention in that regard. We think the challenged evidence is competent, and that the prosecution was not precluded from showing that the defendants aided, abetted and encouraged other strikers to commit the assaults by throwing rocks and that they were therefore guilty as principals even though in some instances the throwers of the rocks were not identified. In the last nine counts the defendants were charged with assaults by the throwing of rocks at a specified person named in each count, to-wit: Pullen, Schwartz, Gibson, Jackson, Wise, Henderson, Mays, Tennison and Ray. In most cases windshields and windows were broken and the cars were damaged. Several of the drivers of the cars were struck and seriously wounded. Half a dozen of them were taken to a hospital and treated. In most cases the defendants were identified by either the drivers of the cars or by other employees of the mill as the persons who actually threw the rocks. In some three or four charges that evidence is lacking. But in no instance is there a lack of evidence that large rocks were thrown at such drivers of machines by some of the strikers. The rocks which were introduced in evidence were identified as those which shattered the windows of the cars and were found in such cars or upon the running boards thereof. We think such rocks were sufficiently identified and properly received in evidence. The motion to strike out that evidence was also properly denied.

The evidence is clear that all of the strikers, including both defendants, assembled at the entrance to the mill before eight o'clock in the morning with the concerted purpose of attacking the non-union workmen when they arrived. The strikers lined up on either side of the road and armed themselves with rocks. They bombarded every machine that drove into the premises that morning. The attack was made only with stones, as charged. The acts, conduct and statements of the defendants and other strikers clearly indicate that they all cooperated in each of said alleged assaults. Each of them might have been charged and convicted of the riots and assaults. It is immaterial that only the defendants were so charged. There is no variance from the charges in the use of weapons, to-wit, rocks, with which the crimes were perpetrated. No weapons, other than the rocks, were used in committing the assaults. Certainly it may not be asserted that if a defendant picked up a rock and handed it to another one of the strikers, telling him to take it and hurl it at the driver of a car, that the defendant would not be guilty of that assault as a principal. We conclude that, under the circumstances of this case, the defendants became guilty of the assaults as principals, in spite of the fact that, in three or four instances, the defendants were not definitely identified as the particular persons who threw the rocks. We are convinced that the evidence was competent as a part of a concerted purpose to commit the offenses, and that the court correctly instructed the jury that Section 31 of the Penal Code was applicable to this case.

The case of People v. Carson, supra, upon which the appellants rely, is not in point. The defendant in that case was serving a life sentence at Folsom state prison. He and several other prisoners planned to escape. Several of them were armed with improvised knives. The defendant picked up a chisel, which he claimed he did not use. There was no direct evidence that he did use the chisel. Two guards, Murphy and Jolly, were attacked. The attack was led by prisoners other than the defendant. Both guards were stabbed with knives and overpowered. The prisoners took the guards as a shield and attempted to escape. Some of them were shot and killed. The defendant was captured. He was indicted under Section 246 of the Penal Code, as it then existed, but subsequently repealed (Stats.1941, ch. 106, sec. 16), for an assault with a deadly weapon, to-wit a chisel. He was convicted and sentenced to the death penalty. Knives found at the scene of the shooting, but not connected with defendant's possession, were received in evidence. The Supreme Court said that "The *theory of the prosecution* was that appellant, with the other prisoners engaged in the assault, had entered into a conspiracy to escape." The evidence showed that "A conspiracy had been entered into between some of these prisoners to attempt to escape." At the trial defendant's objection to evidence of the assaults and conduct of other prisoners, *before proof of any conspiracy* was made, was overruled. On appeal the defendant contended that the evidence of assaults *with knives by the other prisoners* was incompetent and prejudicial and that there was no evidence of an assault by the defendant with a chisel, as alleged in the indictment. The Supreme Court held that the evidence of the conduct and assaults with knives by the other prisoners was competent; that the evidence of a conspiracy to escape from prison was competent to show the *intent* with which the defendant participated in the assault upon the prison officers, and that the knives were properly admitted in evidence. The judgment of conviction was affirmed. The court said:

"* * * There was sufficient evidence in the case to warrant the jury in finding that there was a conspiracy among the prisoners * * * and that the defendant was a party to it. * * * Nor was the evidence subject to a motion to strike it out on the ground that, as defendant was charged in the indictment specifically with an assault * * * with * * * a chisel * * * he could not be convicted by proof that an assault was made by the other prisoners * * * with knives. * * *

"Nor is it of any consequence that the defendant was charged with an assault with a chisel and not with a knife."

The court further said: "* * * the knife found where defendant fell, together with the other knives found, all in proximity to where the defendant and the other prisoners were gathered * * * were admissible in evidence, together with all the circumstances accompanying the assault, as bearing on the question of the conspiracy * * * and also as evidence of the intent with which the assault in general was made by all the prisoners."

In the opinion in the foregoing case the Supreme Court did say, 155 Cal. at page 174, 99 P. at page 974, with relation to the application of Section 31 of the Penal Code, upon the language of which the appellant relied, that: "But as he [the defendant] was charged with an assault with a weapon of specific character, he could only be convicted by proof of an assault made by him with the weapon charged, and the theory of responsibility as an aider and abettor in an assault made by the other prisoners *with other weapons* was neither tenable nor permissible under the indictment against him. But *as appellant does not make any complaint on this appeal as to this theory * * * it is unnecessary to further discuss the proposition.*" (Italics added.)

It will be observed that the court specifically refrained from determining that suggested principle as to whether a defendant who is definitely charged with an assault with a paricular weapon of a specified type might be convicted of *an assault made with an entirely different weapon used by other persons* on the doctrine of aiding and abetting the assault of other persons. The defendant was specifically charged with making the assault with a chisel. The other prisoners actually assaulted and stabbed the officers with improvised knives. What was said by the court about liability of the defendant for merely aiding and abetting his associates is therefore mere dictum. It applies to facts entirely different from those of the present case. In this case there could have been no variance of proof as to the character of weapons used. In this case the defendants were charged with making the assault with rocks only. There was no proof of any other character of weapon used by either the defendants or their associates. Moreover, the court definitely held in the Carson case that the evidence of the conspiracy to escape was admissible to illustrate any fact involved, to shed light on any issue, to show the *intent* with which the assault was made and to show the nature of the wounds inflicted or the damages incurred as a result of the acts with which the accused person is charged. That rule applies to both civil and criminal cases.

[17-19] The photographs were also competent. Packard v. Moore, 9 Cal.2d

571, 581, 71 P.2d 922, 927; Underhill's Criminal Evidence, 4th Ed., p. 157, sec. 117; 8 Cal.Jur., p. 136, sec. 223; 10 Cal. Jur., p. 896, sec. 169; 23 C.J.S., Criminal Law, § 852, page 51; 159 A.L.R., p. 1414, note. In the Packard case, supra, which was a suit for personal injuries received as the result of an automobile collision, a photograph of plaintiff taken while she was in the hospital, showing the wound on her face which was received in the accident, was admitted in evidence over defendant's objection. The court said: "Appellant's objection to the introduction of photographs of the plaintiff showing the nature of the injuries upon her face while in the hospital is without merit. The photographs portrayed possibly more strikingly plaintiff's injuries than oral testimony could have done. This fact did not render them inadmissible. The jury was entitled to know of her true condition and, if that fact could be more accurately portrayed by photographs than by the testimony of the doctor, or others, it was the right of the plaintiff to resort to that method of proof. (Citing authorities.)"

The sufficiency of the preliminary proof for admission of a photograph is within the sound discretion of the trial judge, and where there is substantial evidence of adequate foundation for its admission, that discretion will not be interfered with on appeal. 10 Cal.Jur., p. 896, sec. 169. It would seem to follow that if a photograph of a person is competent to show the condition of a wound on the face, as it was in the Packard case, upon the same principle a photograph showing the damages incurred to automobiles as a result of unlawful assaults by means of throwing rocks should also be competent. The photographs of the automobiles were taken immediately after the assaults occurred. There is ample evidence to show they were in the condition which existed immediately following the assaults. Photographs are competent for the same reason that diagrams and maps are admissible to show the relative location of objects and the surrounding physical conditions. Photographs of weapons, instruments and objects involved in the issues are likewise admissible for similar purposes. People v. Carson, supra; People v. Shaver, 7 Cal.2d 586, 591, 61 P.2d 1170; People v. Sambrano, 33 Cal. App.2d 200, 213, 91 P.2d 221; People v. Singh, 78 Cal.App. 476, 483, 248 P. 981; People v. Jackson, 74 Cal.App.2d 22, 25, 167 P.2d 776. The court did not err in receiving the photographs in evidence.

The case of People v. McCall, 10 Cal. App.2d 503, 52 P.2d 500, upon which appellants rely in support of their assertion that the court erred in receiving in evidence the photographs, is not in point. In that case the defendant was charged and convicted of manslaughter. He and the deceased were intoxicated and driving together in the latter's automobile. No other person was present. The question of a conspiracy or of other persons cooperating in the assault was not involved. No other person could have used any weapon in that assault. The deceased, Hubbard, was driving. The car stalled. Hubbard got out and cranked it. McCall, the defendant, took the driver's seat. The deceased insisted on continuing to drive the car. A controversy arose. "McCall got out of the car and hit Hubbard two or three times on the face, knocking him to the pavement." He was taken to a hospital and died. The skull was found to be fractured. An automobile jack, wrench and tire-iron were found in the back of the car. They were received in evidence over the objection of the defendant. The court said, "There was no evidence which connected the appellant with any of the implements. The car was not his." The court concluded that it was prejudicial "to exhibit to the jury all of the implements that were found in the car of the deceased, *upon the sole ground that, if any one of them had been used, it might have caused the injury which resulted in death.*" The judgment was reversed on that ground. In the present case evidence of the injuries to persons and the damages to their cars were shown to have been caused by the rocks which were actually thrown by the defendants or by their associates with whom they were then unlawfully acting in a common cause or purpose to commit the offenses.

Other cases cited by the appellants upon that issue may be similarly distinguished.

Finally, a motion in arrest of judgment was made on the previously stated grounds. For the reasons heretofore assigned, that motion was properly denied.

The judgment and the order denying a new trial are affirmed.

ADAMS, P. J., and PEEK, J., concur.

Hearing denied; CARTER, J., dissenting.

---

87 Cal.App.2d 753

PEOPLE v. MOORE et al.

Crim. 2041.

District Court of Appeal, Third District, California.
Sept. 28, 1948.

As Modified on Denial of Rehearing Oct. 13, 1948.
Hearing Denied Oct. 25, 1948.

1. Indictment and Information 🔑129(4), 131

Where there was proof that each of offenses charged in indictment grew out of same series of connected transactions and that they were inspired by common purpose on part of defendants and their associate strikers, and there was also proof that the riots and assaults charged were offenses of same class or character and that they were all perpetrated by same group of pickets, acting together to win strike by force, several offenses were properly united in one indictment, notwithstanding that the counts of riots charged only misdemeanors, while counts of assaults to commit bodily injuries charged felonies. Pen.Code, §§ 245, 404, 950–952.

2. Assault and battery 🔑92
Riot 🔑6

Evidence supported conviction of all four defendants of participating in a riot and of assaults to do great bodily injuries by throwing rocks at different named nonunion workmen while picketing during strike. Pen.Code, §§ 245, 404.

3. Criminal law 🔑741(1), 742(1)

Any discrepancy in evidence of present case and a companion case based upon same transaction merely went to weight of evidence and credibility of witnesses, which were matters for determination of jury.

4. Assault and battery 🔑71
Riot 🔑3

Where four defendants were acting together, and with their striking associates, to aid, abet and encourage all strikers present to make assaults upon nonunion workmen, and to commit offenses of participating in riot and of assault by means likely to produce great bodily injuries, defendants were "principals" in commission of offenses charged, whether they were actually identified as particular individuals who hurled the rocks. Pen.Code, §§ 31, 245.

See Words and Phrases, Permanent Edition, for all other definitions of "Principal".

5. Criminal law 🔑808½

In prosecution for participating in a riot and for assaults to do great bodily injuries by throwing rocks at different named nonunion workmen during strike, an instruction substantially in language of statute that all persons concerned in commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, were principals in any crime so committed, was proper. Pen.Code, §§ 31, 245, 404.

6. Criminal law 🔑696(1)

In prosecution for participating in riot and for assaults to do great bodily injuries by throwing rocks at different named nonunion workmen during strike, where foundation for receiving in evidence rocks found in automobiles of nonunion workmen or in their immediate vicinity and photographs of the rocks and of damaged automobiles was satisfactorily laid, refusal to strike such exhibits from the record was not error. Pen.Code, §§ 245, 404.

7. Criminal law 🔑622(1)

A defendant jointly charged with another or others with any public offense is not entitled as matter of right to a separate trial. Pen.Code, § 1098.

8. Criminal law ⚿622(1), 1152(1)

The question of right to a severance of trial by one who has been jointly indicted with another or others is addressed to trial court's discretion, with which decision appellate court may not interfere except upon a clear abuse of that discretion. Pen.Code, § 1098.

9. Criminal law ⚿622(2)

Denial of application for separate trials by defendants who had been jointly indicted on charges of participating in riots and of assaults committed upon different named persons by means likely to produce great bodily injury was not abuse of discretion. Pen.Code, § 1098.

◆

Appeal from Superior Court, Mendocino County; Lilburn Gibson, Judge.

Robert Moore, Richard McCoard, George Sherrad (Sherrard) and Joe Pimentel were convicted on one count for participating in a riot under Penal Code, § 404, and on several counts of assaults to do great bodily injuries by throwing rocks at different named persons, and they appeal.

Affirmed.

Clarence E. Todd, of San Francisco, George E. Flood, of Seattle, Wash., and Gordon W. Mallatratt, of San Francisco, for appellants.

Fred N. Howser, Atty. Gen., and Doris H. Maier, Deputy Atty. Gen., for respondent.

THOMPSON, Justice.

Four defendants were jointly indicted, tried by a jury and convicted on one count for participating in a riot under Section 404 of the Penal Code, and, under Section 245 of that code, on several counts of assaults to do great bodily injuries by "throwing rocks" at different named persons. All defendants have appealed.

This is a companion suit with that of People v. Bundte and Phillips, Cal.App., 197 P.2d 823 in which our opinion was this day filed, to which we refer for further particulars. Both cases grew out of a labor dispute which resulted in a strike and picketing of two adjacent lumber mills in Mendocino County. The affray which is here involved is the same as one which was included in the Bundte case, except that this case is against different pickets who participated in a general plan of assaulting non-union workmen with stones as they drove to the Richardson mill in their separate machines on February 4, 1947. The appellants' opening brief concedes that "defendants are admittedly members of a labor union and all the counts arose from alleged acts committed by defendants on picket lines in connection with a labor dispute between their union and certain redwood lumber companies in Mendocino County." Thirty or more pickets in a group met the non-union workmen as they drove their cars into the entrance to the Richardson Lumber Company mill about 8 o'clock in the morning, and hurled large rocks at each of them. All defendants were among the attacking strikers. Windshields and windows of the cars were broken, and the cars were otherwise damaged. Some of the drivers received serious injuries which required medical treatment. Some of the men identified the strikers who hurled the rocks at them. Other workmen identified the defendants as persons who participated in the affray and hurled rocks at particular drivers named in the several counts. In two or three instances the defendants were not identified as the particular strikers who actually threw the rocks at or who struck those drivers of cars.

All defendants were convicted of the first count of participating in a riot under Section 404 of the Penal Code, and of count three charging an assault on Schwartz. Moore and Sherrard were also convicted of counts four, six, seven and eight. Pimentel was also convicted of counts three, six and eight. All defendants were acquitted of counts nine and ten. The defendants Moore and Sherrard were sentenced on conviction of the first count to the county jail for 180 days. Moore and Sherrard were sentenced on each count of assault of which they were convicted to state prison for the term prescribed by law, said sentences to begin at the expiration of the county jail sentence, and to run concurrently. McCoard and Pimentel were sentenced on conviction of the first count of riot to pay a fine of $250 each, or to one day of imprisonment in the county jail for each $2 of said fines remaining unpaid. They were further fined $300 on each of the other counts of which they were convicted, or to serve imprisonment in the county jail one day for each $2 thereof which was unpaid, to commence at the expiration of the sentence for riot, the terms to run consecutively. Each defendant was released on bond pending the appeal.

[1] The defendants demurred to the indictment on the ground that it did not conform to Sections 950, 951 and 952 of the Penal Code, and that felonies, to-wit, assaults by means likely to result in great bodily injuries were united with the charge of a riot, which is a mere misdemeanor. The demurrer was overruled. That issue was determined in the previous Bundte trial.

The appellants also contend the court erred in overruling their motions for directed verdicts, to dismiss the indictment at the close of the prosecution's case, for a new trial and in arrest of judgment. It is also urged: That the court erred in refusing to strike out certain exhibits alleged to have been unsupported by the evidence, that certain counts failed for lack of evidence showing the particular defendant charged threw rocks at the individuals named therein, and that the court erred in giving to the jury an instruction based on Section 31 of the Penal Code.

[2] The transcript contains over 900 pages of evidence. We are of the opinion the verdicts returned against the four defendants and the judgment of convictions are amply supported by the evidence. Both the riot charged and the assaults of which the defendants were convicted occurred at the Richardson mill at about 8 o'clock on the morning of the 4th day of February. The defendants and other associates had been previously picketing that mill for several weeks. The number of pickets previously engaged was greatly increased on that morning. They greatly outnumbered the non-union workers then engaged in the mill. At the time of the arrival of the workmen that morning, from 15 to 30 pickets had congregated on both sides of the roadway leading to the east entrance to the mill. Another group of pickets was stationed at another entrance to the mill. The evidence clearly indicates that the defendants and their striking associates were then engaged in a concerted plan to act together in the assaults and riot which occurred. The defendants were among them and active in the affray. As the non-union workmen, consisting of 9 men separately mentioned in the various charges of assaults, namely, Pullen, Schwartz, Gibson, Jackson, Wise, Henderson, Mays, Tennison and Ray, drove their automobiles to one or the other of the two entrances to the mill, they were each stoned by the assembled pickets. The stones varied from the size of an egg to that of a cocoanut. Windshields and windows were broken, and the cars were otherwise damaged. Some of the drivers were struck by the rocks and seriously injured, requiring medical treatment. Some of the stones were found in certain cars and were indentified and received in evidence. Photographs of the cars were taken immediately afterward, showing the broken windows, and the dents in and damages to the cars. Those photographs were explained by witnesses and received in evidence after the foundation therefor had been adequately proved. After running the gantlet, the drivers of some of the non-union workmen's cars parked their machines and watched the stoning of other workmen as they entered the premises. Some of the drivers identified some of the pickets who threw stones at them. Two or three of them failed to identify the particular persons who threw the stones at them. Other workmen who watched the stoning of the men supplied that evidence. Pat Gibson, who was hit in the head with a large rock and seriously injured, testified that he was met by a large group of picketers at the entrance, "more than there had been" before; that the defendant Moore said "there goes another one of them scab s-of-b's" and he threw a rock which broke Gibson's windshield and struck him; that Sherrard threw a rock which hit the back of his machine, and that Bundte and Phillips also hurled rocks at him. He said that

Sherrard "called me a dirty ——— ——— scab bastard." Gibson said he parked his car near the mill and that, in company with another workman, he watched the stoning of other employees as they drove into the premises. He testified that he saw and identified each defendant, calling him by name, and also named other strikers who hurled rocks at Schwartz, Wise, Mays and Tennison. After the affray, Stanley Richardson, one of the mill owners, who was also stoned as he entered the premises just behind Mr. Schwartz, testified that he told the workmen to keep out of sight, and that he went out back of the mill and crept or walked through the brush a quarter of a mile to a neighbor's house and telephoned to Willits for an officer. The deputy sheriff, Reno Bartolomei, soon arrived. There was a dispute between the workmen and the strikers regarding the affray and about the damages to the machines. Gibson said that he then heard Moore and Sherrard say, "Bring the Sheriff's car around. We will do the same thing to them." Several of the strikers were pointed out to the officers by the drivers as among those who threw the rocks. The four defendants were so identified, and they were placed under arrest.

[3, 4] There is much argument in the briefs regarding the sufficiency of the identification of the four defendants as the particular ones who hurled rocks at each of the workmen charged by the indictment to have been assaulted. The defendants sought to impeach some of the witnesses in that regard by offering in evidence their testimony given at the former trial of Bundte and Phillips. We think the failure to mention all of these defendants in the Bundte case as having been seen to throw rocks is satisfactorily explained. These defendants were not charged with the offenses stated in the first indictment. We think the identification of the assailants in this case was satisfactorily established. Any discrepancy in the evidence of the two cases merely went to the weight of the evidence and credibility of the witnesses. Those were matters for the determination of the jury. Moreover, it does appear that the four defendants were acting together, and with their striking associates, to aid, abet and encourage all the strikers present to make the assaults and to commit the offenses charged. Under Section 31 of the Penal Code, the defendants were therefore principals in the commission of the offenses charged, whether they were actually identified as the particular individuals who hurled the rocks at each of the workmen.

[5] We are of the opinion the court correctly instructed the jury substantially in the language of Section 31 that "All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, * * * are principals in any crime so committed." Penal Code, sec. 31; People v. Bundte and Phillips, supra. As we held in the last cited case, we are satisfied that section applies to the facts of this case.

The only effort to justify the assaults upon the workmen with stones was testified to by the defendant Robert Moore. He said that the strikers were engaged in picketing the mill premises on account of labor trouble, and that about 15 of them were located at the eastern entrance to the mill; that when the first car arrived "we waved them down and told them there was a strike on and asked them if they couldn't see the picket line and to get out of there;" that the first car then turned around and left; that about twelve cars followed and four of them turned into the east entrance. In response to direct questions from defendants' counsel, Mr. Moore said they did not succeed in "flagging them down", and that the "third car tried to run over us. * * * Made a swipe towards us." He admitted that they threw rocks at the drivers of the cars who tried to run them down. But the evidence is very convincing that rocks were thrown at all the cars of workmen as they drove into the premises that morning. At least that question of defense was an issue for the determination of the jury. It was evidently decided adversely to the defendants.

The other defendants were called as witnesses, but none of them was asked any question regarding the facts or circumstances of the offenses with which he was charged.

[6] There was no variance between the allegations of the indictment and the proof adduced with relation to the acts, conduct or weapons used in committing the assaults or the riot. No weapons except rocks were used. The foundation for receiving in evidence the rocks found in the cars or in their immediate vicinity, the photographs of the rocks and of the damaged automobiles, was satisfactorily laid. The court, therefore, did not err in refusing to strike those exhibits from the record. The principles of law involved in cases under similar facts were fully discussed and determined in the Bundte case, which also included the same assaults which are involved in this case, except that those same acts were there charged against different named defendants.

On authority of the Bundte case, and the citations of law therein contained, we conclude that the court did not err in this action in overruling the demurrer to the indictment, or in denying defendants' motions for directed verdicts, for arrest of judgment, for a new trial, or to dismiss the indictment at the close of the prosecution's evidence.

[7-9] There is no merit in appellants' contention that the court erred in denying their application for separate trials. Section 1098 of the Penal Code provides in part: "When two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be tried jointly, unless the court order separate trial." It has been repeatedly held that a defendant so charged is not entitled as a matter of right to a separate trial. The question of the right to a severance of trial is addressed to the sound discretion of the trial court, with which decision we may not interfere, except upon a clear abuse of discretion. People v. Isby, 30 Cal.2d 879, 897, 186 P.2d 405; People v. Goold, 215 Cal. 763, 12 P.2d 958; 4 Cal.Jur., Ten-Year Supp. 718, sec. 268; 104 A.L.R. 1519, note.)

We are convinced the defendants received a very fair and impartial trial. The jury was fairly and fully instructed on all material issues. We are satisfied there was no miscarriage of justice.

The judgment and the order denying a new trial are affirmed.

ADAMS, P. J., and PEEK, J., concur.

Hearing denied; CARTER, J., dissenting.

---

87 Cal.App.2d 857

PEOPLE v. ANDERSON.

Cr. 4250.

District Court of Appeal, Second District,
Division 2, California.
Oct. 6, 1948.

1. Criminal law 🔑53

An act committed by a person while in a state of voluntary intoxication is none the less criminal by reason of his having been in such a condition.

2. Criminal law 🔑53

Statute providing all persons are capable of committing crimes except persons who commit act charged without being conscious thereof was not applicable to defendant charged with robbery and kidnapping, where temporary interference of his mental faculties resulted from voluntary intoxication. Pen.Code, § 26.

3. Criminal law 🔑940

Where defendants, charged with robbery and kidnapping, moved for new trial based on newly discovered evidence in doctor's report which indicated that at the times charged defendant, due to a heart condition, aggravated by voluntary intoxication, did not know what he was doing, statute providing intoxication was not an excuse for crime applied, and motion was properly denied. Pen.Code, § 22.

4. Kidnapping 🔑5
Robbery 🔑24(1)

Evidence sustained finding that defendant was armed with a deadly weapon at time of commission of offenses of robbery and kidnapping even though the gun used was not introduced in evidence. Code Civ.Proc. § 1954.

5. Criminal law ⚷663

In order to sustain a conviction predicated upon the use of a material object in the commission of a crime it is not necessary that such object itself be introduced in evidence.

◆

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

William Frederick Anderson was convicted of kidnapping for the purpose of robbery and robbery of the first degree while being armed with a deadly weapon, and he appeals.

Affirmed.

Max Solomon, of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., and Dan Kaufman, Deputy Atty. Gen., for respondent.

McCOMB, Justice.

Defendant, after trial before the court without a jury, was found guilty of (1) kidnapping for the purpose of robbery (Sec. 209, Penal Code), and (2) robbery of the first degree (Sec. 211, Penal Code). The court further found that defendant was armed with a deadly weapon at the time of the commission of each offense. Defendant appeals from the judgments and from the order denying his motion for a new trial.

Facts.

The record discloses that on November 22, 1947, Mr. Tissue was in charge of a used car lot located at 7643 Atlantic Boulevard, Los Angeles. At about 9:45 p.m. he noticed defendant looking at some of the cars on the lot and went over and asked him if he could be of any aid. Defendant, who at the time was intoxicated, asked to be shown a 1941 Chevrolet, and after looking the car over requested a demonstration. Mr. Tissue occupied the driver's seat and defendant sat next to him. Within two minutes after the car had been driven off the lot defendant said to Mr. Tissue, "Do you know what this is?" and the driver saw a gun in defendant's hand, held within two or three inches from his body and pointed at him. Defendant told the driver that he had better watch his step, and instructed him to go up Salt Lake Street, turn right to Florence Avenue, and turn right again on Florence Avenue. Defendant asked if Mr. Tissue had any money and when told that he did not, defendant directed Mr. Tissue to keep his hands on the wheel, reached in the latter's hip pocket and took his wallet which contained four one-dollar bills and a five-dollar bill. Several times defendant told Mr. Tissue, "You better do what I tell you."

At the corner of Atlantic Boulevard and Florence Avenue, Mr. Tissue grabbed defendant's wrist and pulled the wheel of the car toward a gasoline station. Defendant asked his captive what he was doing and then grabbed the wheel of the car with his free hand, causing the car to make a complete circle, hit the curb, and before the car was stopped defendant either jumped out or fell from the car and ran up Florence Avenue. A police officer in the vicinity seeing defendant run from the service station endeavored without success to overtake him. Upon receiving a description of defendant he went to a cafe on Atlantic Boulevard, located defendant, arrested him and found in his pocket a five-dollar bill and four one-dollar bills. Subsequently Mr. Tissue identified defendant as the man who had robbed him.

Mr. Tissue had wrested the gun from defendant while they were tussling. This gun was turned over to the service station attendant who in turn delivered it to the police department. Defendant testified that he had been drinking alcoholic beverages since about noon on November 22, 1947, and that he knew nothing of the incidents relative to the alleged kidnapping and robbery.

After defendant was found guilty and prior to the imposition of sentence, the trial judge directed that a medical examination be made of defendant. This was done by Dr. Crahan who reported that defendant had a heart condition which "combined with alcoholic excesses on the date in question probably caused an anemia of the brain which added to the confusion of intoxication" of defendant at the time of the alleged crimes.

Defendant's motion for a new trial on the ground of newly discovered evidence was denied.

Defendant's Contentions.

First: *That the trial court erred in denying his motion for a new trial on the ground of newly discovered evidence, since Dr. Crahan's report indicated that defendant, due to a heart condition aggravated by his voluntary intoxication, did not know what he was doing at the time of the alleged crimes, and therefore under section 26, subdivision 5 of the Penal Code,*[1] *could not be guilty of the crimes since he was not conscious of his acts.*

[1, 2] This proposition is untenable. An act committed by a person while in a state of voluntary intoxication is none the less criminal by reason of his having been in such condition. (People v. Stephens, 66 Cal.App.2d 755, 757, 152 P.2d 1019; People v. Avanzi, 25 Cal.App.2d 301, 302, 77 P.2d 237; Sec. 22, Pen.Code.[2]) Subdivision 5, section 26, Penal Code is inapplicable in cases where temporary interference of the mental faculties results from voluntary intoxication. Such a situation is governed by section 22, Penal Code. (People v. Taylor, 31 Cal.App.2d 723, 732, 88 P.2d 942; People v. Lim Dum Dong, 26 Cal.App.2d 135, 138 et seq., 78 P.2d 1026; People v. Sameniego, 118 Cal.App. 165, 173 et seq., 4 P.2d 809, 5 P.2d 653.)

[3] There is no merit in defendant's contention that it was a combination of the use of an intoxicant together with his physical condition which resulted in his alleged unconsciousness. It is conceded that in the absence of the use of an intoxicant defendant was conscious of his acts. His unconsciousness resulted from his voluntary use of an intoxicating beverage, hence section 22 of the Penal Code, supra, is applicable to the present facts, and section 26, subdivision 5 of the Penal Code is inapplicable. Therefore the trial judge properly denied the motion for a new trial since the alleged newly discovered evidence, to wit, Dr. Crahan's report would not have changed the result of the trial.

People v. Freeman, 61 Cal.App.2d 110, 142 P.2d 435, is readily distinguishable from the facts in the instant case. In the cited case defendant was unconscious due to an attack of epilepsy. Therefore subdivision 5, section 26 of the Penal Code was applicable, epilepsy clearly not being self-induced. In the present case defendant's unconsciousness was caused by his own voluntary act in becoming intoxicated. Neither is People v. Cox, 67 Cal.App.2d 166, 153 P.2d 362, applicable. In such case it was not contended that defendant was unconscious because of voluntary intoxication, but because of the fact that he had received a blow on the head inflicted by an assailant, hence clearly subdivision 5, section 26, Penal Code was applicable. (People v. Cox, supra, 67 Cal.App.2d page 171 et seq., 153 P.2d 362; see also People v. Denningham, 82 Cal.App.2d 117, 185 P.2d 614.)

Second: *That there is no evidence to sustain the trial court's finding that defendant was armed with a deadly weapon at the time of the commission of the above described offenses for the reason that the gun used in the kidnapping and robbery was not introduced in evidence.*

[4, 5] This proposition is likewise untenable. Whenever an object, cognizable

---

[1] Section 26 of the Penal Code reads in part as follows: "All persons are capable of committing crimes except those belonging to the following classes: * * * Five. Persons who committed the act charged without being conscious thereof."

[2] Section 22 of the Penal Code reads thus: "Drunkenness no excuse for crime: When it may be considered. No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such condition. But whenever the actual existence of any particular purpose, motive, or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive, or intent with which he committed the act."

by the senses, is relevant to an issue in a cause, such object may be exhibited to the trier of fact or its existence, situation and character may be proved by witnesses (Sec. 1954, Code Civ.Proc.). In order to sustain a conviction predicated upon the use of a material object in the commission of a crime it is not necessary that such object itself be introduced in evidence. (People v. Rous, 118 Cal.App. 534, 536, 5 P.2d 470; People v. Mitchell, 80 Cal.App. 252, 255, 251 P. 682. See People v. Best, 43 Cal. App.2d 100, 103, 110 P.2d 504.)

Since the record is free from error the judgments and order are and each is affirmed.

MOORE, P. J., and WILSON, J., concur.

---

87 Cal.App.2d 828

PEOPLE v. BOYCE.

Cr. 4237.

District Court of Appeal, Second District, Division 2, California.
Oct. 5, 1948.

1. Criminal law 🔑1023(12)

Where sentence on conviction was suspended, there was no judgment from which to appeal.

2. False pretenses 🔑6

One issuing check for amount exceeding balance of her deposit with drawee bank in payment of hotel bill represented check to be valid, though she knew it was worthless, and thereby perpetrated fraud on hotel, though she made no express representations as to check's validity and its issuance did not alter her status as hotel's debtor.

3. False pretenses 🔑49(2)

Evidence showed that check for amount exceeding balance of maker's deposit in drawee bank was given in partial fulfillment of maker's agreement with payee to open bank checking account as advance on musical concerts to be given by payee, not as a loan, and hence indicated intent to defraud payee.

4. Criminal law 🔑260(11)

The trial court's fact findings, supported by substantial evidence, are conclusive on appeal.

5. Criminal law 🔑1159(3)

Variances, inconsistencies and contradictions in proof of crime are unavailable on appeal from conviction.

6. Criminal law 🔑260(11)

A trial court's finding of accused's guilt of crime charged will not be disturbed by reviewing court, unless it can reasonably hold as matter of law that there was no evidence against accused.

◆

Appeal from Superior Court, Los Angeles County; Edward R. Brand, Judge.

Ruth V. Boyce was convicted of issuing checks on a bank with which she had no funds or credit arrangement, and from the judgment and an order denying her motion for a new trial, she appeals.

Appeal from judgment dismissed, and order denying motion for new trial affirmed.

J. Q. Gilchrist, of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., and Elizabeth Miller, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

[1] Appellant was found guilty on two counts of issuing checks drawn upon a bank in which she had neither funds nor arrangement for credit. Her motion for a new trial having been denied the court suspended the imposition of sentence and ordered her to be placed on probation. She has appealed from the "judgment" and the order denying her motion for a new trial. Sentence having been suspended, there is no judgment. People v. Noone, 132 Cal. App. 89, 22 P.2d 284; People v. Warnick, 86 Cal.App.2d 900, 195 P.2d 552. Hence that appeal will be dismissed.

However, inasmuch as the order denying the motion for a new trial is appealable, Penal Code, sec. 1237, subd. 2; People v. Martin, 199 Cal. 240, 248 P. 908, the record in its entirety and the arguments of the parties have been scanned for prejudicial error, but in vain.

September 1, 1947, appellant employed the witness Edmund Albert to assist her in operating a radio advertising business. She had two checkbooks, one of which Albert kept in the office while appellant carried the other in her purse. On the first stub of the former she penciled the figures "$1500" and had Albert write checks on blanks taken therefrom but to be signed by her. However, the total of her deposits made from the day the account was opened was only $1200, as follows: September 29, $100; October 3, $100; October 6, $500; October 10, $500. At her request Albert wrote checks to a number of persons prior to October 10 when he observed that the total checks issued from his book exceeded $1500. This fact he called to the attention of appellant who had never inquired as to her balance before signing a check.

[2] On October 19, 1947, despite her diminished funds on deposit, to wit, $6.04, she issued to a hotel in Hollywood a check from her small checkbook in the sum of $65.53. Having been accepted by the clerk in payment of her bill and forwarded through conventional channels for collection, it was duly dishonored. By her conduct she represented the check to be valid although she knew it was worthless. Thereby she perpetrated a fraud upon the hotel. Appellant contends in effect that because no express representations were made by her as to the validity of her check and because its issuance to her creditor did not alter the fact that she was a debtor of the hotel at the time of its delivery, and continued as such, there could have been no fraud in thus settling her past due account. Similar contentions were rejected in People v. Williams, 69 Cal.App. 169, 230 P. 667, and in People v. Khan, 41 Cal.App. 393, 182 P. 803, with the declaration that a fraudulent purpose was shown by the proof "that the appellant gave the check, representing thereby that it was good and valid, and that it was given and received with the intent that it should pay appellant's debt." People v. Williams, supra, 69 Cal. App. at page 173, 230 P. at page 669.

[3] The second check involved was for $50, issued and delivered on October 20, 1947, to one Yacoubian, a musician, who had entered into an "artist's agent representative agreement" with appellant. By such agreement appellant was to deposit $1,000 in a checking account which was to be an advance on the concerts to be given by the artist. When he called at appellant's office to sign the cards for opening the bank account there were no cards. Thereupon, as an emollient she gave him the check. She had prior thereto given him other checks for $20 and $30, both of which were, as in the case of the $50 check, dishonored by the drawee bank.

Appellant contends that the latter check to Yacoubian was a loan and could not have served to swindle the payee. From Yacoubian's testimony as to his contract it was a reasonable inference that she gave him the check as a partial fulfillment of her agreement to open the bank account and therefore indicated an intent to defraud the musician. While the latter conceded that the contract did not require her to deposit the $1,000, yet he was positive that the $50 check was given pursuant to the artist's agent contract as "an advance on my first concert."

[4-6] Appellant's denials of relevant portions of the testimony of the state's witnesses were disposed of by the findings of the trial court which are conclusive when supported by substantial evidence. Neither variances, inconsistencies nor contradictions in the proof of a crime are of avail on appeal. People v. Stanhope, 37 Cal App.2d 631, 634, 99 P.2d 1075; People v. Boljat, 36 Cal.App.2d 644, 646, 98 P.2d 513, 1025. The finding of guilt by the trial court will not be disturbed by the reviewing court (People v. Stanhope, supra, 37 Cal.App.2d at page 634, 99 P.2d 1075), unless it can reasonably be held as a matter of law that there was no evidence against the accused. People v. Farrington,

213 Cal. 459, 463, 2 P.2d 814; People v. Beltowski, 71 Cal.App.2d 18, 22, 162 P.2d 59.

The purported appeal from the "judgment" is dismissed. The order denying the motion for a new trial is affirmed.

McCOMB and WILSON, JJ., concur.

O WEST KEY NUMBER SYSTEM

---

87 Cal.App.2d 795

In re KENNEDY'S ESTATE.

LINDSTROM et al. v. HAGLUND et al.

Civ. 16257, 16486.

District Court of Appeal, Second District,
Division 2, California.
Oct. 5, 1948.

1. Executors and administrators 🔑362

A special administrator's notice of sale of property of estate, specifying the time and place of sale and describing the realty to be sold, and reciting that bids would also be received for all furniture and furnishings, with stated exception, as a unit with described realty, or separate bids would be received for either realty or furnishings, was a sufficient basis for sale, either as a unit or separately.

2. Conversion 🔑15(1)

An equitable conversion is effected only by a testator and derives solely from his intention as expressed in his will.

3. Executors and administrators 🔑375

Where probate court was confronted with a will contest, and a special administrator was appointed to protect estate against potential loss, court could not deny confirmation of sale of house and furnishings made in exercise of general power of special administrator. Probate Code, § 465.

4. Executors and administrators 🔑375

Order confirming sale of house and furnishings made in exercise of general power of special administrator appointed to protect estate from potential loss, where probate court was confronted by a will contest, would not be disturbed on appeal, in the absence of proof of fraud in procuring confirmation.

5. Executors and administrators 🔑39

The title to devised realty which vests in deviseee upon death of testator is subject to administration. Probate Code, §§ 28, 300.

6. Executors and administrators 🔑394

Where probate court authorized a conveyance of devised realty in course of administration, consent of devisee to the conveyance was unnecessary. Probate Code, §§ 28, 300.

7. Executors and administrators 🔑38, 314(2), 333

The estate of a decedent passes into the custody of the state, to be managed until creditors are paid and rights of devisees and heirs are established, and, while reposed in custody of state, superior court sitting in probate can determine rights of rival heirs, necessity of sales, and other incidents of winding up estate.

8. Courts 🔑198

Each act of superior court sitting in probate in determining the validity of wills and creditors' claims, rights of rival heirs, necessity of sales, and other incidents of winding up estate, is an independent step in administration, and a decision as to one is not an adjudication of others and does not divest court of power to hear and determine problems that are collateral to proceeding in which an appealed order has been rendered. Probate Code, § 1240.

9. Executors and administrators 🔑358(3)

Probate court did not lose jurisdiction to determine will contest after appeal from order confirming sale of property of estate of decedent made by special administrator appointed to protect estate from potential loss had been filed, since the problems involved in the will contest were collateral to the problems involved in proceeding in which the appealed from order was rendered. Probate Code, § 1240.

10. Wills 🔑386

Finding of probate court that same hand had signed both prior and a subsequent will, and also a codicil to subsequent will, would not be upset on appeal on the mere statement of appellants that testator did not sign the codicil.

◆

Appeal from Superior Court, Los Angeles County; Newcomb Condee and J. A. Smith, Judges.

Proceeding in the matter of the estate of Etta Kennedy, deceased, wherein Ralph G. Lindstrom, as special administrator with general powers, petitioned for confirmation of sale of realty and of household furnishings, and Mignon C. Haglund and R. C. W. Friday contested the confirmation. From adverse orders, contestants appeal and Clarence G. Weisbrod, executor under will, and Ralph G. Lindstrom oppose the appeal.

Orders affirmed.

Walter Gould Lincoln, of Los Angeles, for appellants.

Clarence G. Weisbrod, in pro. per.

Lindstrom & Bartlett, by William C. Bartlett, all of Los Angeles, for petitioner respondent.

MOORE, Presiding Justice

These are appeals from orders of the superior court sitting in probate confirming a sale of real property by a special administrator with general powers, allowing a creditor's claim, and admitting a will to probate and disallowing a prior will.

Etta Kennedy departed this life on October 25, 1946, leaving two writings purporting to be wills. The first, dated January 24, 1945, devised certain real property to appellant Haglund, the residue to appellant Friday who was named executor. The document dated May 23, 1945, devised the same realty to others and by a codicil thereto dated October 3, 1946, designated Clarence Weisbrod executor. Both instruments having been duly offered for probate, by reason of the anticipated delays to be caused by will contests, respondent Lindstrom was appointed special administrator with general powers on December 16, 1946.

On February 13, 1947, Lindstrom, as special administrator, filed a return of sale of the real property and household furnishings which by the first will had been devised to appellants and petitioned the court for confirmation of the sale. He alleged that it was "for the advantage, benefit and best interests" of the estate and the beneficiaries thereof that such property should be sold. Over appellants' objections the court found in accordance with such allegation and confirmed the sale.

Appellants attack the sale on three grounds.

[1] (1) They assert that the advertisement asking for bids contained a statement that "such real and personal property will be offered separately," but were not. This was not true. The notice of sale, after specifying the time and place of sale and describing the realty proceeded to recite that "*also* as a unit with said real estate, all furniture and furnishings except the oriental rugs; *or* separate bids will be received for either realty or furnishings." Such notice was a sufficient basis for the sale either as a unit or separately.

[2-4] (2) The order of confirmation is attacked also upon the ground that it was an "attempted equitable conversion." Such a conversion is effected only by a testator and derives solely from his intention as expressed in his will. In re Estate of Gracey, 200 Cal. 482, 488, 253 P. 921. Courts do not as a rule change the quality of devised property unless so directed by the decedent. Ibid., 200 Cal. at page 489, 253 P. at page 924. But this doctrine does not prohibit the probate court from selling devised property if the circumstances dictate the sale to be most advantageous to the estate. The court below was confronted with a will contest. The first purported will bequeathed the real property to a "friend." The subsequent writing made no special bequest of the realty but all her estate was devised to her son and he was named executor. To protect the estate against potential loss the special administrator was appointed. Having sold the house and furnishings in the exercise of his general power, confirmation of the sale could not be denied. Probate Code, sec. 465; Levy v. Cytron, 84 Cal.App.2d 827,

191 P.2d 816. Crouse v. Peterson, 130 Cal. 169, 62 P. 475, 615, 80 Am.St.Rep. 89, contains nothing to the contrary. In the absence of proof of fraud in procuring confirmation of such a sale the order will not be disturbed. Baldwin v. Stewart, 218 Cal. 364, 23 P.2d 283; In re Estate of George, 123 Cal.App. 733, 736, 12 P.2d 86.

[5, 6] (3) The contention is made that the real property vested in Mrs. Haglund at the death of Mrs. Kennedy by virtue of the terms of the first will. Such vesting of the title of a decedent's property is subject to administration. Reed v. Hayward, 23 Cal.2d 336, 340, 144 P.2d 561; Probate Code, secs. 300, 28. The court having authorized a conveyance of the devised property in the course of administration, Mrs. Haglund's consent to the conveyance was unnecessary. Indeed the court's rejection of appellants' proposed will completely disposes of her claims.

[7-9] It is contended that the court lost jurisdiction to determine the will contest after the appeals from the order of confirmation had been lodged in this court. Appellants lose sight of the fact that the estate of a decedent passes into the custody of the state, to be by its agencies and instrumentalities *managed* until creditors are paid and the rights of devisees and heirs are established. While it reposes in such custody the superior court sitting in probate is authorized to determine the validity of wills and of creditors' claims, the rights of rival heirs, the necessity of sales and other incidents of winding up an estate. Each act of the court is an independent step in the administration. A decision as to one is not an adjudication of the others and does not divest the court of the power to hear and determine problems that are collateral to the proceeding in which an appealed order has been rendered. Duncan v. Superior Court, 3 Cal. 2d 143, 145, 44 P.2d 356; In re Estate of Waters, 181 Cal. 584, 585, 185 P. 951; Probate Code, sec. 1240. An appeal from a prior order made in the course of administration of an estate does not suspend the powers of the probate court to make further orders. In re Estate of Duraind, 51 Cal.App.2d 206, 211, 124 P.2d 330. A statute that would prohibit the probate court from administering an estate pending the appeal of an order made in due course would be intolerable. Such a law would return us to the days of Jarndyce and Jarndyce and seriously retard final distribution of estates.

[10] Appellants' next contention is that testator's codicil dated October 3, 1946, should not have been admitted to probate since the signature thereon is erratic, is poorly written and does not correspond with the signatures on the two wills. As evidence, appellants append to their brief photostatic copies of the three signatures for comparative values. The difference in signatures is readily apparent. But it is the difference between feebleness and strength, sickness and health, a broken body and one that is strong. If there are dissimilarities, the similarities are more striking. The probate court having determined that the same hand signed the three instruments its finding will not be upset on the ipse dixit of appellants that testator did not sign the instrument which merely substituted Mr. Weisbrod for her deceased son as executor. Thus, even if the codicil were excluded the will itself would stand and the court would appoint a new executor to replace him who had been removed from the terres-trial scene. Appellants' contention even if meritorious would avail them nothing.

Other contentions refer to non-essentials. Inasmuch as all three appeals are based upon the same arguments answered above, the orders are all affirmed.

McCOMB and WILSON, JJ., concur.

87 Cal.App.2d 777

Ex parte STONE.

District Court of Appeal, Third District, California.

Oct. 4, 1948.

1. Insane persons ⚷86

The statute providing that when accused, committed to state hospital as sexual psychopath, has not recovered from such psychopathy and will not benefit from further care and treatment in hospital, in superintendent's opinion, he may return accused to court for further disposition of his case, requires his return for trial on original criminal charge, and he cannot be incarcerated in hospital indefinitely or until cured without trial on such charge. Welfare and Institutions Code, § 5502.5.

2. Insane persons ⚷86

Any uncertainty in statute providing that accused, committed to state hospital as sexual psychopath, may be returned to court for further disposition of his case when he has not recovered from such psychopathy and will not benefit by further care and treatment in hospital in superintendent's opinion, should be resolved in favor of accused. Welfare and Institutions Code, § 5502.5.

3. Criminal law ⚷625

The superior court, in adjudging that one charged with commission of lewd and lascivious act on minor girl was a sexual psychopath and committing him to state hospital, determined issue of his mental condition and terminated proceeding for such adjudication, and hence exceeded its powers in recommitting accused to hospital after his return to court by hospital superintendent to answer criminal proceedings after certifying that accused had not recovered from such psychopathy and would not be benefited by further treatment in hospital. Pen.Code, § 288; Welfare and Institutions Code, §§ 5500–5502, 5502.5.

◆

Habeas corpus proceeding by Fred Stone for release from the Mendocino State Hospital.

Petitioner's discharge from the hospital's custody ordered.

Charles Kasch and Leo M. Cook, both of Ukiah for appellant.

Fred N. Howser, Atty. Gen., by Doris H. Maier, Deputy Atty. Gen., for respondent.

ADAMS, Presiding Justice.

On July 12, 1940, an information was filed in the Superior Court of Shasta County, charging petitioner with a violation of section 288 of the Penal Code in that he had committed a lewd and lascivious act upon a girl ten years of age. Stone pleaded not guilty, and on August 20, 1940, his attorney filed a petition under sections 5500 and 5501 of the Welfare and Institutions Code seeking to have him declared a sexual psychopath. After a hearing the court adjudged him to be such sexual psychopath, and on August 22nd ordered that he be committed to the Mendocino State Hospital, and that proceedings on the criminal charge be suspended.

On December 12, 1941, Dr. Rapaport, the medical superintendent of said State Hospital, certified to the district attorney of Shasta County, by letter, that they had given Stone all the treatment possible, and while his physical condition had improved his mental attitude continued to be such that he would not, in their opinion, be improved by further care and treatment. He stated that he believed Stone to be so sexually ill and mentally deranged that, without supervision, treatment, care or restraint he would be dangerous to himself or to other persons, and to society as a whole; but he requested that the sheriff be directed to call for and return Stone to the superior court for further disposition pursuant to section 5502.5 of the Welfare and Institutions Code.

On December 12, 1941, the Superior Court issued an order to the sheriff to bring Stone into court for further proceedings, and on December 16, 1941, this was done. The court then announced that it would have to proceed against defendant on the criminal charge, an attorney was appointed to represent him and the matter was continued until December 30th to be set for trial.

On that date defendant appeared with his counsel, Mr. Shadwell, but the court announced that it would proceed further on the hearing under the sexual psychopath statute, the prosecution taking the position that the public interest and the ends of justice would best be served by continuing to hold the commitment proceeding in force, and the criminal proceedings in suspension, and to confine the psychopath in an institution *so long as he was a menace to the health and safety of others.* The district attorney further stated that precautions had not been taken to preserve the evidence on the criminal case and that the time element would make it difficult to present it. He asked that the court recommit Stone to the Mendocino State Hospital "to be confined until such time as he is no longer a menace to the health and safety of the public."

Counsel for Stone objected to such course and urged that while the court originally had jurisdiction to commit the accused to the State Hospital, that after the superintendent of the hospital had certified that he would not benefit from further treatment he should be tried on the original charge; and exception was taken to any other proceeding.

The court, however, stated that it would proceed as in continuation of the former hearing, and consider all the evidence that had been taken previously; and the original record made at said hearing was introduced in evidence over the objection of Stone's counsel.

Stone then took the witness stand, testified that he was 52 years of age, married and the father of a girl eight years old. He was questioned about the offense with which he was charged and denied it, saying, also, that he had lost all sexual desire. He also stated that in preference to going back to the hospital he would go to San Quentin; and his counsel requested that they proceed with the criminal proceeding.

The court, however, readjudged Stone to be a sexual psychopath and ordered that he be returned to the Mendocino State Hospital to be held "as required by law."

On April 29, 1942, Dr. Toller, then the superintendent of the said hospital in the absence of Dr. Rapaport who was in the Navy, advised the court that in his opinion Stone was no longer a menace to the health and safety of others, and that unless within thirty days the court should order his return for further action on the criminal charge, he would be paroled for a period of not less than five years.

On April 9, 1943, the trial court was advised by Dr. Rapaport that Stone had violated his parole and that his return to the state hospital was desired; and the court issued an order directing the sheriff to take him into custody and deliver him there.

On December 10, 1945, Dr. Rapaport again certified to the trial court that Stone had not recovered from his sexual psychopathy and would not be benefited by further care and treatment in the said institution; and on December 17, 1945, the court issued an order to return Stone to the court "to answer the criminal proceedings against him, which were suspended upon his commitment as a sexual psychopath," and the sheriff was ordered to detain him in the county jail upon said criminal charge, subject to the bail originally set.

On December 26, 1945, Stone again appeared in court, this time without counsel, and was questioned by the court about an alleged offense committed while on parole. He was also further questioned about the offense contained in the original charge and other matters. He stated that he still wanted his plea of not guilty to stand, and asked for a jury trial. The court then set the case for trial on February 19, 1946. However, on February 13, 1946, said court, without further hearing, issued an order again suspending the criminal proceedings and recommitting Stone to the Mendocino State Hospital. Said judge's order recited that the district attorney had reported to him that it was "impractical to try the case because the witnesses desired and necessary have scattered and cannot now be obtained to testify," and that the minor girl's memory of the facts surrounding the alleged offense had weakened because of the lapse of time.

On July 7, 1948, petitioner, relying upon the facts above stated, filed in this court his application for a writ of habeas corpus, contending that his present detention in the Mendocino State Hospital is illegal in view of the fact that the medical superintendent of said hospital has twice certified to the superior court that, though petitioner has not recovered from his sexual psychopathy, he will not be further benefited by further care and treatment in said hospital; that said medical superintendent returned him to the superior court "for further disposition of his case" under section 5502.5 of the Welfare and Institutions Code, and petitioner has demanded, in said superior court, that he be tried on the criminal charge therein, but that said court has refused to proceed with said trial and has recommitted him to the said hospital without any new or additional charge filed therein authorizing a further adjudication that he is a sexual psychopath, and without any finding that he will benefit from further hospitalization.

Since there has heretofore been no adjudication by an appellate court on the construction to be put upon the applicable portions of section 5502.5, supra, we granted the writ.

Section 5500 of the Welfare and Institutions Code defines a sexual psychopath, Sections 5501 and 5502 provide that when any person is charged with a crime, and, either before or after adjudication of the charge, it appears by affidavit to the satisfaction of the court that such person is a sexual psychopath, the court may adjourn the proceeding, or suspend the sentence, as the case may be, and proceed to try the issue of alleged psychopathy; and if the person is found to be a sexual psychopath the court may commit him to a state hospital.

Section 5502.5 provides that whenever a person so committed recovers to the extent that in the opinion of the superintendent of the hospital he is no longer a menace to the health and safety of others, the said superintendent may certify such opinion to the committing court; and, if said court does not within 30 days after the receipt of said certification order the return of said person "to await the further action of the court with reference to the criminal charge against him," the superintendent may parole such person for a period of not to exceed five years. The section then further provides that "When, in the opinion of the superintendent of the hospital the sexual psychopath has not recovered from his sexual psychopathy *and will not benefit by further care and treatment in the hospital*, the superintendent may return him to the court *for further disposition of his case.*" (Italics added.)

It must be conceded that petitioner has not recovered from his sexual psychopathy, and that he is still a menace to the health and safety of others. It must likewise be conceded, since the medical superintendent of the hospital has twice so certified and there is no evidence to the contrary, that he will not benefit by further care and treatment in the hospital, and that, as authorized by section 5502.5, supra, the medical superintendent has for this reason twice elected to return him into court for further disposition of his case. It is also of record that the trial court, on December 17, 1945, ordered his return to the court "to answer the criminal proceedings against him," and that the said criminal proceeding was set down for trial on February 19, 1946. It is also undeniable that Stone, on both occasions when he was returned to the court on the certificate of the medical superintendent, demanded that he be tried on the original criminal charge. It also seems obvious from the record before us that the trial court recommitted Stone to the hospital because of representations by the district attorney that the lapse of time and the difficulty in then securing testimony for the prosecution of the criminal charge rendered a successful prosecution of the criminal charge doubtful, and because of the opinion of the medical superintendent that Stone was still a menace to the safety of others.

[1] However, the applicable statutes do not authorize a court to continue the detention of a sexual psychopath indefinitely for those reasons, or until he shall have recovered from his psychopathy. And section 5502.5 specifically provides that when

the medical superintendent concludes that such person will no longer benefit by hospitalization he may be returned to court "for further disposition of his case."

While the statute does not say, in so many words, that he shall be returned for trial on the original criminal charge, we are of the opinion that such was the intention of the legislature. Otherwise there would have been no logical reason for making such provision in the act. The purpose of hospitalization under the sections of the code applicable to sexual psychopaths obviously is for treatment for the mental disease or disorder from which the psychopath is suffering; and they contemplate that in either of two contingencies such hospitalization shall cease, to wit, if the accused has recovered, or if he will no longer benefit by further care and treatment in the hospital. And where such person has been returned to court "for further disposition of his case" the conclusion seems to be obvious that by such language the legislature meant that he should then be tried for the criminal offense. While it may well be said that where by lapse of time it has become probable that as the result of such a trial the defendant will be acquitted and be entitled to be restored to his liberty while still a menace to society because of his sexual psychopathy, we cannot therefore hold that accused, without ever being granted a trial on the charge against him, and without the imposition of any sentence fixing a term of imprisonment, may be incarcerated for the remainder of his life because he is such a psychopath, or that he may be bounced from the court to the hospital and from the hospital back to the court ad infinitum. If the legislature had intended that a sexual psychopath might or should be, merely because of such condition, incarcerated in a hospital until cured, it would have so provided in the statute. It is not contended that one not accused of crime may be deprived of his liberty because of a sexual psychopathic condition, nor do we believe that merely because a sexual psychopath is accused of crime he may be held indefinitely in a hospital when he will not benefit from further treatment there, and never permitted to have the question of his guilt or innocence of such crime determined.

Statutes applicable to sexual psychopaths charged with crime differ from those applicable to the insane, for sexual psychopaths are not necessarily insane and are not by reason of their mental condition unable to defend themselves from criminal charges; and if they are convicted of crime, and cannot be benefited by hospitalization, the public is as well protected from them when they are committed to a prison; and if they are innocent of the crime they are entitled to their liberty until again charged with crime or committed as insane under proceedings brought for that purpose under the applicable statutes. The presumption of innocence still protects petitioner, and he is not to be dealt with as a lawbreaker unless and until so adjudicated.

Respondent's counsel in their brief say that section 5502.5 should be so construed that if the psychopath is returned to the superior court as unrecovered and if the court finds it impractical or impossible to continue with the criminal prosecution, the court should not be forced to dismiss the proceeding, but should, in view of the prisoner's continued psychopathy, have a discretionary power to recommit him to the state hospital; that only in this manner can the statutory purpose to protect society be subserved; and that the construction advocated by petitioner would negate this purpose.

[2] May we suggest that if, because of lapse of time during which a sexual psychopath has been detained in a hospital it may become impracticable to bring him to trial when it has been determined that he will no longer benefit from hospitalization, section 5501 may well be amended to provide that proceedings for determining his condition as a sexual psychopath may be had only *after* adjudication of the criminal charge. A comparable amendment to section 7067 of the Welfare and Institutions Code was made in 1939. And if the protection of society from sexual psychopaths is the sine qua non of the statutory enactments regarding such persons, and their confinement in state hospitals *until their recovery is accomplished* is necessary for such persons, then the legislature should so provide in no uncertain language. This it has not done, but, on the contrary, it has

provided that when in the opinion of the superintendent of the state hospital a sexual psychopath will not benefit by further treatment he may be returned to the court for further proceedings in his case. And when he has been so returned, as was Stone, and especially where no new proceedings have been instituted under sections 5500 et seq. and there is no reason to believe that he will be benefited by further hospitalization, it must have been the intention of the legislature that he should then be tried upon the criminal charge. The words found in section 5502.5, "for further disposition of his case," evidence such intention. It is stated by respondent's counsel that section 5502.5 is ambiguous; and if this be the case, any uncertainty therein should, we believe, be resolved in favor of the person charged. See People v. Ralph, 24 Cal.2d 575, 581, 150 P.2d 401.

[3] We are further of the opinion that when the court had once adjudicated Stone a sexual psychopath and committed him to the state hospital, it determined the issue of his mental condition and terminated that proceeding; and that it exceeded its powers in recommitting him after he was returned to the court and, as the order of the court effecting his return stated, he was being held to answer to the criminal charge. For these reasons we conclude that the order of recommitment made on December 13, 1945, was invalid, and that petitioner is entitled to his discharge from the custody of the said hospital; and it is so ordered.

THOMPSON, and PEEK, JJ., concur.

---

87 Cal.App.2d Supp. 921

PEOPLE v. ZOOK et al.

Cr. A. 2386.

Appellate Department Superior Court,
Los Angeles County, California.

July 21, 1948.

1. Municipal corporations ⇨592(2)

A "conflict" exists between city ordinance and a state law so as to render the ordinance unconstitutional when the ordinance and the state law punish precisely the same acts.

See Words and Phrases, Permanent Edition, for all other definitions of "Conflict".

2. Commerce ⇨8(1)

When the United States has exercised its exclusive powers over interstate commerce so far as to take possession of the field, the states no more can supplement its requirements than they can annul them.

3. Commerce ⇨5

The power of Congress to regulate interstate commerce and all its instrumentalities is supreme.

4. Commerce ⇨8(1)

Congress by enactment of the provision of the Interstate Commerce Act penalizing the unauthorized selling of transportation of persons by motor carrier has occupied the entire field, precluding the prosecution of defendants for violation of the California statute by selling transportation to persons in interstate commerce. Interstate Commerce Act, §§ 201–228, § 211(a), 49 U.S.C.A. §§ 301–327, § 311(a); Pen. Code, § 654.1.

◆

Appeal from Municipal Court of Los Angeles; Byron J. Walters, Judge.

Berl B. Zook and others were convicted of unauthorized selling of transportation of persons over public highways, and they appeal.

Judgment reversed and cause remanded with directions, and appeal from order in arrest of judgment dismissed.

DeWitt Morgan Manning and F. W. Turcotte, both of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., Donald M. Redwine, Asst. City Atty., and John L. Bland, Deputy City Atty., all of Los Angeles, for respondent.

SHAW, Presiding Judge.

Defendants were convicted on a charge of violating Penal Code section 654.1, and appeal. In brief, that section, added to the

Code in 1947, makes it unlawful for any person to sell or offer for sale or to negotiate for sale of, transportation of persons on an individual fare basis over public highways of the state, unless the transportation is to be done by a carrier authorized either by the state Public Utilities Commission or by the Interstate Commerce Commission. The complaint charged a violation of this section by selling transportation to two persons from Los Angeles to Fort Worth, Texas. After a demurrer had been overruled, the case was submitted to the trial court on a stipulation of facts showing the complaint to be true, and that the transportation was in fact by motor carrier.

The point made on appeal is that the acts charged and proved against defendants were done in interstate commerce and that for that reason and because of certain Federal legislation, the state law cannot be applied to those acts. We find this contention well founded. The Federal legislation in question (Part II, Interstate Commerce Act, U.S.C.A., Title 49, secs. 301–327) is reviewed in People v. Van Horn (1946), 76 Cal.App.2d 753, 174 P.2d 12, and for details regarding it and the order of the Interstate Commerce Commission which put some of it into effect, we refer to that case. The general effect of the Federal law is that it is unlawful for anyone to sell or offer for sale such transportation by motor carrier as is here in question unless he is licensed as a broker by the Interstate Commerce Commission, or is agent for an anthorized carrier, and that the transportation sold shall be done only by a carrier authorized by the Interstate Commerce Commission (U.S.C.A., Title 49, sec. 311(a)).

There is a field of local regulation of interstate commerce which the state may enter, in the absence of action by Congress, and in State of California v. Thompson (1941), 313 U.S. 109, 61 S.Ct. 930, 85 L.Ed. 1219, it was held that the particular subject matter here involved is in that field and that no Congressional action affecting it was then operative. But since that decision, action by the Interstate Commerce Commission has operated to apply the Congressional action to this subject, as was held in People v. Van Horn, supra, and in our own unpublished decision in People v. Edmondson (1946), L.A.Cr.A. 2160.[1] Since the United States Supreme Court denied certiorari, 329 U.S. 716, 67 S.Ct. 47, 91 L.Ed. 621, in our case we assume they approved our holding. We now have, therefore, a case where there is Federal legislation occupying the same field as the state law.

[1-3] Respondent concedes and even demonstrates that under the circumstances of this case the Federal law and section 654.1, Penal Code, forbid and punish the same acts, but contends that this is permissible and does not invalidate the state law, even as applicable to acts in interstate commerce. If we look to the rule in California for determining whether a city ordinance is in conflict with a state law and for that reason void, the city being limited by our Constitution to such police regulations "as do not conflict with general laws," we find it established that "there is a conflict where the ordinance and the general law punish precisely the same acts." (In re Sic (1887), 73 Cal. 142, 149, 14 P. 405; In re Bell (1942), 19 Cal.2d 488, 498, 122 P.2d 22; Pipoly v. Benson (1942), 20 Cal.2d 366, 370, 371, 125 P.2d 482, 147 A.L.R. 515; In re Portnoy (1942), 21 Cal.2d 237, 240, 131 P.2d 1; People v. Commons (1944), 64 Cal.App.2d Supp. 925, 929, 148 P.2d 724.) Respondent contends that this is not the rule applicable as between State and Federal legislation, but on review of the authorities we conclude that the rule in interstate commerce matters has substantially the same effect as that above stated. Of such a case, the United States Supreme Court said long ago: "This legislation [enacted by Congress] covers the same ground as the New York Statute, and they cannot co-exist." (People of State of New York v. Compagnie Generale Transatlantique (1883), 107 U.S. 59, 63, 2 S.Ct. 87, 27 L.Ed. 383, 385.) In Charleston etc. R. Co. v. Varnville Furn. Co. (1915), 237 U.S. 597, 604, 35 S.Ct. 715, 59 L.Ed. 1137, 1140, Ann.Cas.

---

[1] No opinion for publication.

1916D, 333, where it was urged that a state law regarding payment of claims for overcharges of freight was in aid of interstate commerce, the court said: "When Congress has taken the particular subject matter in hand, coincidence is as ineffective as opposition." This quotation was quoted with apparent approval in Cloverleaf Butter Co. v. Patterson (1942), 315 U.S. 148, 169, 62 S.Ct. 491, 86 L.Ed. 754, 770, and in Bethlehem Steel Co. v. New York State Labor Rel. Bd. (1947), 330 U.S. 767, 775, 67 S.Ct. 1026, 91 L.Ed. 1234, 1247. In Pennsylvania R. Co. v. Public Service Comm. (1919), 250 U.S. 566, 569, 40 S.Ct. 36, 64 L.Ed. 1142, 1145, the court said: "But when the United States has exercised its exclusive powers over interstate commerce so far as to take possession of the field, the states no more can supplement its requirements than they can annul them." Again in Missouri Pac. R. Co. v. Porter (1927), 273 U.S. 341, 346, 47 S.Ct. 383, 71 L.Ed. 672, 675, the court said, referring to the power of Congress over interstate commerce: "Its power to regulate such commerce and all its instrumentalities is supreme; and, as that power has been exerted, state laws have no application. They cannot be applied in coincidence with, as complementary to or as in opposition to, federal enactments which disclose the intention of Congress to enter a field of regulation that is within its jurisdiction." In Oregon-Washington R. & Nav. Co. v. Washington (1926), 270 U.S. 87, 101, 46 S. Ct. 279, 70 L.Ed. 482, 488, the court said of such local regulations as we have here: "the state may exercise its police power until Congress has by affirmative legislation occupied the field by regulating interstate commerce and so necessarily has excluded state action." In Northern Pac. R. Co. v. Washington (1912), 222 U.S. 370, 378, 32 S.Ct. 160, 56 L.Ed. 237, 239, the court held that an act of Congress regulating hours of labor in interstate railway transportation, even though it was not to take effect until a year after its passage, prevented the state from enforcing similar regulations in the meantime, saying: "* * * as the enactment by Congress of the law in question was an assertion of its powers by the fact alone of such manifestation that subject was at once removed from the sphere of operation of the authority of the state." A similar declaration appears in People v. Marine Products Co. (1947), 77 Cal.App.2d Supp. 929, 933, 177 P.2d 67.

Against our conclusion already stated respondent cites United States v. Lanza (1922), 260 U.S. 377, 43 S.Ct. 141, 67 L.Ed. 314, Cross v. North Carolina (1889), 132 U.S. 131, 10 S.Ct. 47, 33 L.Ed. 287, and other cases holding that the same act or acts may be an offense against both state and nation and punishable by each. In the Lanza case, the 18th Amendment was involved, which, as the court pointed out, expressly authorized its enforcement concurrently by state and nation. The other cases do not concern interstate commerce and are sufficiently distinguished in Southern R. Co. v. Railroad Comm. (1914), 236 U.S. 439, 445, 446, 35 S.Ct. 304, 59 L.Ed. 661, 665. There it appeared that the State of Indiana had a statute nearly the same as one passed by Congress, requiring grab irons and hand holds on freight cars and imposing a penalty for violation. A proceeding was brought against the railroad company under the Indiana statute to recover the penalty, but the United States Supreme Court held the statute invalid, after considering the same argument made here. Referring to Cross v. North Carolina, supra, and to the rule declared in it, the court said: "But, upon an analysis of the principle on which it is founded, it will be found to relate only to cases where the act sought to be punished is one over which both sovereignties have jurisdiction." The court further said: "But the principle that the offender may, for one act, be prosecuted in two jurisdictions, has no application where one of the governments has exclusive jurisdiction of the subject-matter, and therefore the exclusive power to punish. Such is the case here where Congress, in the exercise of its power to regulate interstate commerce, has legislated as to the appliances with which certain instrumentalities of that commerce must be furnished in order to secure the safety of employees. Until Congress entered that field, the states could legislate as to equipment in such manner as to incidentally affect, without burdening, interstate commerce. But Congress could pass the safety appliance act only because of the fact that the equipment of cars moving on interstate roads was a regulation of interstate commerce. Under the Constitution the nature of that power is such that, when exercised, it is exclusive, and ipso facto supersedes existing state legislation on the same subject." The first of these quotations was copied with approval in United States v. Lanza, supra, at 260 U.S. 384, 43 S.Ct. 143, 67 L.Ed. 318.

In State v. Harper (1914), 48 Mont. 456, 138 P. 495, 51 L.R.A.,N.S., 157, 159, Ann. Cas.1915D, 1017, the court held invalid a state law substantially like the Mann Act, 18 U.S.C.A. § 397 et seq., prohibiting the transportation of women into the state for immoral purposes; and discussing the argument that the same act may be an offense against both the United States and the state, the court said: "This might be true in some instances, but here we are confronted with the fact that, so far as the regulation of interstate commerce is concerned, the states have expressly surrendered the entire subject to the general government, and that, when the general government sees fit to exercise the powers delegated and surrendered to it by the states, the state is precluded from saying that the subject, or any matter connected therewith, is under the concurrent control of the two sovereignties."

[4] We conclude, therefore, that section 654.1, Penal Code, cannot be validly applied to transportation in interstate commerce, and since the complaint herein expressly limits itself to such transportation, it states no offense punishable under the section and the demurrer should have been sustained.

The judgment is reversed and the cause remanded to the Muncipal Court with directions to sustain the demurrer to the complaint and enter judgment dismissing the action, The appeal from the order in arrest of judgment is dismissed.

BISHOP, J., concurs.

---

87 Cal.App.2d Supp. 933

FREE et al. v. SLUSS et al.

No. 146946.

Appellate Department, Superior Court,
San Diego County, California.
Sept. 3, 1948.

1. Judgment ⚷251(1)

If a cause of action is fairly proved by plaintiffs as against either or both defendants, plaintiffs should have their remedy, no matter on what theory the complaint is drawn.

2. Judgment ⚷251(1)

It is the facts pleaded and not the theory of the case on which a plaintiff is to be granted or denied relief, when supported by sufficient evidence.

3. Sales ⚷73

Where second sale was procured on representations that the soap was the same soap as that previously demonstrated, the second sale was sale by sample.

4. Sales ⚷261(7)

Where quality of first lot of soap purchased had proved satisfactory and such quality was made the basis of offer to sell and acceptance of second lot of soap, which was represented to be the same soap as that previously purchased, there was an express warranty of quality, and it was unimportant that the warranty was only collateral to the principal contract.

5. Appeal and error ⚷842(2)

Where there was no conflict in the evidence, findings of the trial court on issue involved amounted only to a conclusion of law.

6. Sales ⚷284(1, 4)

Where second lot of soap was purchased on representation that it was the same soap as that previously demonstrated and found satisfactory, but the second lot was unfit for the purposes for which it was sold and was unmerchantable, the dealers were liable to the buyers.

7. Sales ⚷255

Package containing statement that, if soap therein contained did not meet with entire approval, dealer would cheerfully refund the purchase price upon return of unused portion; established manufacturer's intention that the soap should move through the usual channels of trade and was a representation addressed to those who should deal in such soap, and the manufacturer was liable to buyers who purchased the soap through dealers, where the soap was unfit for use. Code Civ.Proc. § 1962, subd. 3.

8. Appeal and error ⚿1008(3)

The Appellate Court may determine the legal effect of a written instrument contrary to construction given instrument by trial court.

◆

Appeal from Municipal Court of City of San Diego; Lowell Howe, Judge pro tem.

Action by Charles A. Free, James A. Free, and Melvin H. Free, copartners doing business under the name of Free Brothers Market, against I. B. Sluss and M. F. James, copartners doing business under the name of M. F. James Brokerage Company, and Frederick Soap Company, a corporation. From the judgment rendered, the plaintiffs appeal.

Judgment reversed, as to both sets of defendants with direction to amend conclusions of law and to enter judgment for plaintiffs as prayed for.

Glen H. Munkelt, of San Diego, for appellants.

Harden & Condra, of San Diego, for respondents Sluss, James and M. F. James Brokerage Co.

Rollinson & Priess, of Los Angeles, for respondent Fredrick Soap Co.

BURCH, Judge.

The plaintiffs operate a retail grocery in Coronado. The defendant corporation is the manufacturer of soap. The individual defendants are a partnership wholesale broker and dealers in soap. The litigation grows out of a transaction which occurred in the fall of 1946 when soap was scarce and hard to obtain for the existing market. The uncontradicted testimony of one of the plaintiffs, Charles A. Free, establishes that Mr. James, one of the defendant dealers, brought to plaintiffs' grocery store, for the purposes of effecting a sale, a package of Fredrick's Margarita Soap, which was a new product to plaintiffs. Mr. James represented that he had the answer to plaintiffs' want; that he had a good product in a good looking package; that the soap was likely to stay upon the market; and he exhibited to plaintiffs at that time a guarantee of quality printed on the back of the package, and told plaintiffs that if they had any trouble to go ahead and refund the customer's purchase price and that the guarantee would take care of the plaintiffs. The plaintiffs purchased twenty-five cases. The witness testified "this Fredrick's soap looked so good we took a chance on 25 cases". He was asked if he had made any public demonstration of that soap. His answer was: "We did. I got my wife's washing machine, and we put it right next to our checking stand, and we put a small amount of this soap in the washing machine, and it wasn't bad." Question: "Did you have any second dealing with Mr. James about the Frederick's Margarita soap?" Answer: "Yes. Mr. James came back to us. It was not too long after this first 25 cases of soap, and asked us how we had done, and we told him we had done fair on it, and asked us if we would like another shipment of the same soap. We told him that we would, and he said 'Well, I think we can get you 100 cases. A lot of smaller markets can't handle as much as we thought they were going to handle, so you sold all of this, so we can give you this 100 cases' and I took it. We received the shipment just a few days after that and paid for it."

On further substantial evidence the Court found that the one hundred cases of soap purchased were unfit for the purposes for which they were sold and were unmerchantable. It also appears in the record without contradiction that the plaintiffs offered to return the goods to both the dealers and to the manufacturers.

The guarantee of quality referred to above is as follows:

"Frederick
"Margarita
"All Purpose Granulated Soap
"Guarantee of Quality

"If Frederick's granulated soap does not meet with your entire approval your dealer will cheerfully refund the full purchase price upon return of the unused portion.

"(Directions in various uses follow.)

"Frederick Soap Co. Los Angeles
"California"

When, after discovery of unmerchantability, plaintiffs offered to return the soap to the manufacturer, the latter admitted that the necessary materials to put into the manufacture of a merchantable product were not available.

The fact is evidenced and not contradicted that the plaintiffs bought on the representations made by Mr. James during the negotiations as above set forth.

For the dealer it is contended that these representations were no part of the contract and that no warranty of quality for which the dealer is responsible to the grocerymen is involved.

Defendant manufacturer contends it is relieved by want of privity; and that there is no obligation arising against it in the circumstances either in contract or in tort.

[1, 2] If a cause of action is fairly proved by plaintiffs as against either or both the dealer and the manufacturer, they should have their remedy, no matter on what theory the complaint is drawn. It is the facts pleaded and not the theory of the case on which a plaintiff is to be granted or denied relief, when supported by sufficient evidence.

[3] The circumstances attendant upon the two sales, whereby it is represented that the soap is the "same soap" as that previously demonstrated, makes the second sale one by sample. 46 Am.Jur. 552, Sales § 369; Pederson v. Goldstein, 70 Cal.App.2d 155, 160 P.2d 878; Taylor v. J. B. Hill Co., 31 Cal.2d 373, 189 P.2d 258.

[4] Moreover, the sale was one with express warranty of quality because the quality of the previous soap which had proved satisfactory was made the basis of the offer to sell and the acceptance of the goods. Taylor v. J. B. Hill Co., 31 Cal.2d 373, 189 P.2d 258. It is unimportant that the warranty was only collateral to the principal contract. Chamberlain Co. v. Allis-Chalmers Co., 51 Cal.App.2d 520, 522, 523, 125 P.2d 113.

[5, 6] Since there is no conflict in the evidence on these matters the findings of the trial court on the issue amount to but a conclusion of law. San Diego Trust & Savings Bank v. County of San Diego, 16 Cal.2d 142, 153, 105 P.2d 94, 133 A.L.R. 416. We are of the opinion that the only conclusion which can be reached from a consideration of the undisputed evidence is that the dealer is liable to the plaintiffs.

[7] As to the manufacturer we have concluded that the "guarantee of quality" printed upon each package of soap reached beyond the dealers to persons in the position of plaintiffs. It establishes the manufacturer's knowledge and intention that the goods should move through the usual channels of trade, and was a representation addressed to those who would deal in its product. It was under no obligation to make the guarantee, but having made it, it does not lie in its mouth to repudiate it when the condition of complete unsuitability for the market brings the guarantee into play.

"Whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it." Code of Civil Procedure, Section 1962, sub. 3.

[8] That the manufacturer had a financial interest in the immediate sale to plaintiffs is established. Southern California Enterprises v. D. N. & E. Walter & Co., 78 Cal.App.2d 750, 178 P.2d 785. The evidence is uncontradicted that it marketed a product which it had manufactured without the necessary ingredients to produce merchantable soap. When plaintiffs offered to return the unsatisfactory soap the manufacturer so advised plaintiffs. Under the

rule of Paul v. Williams, 64 Cal.App.2d 696, 149 P.2d 284, the manufacturer is not in position to deny liability. Though the trial court did not so construe the written instrument, the appellate court may determine its legal effect. Trubowitch v. Riverbank Canning Co., 30 Cal.2d 335, 182 P.2d 182.

The judgment appealed from is reversed as to both sets of defendants, with directions to amend the conclusions of law and to make and enter judgment for the plaintiffs as prayed for.

TURRENTINE, P. J., and THOMPSON, J., concur.

CALIFORNIA REPORTER

198 PACIFIC REPORTER

SECOND SERIES

32 Cal.2d 632

WOLFSEN et al. v. HATHAWAY et al.

Sac. 5849.

Supreme Court of California.
Sept. 28, 1948.

1. Appeal and error 🔑1045(1)

Defendants, securing satisfactory jury, could not urge prejudice to them in operation of statute requiring joinder of several parties on either side of litigation in challenge to jurors on ground that presence in case of codefendants interfered with proper challenges on defense's behalf, regardless of whether such codefendants' interests conflicted with those of plaintiffs. Code Civ. Proc. § 601.

2. Judgment 🔑948(1)

In action to recover damages for destruction of grass and grain growing on land leased by plaintiffs for pasturage, where answer set forth as separate defense alleged oral lease of land to one of defendants in justification of their farming operations thereon, plea of prior judgment, determining that such defendant did not hold oral lease and that defendants had no right to plow land or destroy grass and grain, was not prerequisite to plaintiffs' right to prove such judgment as estoppel against defendants' attempt to relitigate same issues. Code Civ.Proc. § 462.

3. Judgment 🔑948(1)

The defense of res judicata is waived by failure to plead or prove former judgment on litigated issues in subsequent action.

4. Evidence 🔑43(3)

Plaintiffs cannot avail themselves of principle of judicial notice in support of their plea of former adjudication of issue in case by judgment in prior action against defendants by other plaintiffs, as court generally will not take judicial notice of other actions, even if pending or concluded in same court.

5. Evidence 🔑43(2, 3)

A court's authority to take judicial notice of its own records is limited to proceedings in same case as that before it.

6. Frauds, statute of 🔑44(4)

An oral agreement, made on December 15, 1945, to lease land until June 30, 1947, was invalid as for longer period than one year, in absence, of written memorandum signed by lessor or his agent. Civ.Code, § 1624, subd. 4.

7. Landlord and tenant 🔑22(2)

One seeking to lease land acquired no right to possession thereof by virtue of preliminary negotiations not yet reduced to writing satisfactory to parties and entered on land at his peril before ultimate settlement of leasing conditions.

8. Landlord and tenant 🔑54

In action to recover damages for destruction of grass and grain growing on land leased by plaintiffs for pasturage, evidence was insufficient to take to jury question whether defendants held oral lease of land for farming purposes or were lawfully entitled to enter on and disk or plow land and destroy such crops.

9. Frauds, statute of 🔑129(12)

Where landowners refused to execute proposed lease of land for farming purposes and consistently disclaimed any rights of possession accrued thereunder, proposed lessee's entry on land and performance of farming work thereon did not constitute part performance of alleged oral agreement to lease land to them for longer period than one year, and hence did not validate such agreement. Civ.Code, § 1624, subd. 4.

10. Landlord and tenant 🔑54

Where lessees' right to harvest grain growing on land leased to them for pasturage was integral part of lease, and persons claiming right to farm land under oral agreement to lease it to one of them received notice of pasturage lease on day after execution thereof, their subsequent destruction of grain crop by disking operations invaded grazing lessees' rights so as to entitle them, as real parties in interest, rather than landowners, to sue persons claiming under oral lease for resulting damages. Code Civ.Proc. § 367; Civ.Code, §§ 3520, 3523.

11. Damages 🔑112

The proper measure of damages for wrongful destruction of perennial crops, such as volunteer grass for grazing purposes, is difference in rental value of land on which grown, with and without crops.

12. Damages 🔑112

The proper measure of damages for wrongful destruction of annually planted crops is market value of estimated product at time of destruction, less cost of producing and marketing crops.

13. Damages 🔑112

Where lease of land for pasturage purposes gave leesees right to harvest volunteer grass growing thereon, they were entitled to recover market value of grass, less cost of cutting and hauling it to market, as damages for wrongful destruction thereof by disking and plowing of portion of land by persons claiming it under oral lease for farming purposes.

14. Appeal and error 🔑882(3)

In action to recover damages for destruction of grass growing on land leased by plaintiffs for pasturage, where evidence of market value of grass in light of cost of replacement thereof for feed of plaintiffs' cattle was admitted without objection and case was tried on theory that such value was measure of damages, defendants cannot complain of such method of proving damages on appeal from judgment on jury's verdict for plaintiffs. Civ.Code, § 3333.

15. Damages 🔑138

Evidence was sufficient to support jury's award of $15,410 compensatory damages to lessees of pasture land for wrongful destruction of grass and grain growing thereon by defendants' farming operations.

16. Damages 🔑91(1)

The only malice contemplated by statute authorizing plaintiff to recover exemplary damages in tort action, where defendant has been guilty of malice, expressed or implied, is malice in fact, and phrase "express or implied" refers only to evidence by which such malice is established. Civ.Code, § 3294.

17. Damages 🔑91(1)

"Express malice," within statute authorizing recovery of exemplary damages in tort action, where defendant has been guilty of malice, express or implied, means malice established by express or direct evidence of actual hatred and ill will, while "implied malice" refers to indirect evidence from which jury may infer existence of malice in fact. Civ.Code, § 3294.

See Words and Phrases, Permanent Edition, for all other definitions of "Express Malice" and "Implied Malice".

18. Damages 🔑91(1)

Punitive damages may be awarded only on showing regarded by law as adequate to establish "malice in fact," that is motive and willingness to vex, harass, annoy, or injure.

See Words and Phrases, Permanent Edition, for all other definitions of "Malice in Fact".

19. Damages 🔑91(1)

An award of punitive damages may not be based on mere speculation, but depends on definite showing of willingness to vex, harass, annoy or injure, consistent with wrongful personal intention to injure.

20. Damages 🔑208(8)

Evidence showed, as matter of law, that tortious acts of one relying on oral agreement for lease of land to him for farm cultivation in disking and plowing portion thereof after notice of written lease thereof to others for pasturage purposes, did not stem from malice in fact, but wholly from mistaken claim of right under belief that oral lease was valid and enforceable, so as to preclude submission to jury of question of pasturage lessees' right to punitive damages; wrongful personal intention to injure not being established. Civ.Code, § 3294.

CARTER and SCHAUER, JJ., dissenting.

◆

Appeal from Superior Court, Merced County; H. S. Shaffer, Judge.

Action by Henry B. Wolfsen and another against W. L. Hathaway, Seth Cole and others, to recover damages for destruction of grass and grain growing on land leased by plaintiffs for pasturage. From a judgment for plaintiffs against named defendants only, they appeal.

Modified, and affirmed as modified.

Prior opinion, 187 P.2d 449.

L. M. Linneman and Linneman & Burgess, all of Dos Palos, for appellants.

C. Ray Robinson and Margaret A. Flynn, both of Merced, for respondents.

SPENCE, Justice.

Plaintiffs brought this action to recover damages for the destruction of grass and grain growing on land leased by them for pasturage. The damages occurred as the result of some farming operations undertaken by defendants W. L. Hathaway and Seth Cole, claiming to have acted in reliance upon an oral agreement for the written lease of the land for farm cultivation. Upon the completion of the trial testimony and in response to plaintiffs' motion premised on the theory that there was no evidence validating the existence of said defendants' alleged oral agreement, the court "directed * * * a verdict in favor of [plaintiffs] on actual and compensatory damages," with the amount thereof to be fixed by the jury, but on the issue of "punitive damages" the court left "the question * * * entirely to the discretion of the jury," both as to the matters of allowance and amount. Thereupon the jury returned a verdict against each of said defendants for compensatory damages in the sum of $15,410, and against defendant W. L. Hathaway as "exemplary or punitive damages" the further sum of $15,000. From the judgment accordingly entered against them, defendants W. L. Hathaway and Seth Cole prosecute this appeal. The owners of the land were also named as codefendants in this action, but in pursuance of the court's instruction, the jury returned a verdict in their favor, judgment was so entered, and they are not parties to this appeal.

Appellants contend that the court erred in instructing the jury that respondents were entitled to damages in any sum whatsoever, and claim that the assumed invalidity of appellants' alleged oral agreement for lease of the land involved, as premise for the directed verdict, is not supported by the evidence. They also argue that the amount of compensatory damages is excessive, and that there is no showing of actual malice to substantiate the award for exemplary damages. The record sustains appellants only as to the last proposition—the impropriety of the punitive damage assessment.

[1] As an additional point, appellants question the constitutionality of the required joinder of "several parties on either side" of litigation in any challenge to jurors, whether peremptory or for cause. Code Civ.Proc., sec. 601. In this connection they argue that the owners of the land "were anything but adversaries to the plaintiffs" and that "their presence in the case as codefendants with" appellants interfered with the proper interposition of challenges on behalf of the defense, with the result that "appellants were in effect deprived of their right to trial by jury." But whether or not the designated codefendants had "conflicting" interests, the record shows that appellants secured a jury which was apparently satisfactory to them. There is thus no basis for their urging any prejudice or injury in the operation of the statute with respect to the procedural formality in their authorized exercise of "challenge to jurors" (see National Sanitary Rag Co. v. Lawrence, 33 Cal.App.2d 198, 200, 91 P.2d 120), and the matter need not be considered further.

The record discloses these salient facts: Defendants Luis Fatjo, Lolita Fatjo Judge, Mary J. Fatjo and Paula Marie Fatjo, as a family unit, owned 1,740 acres of grazing and grain land situated in the county of Merced. On January 17, 1946, they executed a written lease of said land to respondents for a term of seven and one-half months commencing on March 15, 1946, for the cash rental of $7,500. Respondents leased the land "for the purpose of conducting therein the grazing of cattle and the harvest of volunteer grass and grain." They took possession as scheduled under the terms of their lease. Appellants, by their separate answer to the complaint and at the trial, claimed that "on or about the 15th day of December, 1945," the owners of the land, through their agent, C. J. McCullough, "entered into an oral agreement with defendant W. L. Hathaway * * * to lease and demise and agreed to enter into a [subsequent] written lease for the purpose of leasing and demising to" him said land, for a term of tenancy "to commence forthwith" and "to expire on the 30th day of June, 1947," in consideration of one-fourth of the crop of grain produced, to be delivered to the lessors as rental therefor; that the written lease [which was never executed nor delivered] "should contain substantially the same terms and conditions in addition to the foregoing terms and stipulations as were contained in a certain lease executed * * * under date of November 1, 1941, to one Thomas Hauschildt"; that pursuant to said oral agreement, "defendant W. L. Hathaway entered into [immediate] possession of the land" and "plowed and disced certain portions" thereof; and that "defendant Seth Cole" was "the agent and employee of defendant W. L. Hathaway" and worked "in cooperation and conjunction with" the latter on said land. The lessee Hauschildt had died during the term of his tenancy and "without formal assignment or assumption of the lease," appellant Hathaway "took [it] over" and "harvested the grain in the summer of 1945," but he had "no further right" on the land after he had done that job as successor to Hauschildt and any subsequent rental arrangement was "an entirely new matter." However, appellant Hathaway in "December of '45," at the time of the alleged oral agreement for his lease of this land, was "operating" a "farming field" of approximately the same acreage "directly across the highway" and belonging to the same owners.

McCullough was acting as agent for the real estate firm which handled the various transactions connected with the numerous realty holdings of these particular owners in the vicinity. The evidence is undisputed that no written lease of the property here involved was executed between appellant Hathaway and the owners. However, on January 8, 1946, appellant Cole commenced plowing the land and so continued until about noon of the next day when there was a breakdown of the machinery. Meanwhile McCullough, having received a telephone message from respondent Henry Wolfsen that "there was some plowing being done upon [the] premises," telegraphed to appellant Hathaway under date of "January 8 P.M." as follows: "There is some uncertainty if owners will approve farming field arrangement. Do not disk or plow until we communicate with you again." Receiving the telegram the next morning, January 9, appellant Hathaway went to the premises that afternoon "between one and two o'clock," found appellant Cole "fixing [the] plow" and told him that "McCullough * * * wanted [them] to stop for a few days." Then on January 18, 1946, McCullough notified appellant Hathaway by letter as follows: "As the writer mentioned to you, the Fatjo family have decided not to farm the south field [the land here involved] this year, and instead have leased it for grazing purposes. Will you please be sure that your foreman knows of this and that he does not by mistake do any more plowing. The writer understands that before the foreman was properly informed he had plowed about 40 acres." Two or three weeks thereafter appellant Hathaway took up the matter with his attorney, who told him that he "had a legal and enforceable [oral] lease" of the property. The attorney accordingly on February 19, 1946, wrote to McCullough that appellant Hathaway was "relying in good faith * * * upon the oral agreement" as entitling him "to the possession of the property," that he had "embarked upon the performance of the lease," and that he would appreciate hearing from McCullough "on the subject" after the latter had communicated with his "principals." On February 26, McCullough advised appellant Hathaway's attorney by letter that "there was no agreement, oral or otherwise, with Mr. Hathaway," that "we do not recognize any right in Mr. Hathaway to possession of the property," and that "the field as we informed Mr. Hathaway has been leased to another for grazing purposes."

Following this exchange of letters in February, 1946, and toward "the latter part of" the month or "the 1st of March" appellant Cole, upon instructions from appellant Hathaway, resumed farming operations on the property and began to disk the land. While he was so proceeding and on March 5, 1946, respondent Henry Wolfsen went to the field and told appellant Cole that respondents "had a lease on the property," warned him "to quit disking" and not to destroy "the feed" or "there was somebody going to pay some damages for it." Thereafter, and "on the evening of the 7th of March," a restraining order was served on appellants, and they undertook no further farming operations on the property, but by that time some 635 acres of the grazing and grain land had been plowed and disked.

[2-5] As a preliminary point, respondents cite a judgment which was rendered in a former action brought by the owners of the land against these appellants—wherein it was determined that Hathaway did not hold the oral lease claimed in this suit, that neither he nor Cole had the right to disk, plow or destroy the crops of grass or grain growing on the property, and an injunction was issued accordingly against their continuing such activity—as res judicata of those issues in this action. It is true that such suit was filed on March 7, 1946, in which those precise issues were resolved against the defendants Hathaway and Cole; that from the judgment entered in disposition of the matters so litigated, defendants appealed to the District Court of Appeal, Third Appellate District, and that "pursuant to request," their appeal was dismissed on March 26, 1947. Fatjo et al. v. Hathaway et al., 3 Civ.No. 7349. It is also true that since appellants in their answer in this case set forth as a separate defense the alleged oral lease of the property in justification of their "farming operations" thereon, and respondents therefore had no opportunity to plead the prior adjudication that plea was not a prerequisite to respondents' right to interpose proof of the former judgment as an estoppel against the attempt of appellants to relitigate the same issues. Code Civ.Proc., 462; 21 Cal.Jur., sec. 113, p. 163. But the record in this case contains no proof of respondents' reliance upon the former judgment as res judicata. While in the course of cross-examination of appellant Hathaway, certain relevant portions of his testimony in the former action were cited, such references were made only for the purpose of impeachment. It has been uniformly held that in the absence of either pleading or proof of a former judgment upon litigated issues, the defense of res judicata is thereby waived in the subsequent action. 15 Cal.Jur., sec. 233, p. 214; 50 C.J.S., Judgments, § 822, page 389; Domestic and Foreign Petroleum Co., Ltd., v. Long, 4 Cal.2d 547, 562, 51 P.2d 73; Rideaux v. Torgrimson, 12 Cal.2d 633, 638, 86 P.2d 826; Spitzer v. Superior Court, 74 Cal. App. 494, 498, 241 P. 270. Nor can respondents avail themselves of the principle of judicial notice in support of their present plea of the former adjudication. It is the general rule that "the court will not take judicial notice of other actions, not even those pending or concluded in the same court." Johnston v. Ota, 43 Cal.App.2d 94, 96, 110 P.2d 507, 509; see, also, 10 Cal.Jur., sec. 52, p. 727; Stanley v. McElrath, 86 Cal. 449, 457, 458, 25 P. 16, 26 P. 800, 10 L.R.A. 545; Bank of America National Trust & Savings Ass'n v. Button, 23 Cal.App.2d 651, 653, 74 P.2d 81. The authority of a court to take judicial notice of its own records "is limited to proceedings in the same case." Sewell v. Price, 164 Cal. 265, 273, 128 P. 407, 410.

[6] However, there does not appear to be any substantial evidence in this case that appellant Hathaway held a valid oral lease on the land as the basis for undertaking the farm work in question. The alleged oral agreement to lease the land was invalid, under subdivision 4 of

section 1624 of the Civil Code, for it purports to be "an agreement for the leasing for a longer period than one year." It was claimed to have been made on December 15, 1945, and that it "was to expire on the 30th day of June, 1947." The statute provides that such an agreement is "invalid, unless the same, or some note or memorandum thereof, is in writing and subscribed by the party to be charged or by his agent." No such memorandum was signed. It seems evident from a reading of the record that appellant Hathaway had a conversation with McCullough, the real estate agent, in December, 1945, regarding a proposed lease of the land. As above stated, the property had been formerly leased to Thomas Hauschildt—for five years, running from November, 1941—but when he died in 1945, appellant Hathaway "just stepped in there and did Tom Hauschildt's job," harvesting "the grain in the summer of 1945" on the "basis which Hauschildt operated, three-quarters to the tenant and one-quarter to the landlord." As appellant Hathaway himself testified, his contemplated lease of the property was to be on a "crop share" arrangement "*along the line* of the Hauschildt lease," upon terms to be thereafter agreed upon and executed between the owners of the land and himself. In that regard he testified: "Q. You understood then that this lease was to be signed by the owner of the property, didn't you? A. That is right. * * * Q. You understood by that that he wanted a signed lease in order to complete the deal, isn't that right? A. Yes."

[7] It is true that on January 2, 1946, following their discussion of terms some two weeks earlier, McCullough prepared and sent to appellant Hathaway a proposed written lease for the latter's approval and signature. It was not signed by the owners. The prompt delivery of that proposed written lease by McCullough demonstrates that the parties' rights were not to depend upon any oral rental arrangement but rather were to stem from a written agreement to be thereafter executed by them. McCullough had no authority as an agent of the owners or otherwise to make an oral lease of the property or to agree upon the terms of the proposed written lease with appellant Hathaway. He so testified. There is absolutely no evidence in the record that McCullough had or claimed any such authority, and no basis for appellant Hathaway to insist their dealings would warrant any other conclusion. To this point appellant Hathaway testified that McCullough told him "he was going to *take the bull by the horns* and go ahead with this arrangement with me on the property." Such statement clearly inferred that McCullough had no authority to lease the property orally or otherwise. It is true that McCullough appreciated the urgency of completing the arrangements so that the farm work could proceed "in the immediate future." Accordingly, in his letter of transmittal to appellant Hathaway, McCullough stated that "it is essential that we consummate this lease as quickly as possible as the time is close at hand for doing the summer fallow work" and he asked Hathaway, "as a means of saving time," to "call [him] on the phone at our expense" with regard to any questions. But such communication, which appellant Hathaway claims to have interpreted as meaning that he was to proceed with his farming operations "under the agreement at once," on its face does no more than confirm McCullough's steadfast position that the commencement of the work was to await the execution of the written lease, with the matter receiving the parties' "earliest attention." Moreover, appellant Hathaway admitted that he read the proposed written lease which he received from McCullough and signed it, notwithstanding the fact that it contained some provisions with which he did not agree. Such execution followed his phone call to McCullough sometime between "January 3rd" and "January 5th." Regarding the variances in the proposed lease, which admittedly contained "clauses * * * that * * * had not even [been] discussed" in the preliminary oral negotiations with McCullough, appellant Hathaway testified: "We had not arrived at all the details of the lease, the agreement was I believe I testified to in discussing this with Mr. McCullough over the phone, and he told me to go ahead and sign this lease and shoot it up to him, that he and I would

get together on some of the details later. * * * I have had no conversation with Mr. McCullough since the phone call that I made." On January 8, 1946, two days after returning the signed lease to McCullough, appellant Hathaway sent his foreman Cole upon the land to commence the plowing work above mentioned though admittedly neither then nor at any time thereafter was there "a final determination of the terms and provisions of the contemplated lease between [himself] and the Fatjo heirs." With the ultimate settlement of the leasing conditions so pending, appellant Hathaway acquired no right to possession of the land by virtue of the preliminary negotiations which had not yet been "reduced to writing" satisfactory to the parties (Pacific Coast Joint Stock Land Bank of San Francisco v. Jones, 14 Cal.2d 8, 14, 92 P.2d 390, 123 A.L.R. 695), and he entered on the property "at his peril." Linnard v. Sonnenchein, 94 Cal. App. 729, 735, 272 P. 315, 318.

[8] Appellant Hathaway admitted that he had received the letter from McCullough, dated January 18, 1946, notifying him that the property had been leased "to other persons for grazing purposes" and returning the proposed lease theretofore signed by appellant, with the statement that it had been rejected by the owners in line with their decision "to not farm the * * * field [that] year." As heretofore mentioned, ten days prior to that letter—on January 8—McCullough telegraphed appellant Hathaway to "not disk or plow [the land] until we communicate with you again." Likewise, as above recited, appellant Hathaway had McCullough's letter of February 26, 1946, stating that he "had no lease on the property." Nevertheless, appellant Hathaway instructed his foreman Cole "around the [end] of February" to "get the equipment ready and move it over onto the property to start disking." After such operations had proceeded for a few days and on March 5, respondent Henry Wolfsen saw appellant Cole working on the land, told him that respondents had leased the property, and warned him not to destroy the crops. In reply, appellant Cole said that he "wouldn't stop because I just take orders from one man [appellant Hathaway]." Accordingly, appellants continued the farming work, which they had undertaken about "the 1st of March," until March 7, when the restraining order was served upon them, and committed during that period substantially all the damages subject of this suit. In line with this review of the record, there appears to be no evidence in this case that appellants held an oral lease or that they were lawfully entitled to enter upon the property and disk or plow the land and destroy the crops thereon. The court therefore properly instructed the jury to that effect. Galiano v. Pacific Gas & Electric Co., 20 Cal.App.2d 534, 538, 539, 67 P.2d 388.

[9] Appellants contend that the alleged oral agreement to lease was not invalid under section 1624 of the Civil Code, regardless of the fact that it was "for a longer period than one year," for the reason that they entered upon the property and performed some work in partial performance of the agreement. Schubert v. Lowe, 193 Cal. 291, 223 P. 550, 552; Manning v. Franklin, 81 Cal. 205, 22 P. 550; Cheney v. J. R. Newberry & Co., 67 Cal. 125, 7 P. 444. The cited cases do not appear to be in point. None of them involves, as does the present action, the wrongful entry of real property by defendant under an "invalid" oral agreement and the destruction of growing crops thereon, after notice of the invalidity of their claim, and of the fact that the land had been leased to other persons. As the above recital of the record in this case establishes, the owners of the land indisputably refused to execute the proposed lease in favor of appellants and consistently disclaimed any rights of possession accrued thereunder, so that the acts of appellants could not possibly be construed as done in "part performance" thereof—that is "done [not only] 'in pursuance of the contract, and with the design of carrying the same into execution [but also] with the consent and knowledge of the other party.' Foster v. Maginnis, 89 Cal. 264, 267, 26 P. 828, 829." Fritz v. Mills, 170 Cal. 449, 458, 150 P. 375, 378. In accord, see Stark v. Byington, 21 Cal. App.2d 642, 648, 69 P.2d 995.

[10] There is no merit to appellants' objection to respondents' prosecution of the

present action for damages because they admittedly were not in possession of the property, nor entitled thereto under the terms of their lease, at the time of appellants' performance of the main "disking operations," which commenced about "the 1st of March" and terminated on March 7, 1946, as the result of the issuance of the restraining order above mentioned. Appellants rely upon the general rule correlating the maintenance of an action for injury to land, under the common-law concept of trespass quare clausum fregit, with the right to actual or constructive possession of the premises when the trespass was perpetrated. 24 Cal.Jur. sec. 22, p. 680; 63 C.J. sec. 20, pp. 903, 904; Taylor v. Terry, 71 Cal. 46, 47, 48, 11 P. 813. Accordingly, they argue that the owners of the land were the proper parties to complain of appellants' alleged wrongful acts committed prior to the date of the commencement of respondents' lease, March 15, 1946, and that respondents' claim of damages against appellants is unsupportable. Risco v. Reuss, 45 Cal.App.2d 243, 244, 113 P.2d 914. But appellants mistake the theory of respondents' pleading—analogous to the common-law action of case—upon the premise that appellants' destruction of the growing crops amounted to an invasion of respondents' future possessory interest under their presently existing and valid lease. Thus, by the lease which respondents concluded on January 17, 1946, with the owners of the land, on a cash rental basis of $7,500—of which "$3,750" was paid "upon the execution of the lease and $3,750 on May 1st, 1946"—respondents obtained the right to claim possession of the grain crop which was then growing on the land and which they deemed essential to the leasing arrangement between the parties. So respondent Henry Wolfsen stated at the trial that "when * * * negotiating with Mr. McCullough in connection with [the] pasture," he said "that without that privilege [to mow and harvest the field he] couldn't afford to pay anywhere near the $7,500 for the" property. McCullough confirmed this statement, and the lease was made on that basis—thereby vesting in respondents a future possessory interest in the property, including the growing crops. In line with this view is the testimony of respondent Henry Wolfsen to the effect that when he saw appellant Cole working on the land on March 5, 1946, "I told Mr. Cole that I had a lease on the property, that I wanted them to quit disking, and the feed was mine, and if they tore it up that there was somebody going to pay some damages for it."

The right to harvest the grain crop was an integral part of respondents' lease and as early as January 18, 1946, appellants had notice that the property had been leased "to other persons for grazing purposes," so that any plowing or disking operations would necessarily injure the land insofar as concerned the announced purpose of pasturage. In such circumstances there can be no doubt that appellants' subsequent destruction of the growing crops constituted an invasion of respondents' rights under the terms of their lease, depriving them of benefits thereby conferred, and they are entitled to pursue their remedy against appellants as the persons by whom the acts were committed. Cf. Playter v. Cunningham, 21 Cal. 229, 233; Rogers v. Duhart, 97 Cal. 500, 503–505, 32 P. 570. While the owners of the land were named as codefendants in this action—so that all parties to the controversy would be before the court, Code Civ.Proc., sec. 379c, and circuity of action would be obviated—the record indisputably establishes that they at no time acquiesced in appellants' tortious conduct but, immediately upon learning thereof, acted in protection of respondents' rights under the lease. Accordingly, the court concluded that respondents had no cause of action against the owners of the land and directed a verdict in their favor. But as "the real party in interest", Code Civ.Proc., sec. 367, sustaining the loss occasioned by appellants' acts in destroying the growing crops on the land, respondents' claim of redress from appellants cannot be denied. Civ.Code, sec. 3520; cf. Playter v. Cunningham, supra, 21 Cal. 229, 233. The propriety of an action for damages to property by one who is not in possession or entitled to possession at the time of its injury has been recognized in this state under varying factual circumstances (Easton v. Ash, 18 Cal.2d

530, 539, 116 P.2d 433; Southern Pacific Land Co. v. Kiggins, 110 Cal.App. 56, 61, 293 P. 708; Rhoda v. County of Alameda, 134 Cal.App. 726, 732, 733, 26 P.2d 691), and the present case illustrates another type of situation where fundamental principles of right and justice would so require. Civ.Code, sec. 3523.

[11-13] However, as a further consideration with regard to respondents' recovery, appellants, for the first time on appeal, challenge the measure of damages adopted at the trial of this case. They rely on the distinction drawn between the wrongful destruction of perennial crops, such as volunteer grass for grazing purposes, and annually planted crops. Thus, in the former case the proper measure of damages is the difference in the rental value of the property with and without the crops (Miller & Lux, Inc. v. Pinelli, 84 Cal.App. 42, 47-51, 257 P. 573; Maddalena v. LeDuc, 29 Cal.App.2d 211, 212, 84 P.2d 254), while in the latter case the proper measure of damages is the market value of the estimated product at the time of destruction, less the cost of producing and marketing the same. 8 Cal.Jur., sec. 76, p. 819; 25 C.J.S., Damages, § 85b, page 610; Fay v. Cox, 45 Cal.App. 696, 701, 702, 188 P. 623; Dutra v. Cabral, 80 Cal.App.2d 114, 119, 120, 181 P.2d 26. Here the destruction of both volunteer grass and grain is involved. The evidence shows that respondents wanted the land for feeding their cattle upon both the volunteer grass and the stubble and uncut grain which remained on the property. But the lease also gave them the right to "harvest [the] volunteer grass and grain," and it indisputably appears that they insisted on this "privilege" as a condition to their rental of the land at the agreed sum. Accordingly, evidence of the market value of the grass, less the cost of cutting and hauling it to market, was adduced by respondents from expert witnesses without the objection of appellants. In fact appellants cross-examined the witnesses on the theory that was the correct measure of damages—$25 per ton at an estimated yield of one ton per acre for the minimum 635 acres disked by appellants, whether gauged as "hay baled" or "hay in shocks" in the field for feed—rather than a computation on the basis that such percentage of the cash rental figure, $7,500, as reflected the proportion of the total acreage destroyed "for grazing purposes," would determine the actual damage sustained.

So pertinent is the case of Staub v. Muller, 7 Cal.2d 221, 60 P.2d 283, wherein evidence of the value of damaged alfalfa was established by showing the market value of the crop destroyed, as was done here. "No finding of damage to the freehold was made" and "the award covered but one element of damage, i. e., injury to the crop." 7 Cal.2d at page 227, 60 P.2d at page 286. "No evidence was adduced as to rental value of the land and no foundation was laid for measuring the damages by the rule which appellant now asserts should have been invoked, that is, that the measure of damages was the difference in rental value of the property with and without the crop thereon." 7 Cal.2d at page 228, 60 P.2d at page 286. After noting the "distinction between the proper measure of damages for the destruction of a perennial crop, such as alfalfa, and the measure for destruction of such crops as vegetables and grain, which require annual planting," and stating the "question * * * [to be] one presenting so many phases and conditions which may affect the result one way or another, that, even aside from the conflict of opinion among the decisions, it is practically impossible to formulate a general rule by which all cases may be governed," (7 Cal.2d at page 228, 60 P.2d at page 286), this court finally concluded, 7 Cal.2d at page 229, 60 P.2d at page 287, as follows: "Notwithstanding the conflict of authority and the difficulty of estimating damages in these cases, the decisions are in complete agreement upon one proposition, and that is, that '*compensation for the real injury is the purpose of all remedies.*' (Citing authorities; emphasis added.) From the record in this case we cannot but conclude that the court, in fixing the damages, named an amount which, as nearly as it is possible to ascertain, will fairly compensate plaintiff for the actual injury suffered." Accordingly, it was said, 7 Cal.2d at page 230, 60 P.2d at page 287 that "the judgment as rendered should stand."

[14, 15] Pursuant to the state of the record prevailing in this case on the issue of damages, the jury, at the request, at the request of appellants, was instructed as follows:

"Compensatory damages are such damages as will reasonably compensate the person injured for the detriment suffered by him. In awarding compensatory damages, no jury has the right to award any amount in excess of such sum as will reasonably compensate for the damage actually sustained, but in this connection you are instructed that it is not the purpose of the law in permitting compensatory damages to permit any plaintiff to realize a profit by way of award of compensatory damages."

"I instruct you that the measure of damages for the destruction of a growing crop is the value of the crop in the condition it was in at the time and place of destruction."

It is true that at the request of respondents, the jury was further charged as follows:

"In determining any such value of a growing crop, it is proper for you to determine and take into consideration the probable yield and market value thereof and deduct therefrom the cost of producing and marketing the same and in determining these matters, it is also proper for you to consider the kind of crops so injured or destroyed, the average yield per acre of such crops on the land where not so injured or destroyed and on other similar lands in the immediate neighborhood cultivated in like manner, the stage of growth of such crops at the time of any such injury or destruction, the expense, if any, of cultivating, harvesting and marketing such crops, and the market value of such crops at the time of maturity or within a reasonable time after any such injury or destruction."

But such last quoted instruction only added the qualifications coincident with the rule for measuring damages under appellants' own theory of assessment in the case of the growing crops here involved. These matters were all fully covered in the course of examination and cross-examination of respondents' witnesses, and the propriety of their consideration in the event of a damage award in favor of respondents was in nowise questioned by appellants. In short, the testimony on the subject all went to the point of market value of the grass or hay in the light of cost of replacement to respondents for feed of their cattle. Appellants may not now complain of the method of proving the amount which would compensate respondents for their loss of crops, pursuant to section 3333 of the Civil Code, since that evidence was admitted without objection and was the apparent theory of the measure of damages upon which the case was tried in an effort to determine upon an award which would "fairly compensate" respondents "for the actual injury suffered." Staub v. Muller, supra, 7 Cal.2d 221, 229, 60 P.2d 283, 287, Under the circumstances, the evidence adequately supports the amount of compensatory damages fixed by the jury.

[16-18] There now remains the question of the evidentiary basis in this case for an award of exemplary damages against appellant Hathaway. In a tort action "where the defendant has been guilty of oppression, fraud, or malice, express or implied, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant." Civ.Code, sec. 3294. But, "the malice, and the only malice, contemplated by section 3294 is malice in fact, and * * * the phrase 'express or implied' has reference only to the evidence by which that malice is established; 'express malice' thus meaning that the malice is established by express or direct evidence going to prove the actual existence of the hatred and ill-will; 'implied malice' referring to the indirect evidence from which the jury may infer the existence of this malice in fact. * * * It is in those cases where the defendant has been guilty of oppression or fraud, or of a malice akin to oppression and fraud, that punitive damages may be awarded. But throughout the whole history of the law, whatever may be

the mode of proving the existence of malice in fact, it is only upon some showing regarded by the law as adequate to establish the presence of malice in fact (that is, the motive and willingness to vex, harass, annoy, or injure) that punitive damages have ever been awarded. And this the adjudications abundantly and without controversy establish.

"When consideration is paid to the fact that *the sole object of an action at law is to return full compensation in terms of money for a legal wrong inflicted upon a plaintiff,* and where in any action a plaintiff has been made whole, in contemplation of law, by the receipt of such an award in damages, it is indeed an anomaly to find that in any case more than full compensation may be awarded him. And it is well said in Haines v. Schultz, 50 N.J.L. 481, 14 A. 488, that 'the engrafting of this notion (punitive damages) into personal suits has resulted in an anomalous rule; the doctrine of punitive damages being a sort of hybrid between a display of ethical indignation and the imposition of a criminal fine; but, whether we regard it in the one light or the other, it is the wrongful personal intention to injure that calls forth the penalty.'" Davis v. Hearst, 160 Cal. 143, 162, 116 P. 530, 539. (Emphasis added.)

[19, 20] In line with this authoritative statement of the law, these matters disclosed by the record are significant. A major portion of the disking operations, which were commenced on the land about "the 1st of March" and which caused the principal damage subject of this action, was done without appellants' knowledge of the identity of respondents as the lessees. As above noted, respondent Henry Wolfsen testified that March 5 was the day when he informed appellant Cole that respondents "had a lease on the property" and that appellants should "quit disking" thereon—indicating that until that date appellants did not know who was claiming the land and correlating with appellant Hathaway's testimony that at the time (the end of February) he ordered his foreman Cole to "get the equipment ready and move it over onto the property to start disking," he "did not know who had the lease on the property." The various communications from the real estate agent McCullough to appellant Hathaway with reference to the leasing arrangements for the property had carefully omitted the name of any lessees, but had merely stated that it had been leased "to other persons" or "to another." It is true that appellants continued the disking operations on the land until March 7, when the restraining order was served upon them, but the nature of the work as performed after March 5 was in nowise different from that performed prior thereto, when appellants did not know the identity of the lessees. In short, the whole tenor of appellants' operations indicated their intent to work the land beneficially in pursuance of their claim to possession thereof following the terms of the alleged oral agreement with McCullough as representing the owners of the property—and regardless of the identity of any other persons claiming as lessees. Accordingly, appellants were anxious to prepare the premises for the crop planting, and they undertook early in the year farming operations directed to that end. While the plowing and disking necessarily involved turning over the land and destroying any volunteer grass and grain growing thereon insofar as concerned their use for stock feed, such procedure was wholly consistent with recognized methods of good husbandry, gauged to enhance the fertility and productivity of the soil, and reflected appellants' belief that they had the right to so proceed as lessees of the field for farming purposes.

As stated in the foregoing review of the record, appellant Hathaway, upon the death of the former lessee of this particular land, "just stepped in there," harvested "the grain [growing thereon] in the summer of 1945," and carried out the crop share agreement which the deceased lessee had undertaken with the owners of the land. Although such informal arrangement admittedly gave said appellant no further right on the property after the completion of that summer's harvesting, his apparently satisfactory farm work thereon undoubtedly prompted his negotiations with McCullough for the right to lease the land upon the crop share basis theretofore prevailing and at a time when he was "operating" a "farming field" of approximately the same acreage "directly across the highway" and belonging to the same owners—circumstances supporting said appellant's claim of his desire to coordinate his farm program in the two fields. The first plowing on the land here involved was on January 8, 1946, "within two days" after appellant Hathaway had signed and returned the proposed written lease to McCullough and "in reliance upon [that] fact" following the telephone call to McCullough regarding some of the terms thereof. That plowing was stopped the next day upon appellant Hathaway's receipt of McCullough's telegram stating that there was "some uncertainty" as to whether "the owners" would "approve" the previously discussed "farming field arrangement" and requesting that no more disking or plowing be done on the land until futher communication. The farm work was not resumed until "around the * * * 1st of March," following appellant Hathaway's full disclosure of the situation to his attorney and the latter's advice that said appellant "had a legal and enforceable [oral] lease." Accordingly, and in reliance upon such legal advice, confirming his own belief as to his rights in the matter, appellant Hathaway continued with the plowing and disking operations on the land until restrained by the court order, and the identity of the lessees —whether respondents or some other persons—as disclosed some three or four days after the resumption of the farm work appears to have had no bearing on the matter. While the attorney's advice was erroneous, as the situation has been heretofore discussed, it is clear that appellants' operations constituted acts of good husbandry performed under a claim of right to possession of the property. See 25 C.J. S., Damages, § 123e, page 727.

Respondents argue that appellant Hathaway's persistent course of action is chargeable to the fact that certain ill-will developed between them and appellant at the time of their joint operation of this particular land in 1945, when respondents had contracted for the stubble for the feed of their cattle and appellant was then engaged in harvesting the grain crop in the place of the former lessee. It seems that within some ten days four "mysterious" fires occurred on the premises during such period of joint operation and a considerable portion of the acreage—with both stubble and grain thereon—was burned. The cause of the fires was undetermined, but the record shows that respondents protested their repeated happening to appellant Hathaway, and there was a somewhat heated exchange of words between the parties indicating their anger over the situation resulting in their mutual loss. However, be that as it may, appellant Hathaway's procedure here appears to have had no relation to the prior dispute since he did not know the identity of respondents as the lessees at the time he undertook what he considered "performance of his oral agreement" for the lease of the land and his actions thereon were in nowise changed when he learned, after a substantial portion of the plowing and disking had been done, that respondents were in fact the persons claiming as lessees of the property. Respondents suggest that appellant Hathaway might easily have "suspected" that they were the lessees, as he knew that they had cattle in the area and would want land "for grazing purposes," but the record does not show that appellant did, in fact, have such knowledge until his foreman was so informed by respondent Henry Wolfsen on March 5, 1946. An award of punitive damages may not be based upon mere speculation, but rather such penalty depends upon a definite showing of a "willingness to vex, harass, annoy, or injure * * * '[consistent with] the wrongful personal intention to injure. * * *' And this is necessarily so, for the law, having made full compensation for the *act*, can thereafter be concerned solely with the *motive* of the act. The wrongful act has been redressed by full compensation. The improper motive which actuated it may be punished by an award of exemplary damages." Davis v. Hearst, supra, 160 Cal. 143, 162, 116 P. 530, 538; see, also, 8 Cal. Jur., secs. 107, 108, pp. 864–866, and cases cited.

Since the record indisputably shows that appellant Hathaway's tortious acts upon the premises in question stemmed not from any "malice in fact," but wholly from a mistaken claim of right under the belief that his "oral lease" was valid and enforceable, the "wrongful personal intention to injure" that calls forth the penalty of punitive damages was not established and the court erred in submitting the matter of such award to the jury. In view of this conclusion as to the insufficiency of the evidence to support a recovery of exemplary damages, the opposing arguments of the parties as to the propriety of the instructions on the subject or the excessive amount of the award need not be discussed.

The judgment is modified by reducing it in the sum of $15,000, being the amount which was awarded as exemplary damages, and as so modified, the judgment is affirmed. The parties will bear their own costs on this appeal.

GIBSON, C. J., and SHENK, EDMONDS AND TRAYNOR, JJ., concur.

CARTER, Justice.

I dissent.

In my opinion the determination of the jury and the trial court allowing the plaintiffs exemplary damages should be affirmed. The existence of malice requisite to the allowance of exemplary damages is always a question for the jury; it must always be submitted to them to find whether it existed. As the question of maliciousness, wilfulness or wantonness with which the act was done is left to the jury, its determination that the defendant acted maliciously should be affirmed. The jury sees and hears the witnesses, and it necessarily follows that whether or not the witness appears to be telling the truth, his manner of giving the testimony, and his credibility in general is for the jury. Whether his testimony is believed is for the jury's determination, as are the inferences to be drawn therefrom. In this case, the jury allowed the respondents compensatory damages for the loss of their grazing land and the grain and grass growing thereon *and* punitive or exemplary damages. Since punitive damages are those awarded for the purpose of punishment, and for the purpose of setting an example to others, and are only awarded where the actor is motivated by malice, or is guilty of fraud or oppression, the jury must have so found in this case.

The Civil Code, section 3294, provides that in a tort action "where the defendant has been guilty of oppression, fraud, or malice, express or implied, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant."

Malice, other than constructive malice or malice implied in law, is of two kinds, express or implied. Express malice does not mean, necessarily, malice expressed in words, but is defined to be the doing of a wrongful act with a sedate and deliberate mind and formed design, and, being a mental condition and not ordinarily susceptible of other kinds of proof, it may be evidenced by the external circumstances attending the execution of the act. It has been held that there is no difference in the nature or degree of the malice intended, whether it be called express or implied, when these terms are used in their most appropriate sense, and that, if properly applied, they refer only to the *evidence* by which the existence of malice is established. Malice of any kind must be inferred, because it consists in a quality or state of the mind, either actual or imputed. Its actual existence may be manifested by external circumstances, from which it may be reasonably inferred, in which event it is *express.* In the absence of those external circumstances which make it manifest, it is in some cases imputed as a legal inference, without reference to whether it exists in fact or not, in which event it is said to be implied—malice *implied in law. Malice in fact* implies a desire and an intention to injure.

The word "malicious" within the rule as to punitive damages means the intentional doing of a wrongful act without just cause or excuse, and does not require the act to have been done in spite or ill will. Robbs v. Missouri Pac. Ry. Co., 210 Mo. App. 429, 242 S.W. 155.

"In actions of trespass, where the injury has been wanton and malicious, or gross and outrageous, courts permit juries to add to the measured compensation of the plaintiff, which he would have been entitled to recover had the injury been inflicted without design or intention, something farther by way of punishment or example, which has sometimes been called 'smart money'. This has always been left to the discretion of the jury; as the degree of punishment to be thus inflicted must depend upon the peculiar circumstances of each case." Sedgwick on Damages, 9th Ed., sec. 352, quoting from Day v. Woodworth, 13 How. 363, 14 L.Ed. 181.

"Malice, in respect to exemplary damages, does not consist of personal hatred, ill will, or animosity. It consists of a state of mind that is reckless in its nature and implies a determination to do a thing regardless of legal rights or for the purpose of inflicting an injury. True, it may be motivated by personal ill will, hatred, or animosity, but unless the wrongful act proceeds from the malice and is done deliberately and in disregard of legal rights or in an effort to gratify passion engendered by hatred or ill will, the latter becomes immaterial in so far as exemplary damages are concerned." Lusk v. Onstott, Tex.Civ. App., 178 S.W.2d 549, 554.

This Court said, in Gudger v. Manton, 21 Cal.2d 537, 543, 134 P.2d 217, 221 (a slander of title case) that: "There has been considerable confusion and lack of rationalization flowing from the use of the term malice. It arises chiefly from the failure to clearly distinguish between malice implied in law and actual malice. The former is a mere legal fiction, while the latter denotes ill will *or the desire to do harm for the satisfaction of doing it or conduct which in effect amounts to the same thing.*" (Emhasis added.) Since it would be a very rare case indeed when a defendant would admit, in an action of this kind, to a "feeling" of spite or ill will or hatred toward a certain person, or admit that he did a wrong for the sheer satisfaction of doing it, it is necessary to consider the circumstances surrounding his allegedly malicious acts. From such circumstances the trier of fact may infer that the defendant was actuated by malice in fact, which is *either* a feeling of spite or ill will toward the plaintiff *or* an act done in wilful violation of a known right of another.

An examination of the record in the instant case and a chronological outline of the facts show that the defendant acted wilfully and in wanton disregard of the rights of another person. He knew of the *existence* of that other person, although he may not have known his name. It cannot be seriously contended as material to the issue of malice whether or not that person's name was Smith, Jones or Wolfsen. If I kill another's horse, his cow, or demolish his house or his automobile just because they are not mine or because I do not want him to have them when I am unable to have the same things, can it be said that I have not acted maliciously? Have I acted less maliciously, or without malice, just because I am not aware of his name, but only that he owns these things and I do not? The defendant knew that the land was leased to someone other than himself; he knew, when he acted, that he was not to have a lease on the land; he knew that his own signature on the proposed lease was not sufficient to give him any rights unless the owners' signatures were also on it. These things he admitted at the trial.

An examination of the record discloses that on December 15, 1945, an agent of the owners of the land, entered into oral negotiations for the lease of the land to the defendant. This was reduced to writing sometime in January, 1946, and was sent to the defendant for his signature together with a letter asking him to sign the lease and informing him it would be *forwarded for the signatures of the owners.* Defendant knew that these signatures were never obtained, yet on January 8th and 9th, 1946, the defendant entered on the land and started "disking" it. He stopped on January 9th because of a breakdown of the necessary machinery. On *January 9th,* 1946, the defendant received a wire from the agent which informed him that there was uncertainty as to whether the owners would lease the land to him. He was further told *not* to disk or plow the land. On the same day he received a letter confirming the telegram. A letter dated *January 18th,* 1946, written by the agent, and admittedly received by the defendant, informed him that the land had been leased to other persons.

Despite these letters and the telegram, the defendant wilfully entered upon the land and started plowing and disking *on March 1st, or the latter part of February.* During this time, the plaintiffs notified the defendant that the property was leased to them, and that he was to stop his operations. On *March 7th,* 1946, a court order to desist was served on the defendant and his servant. But before he did desist, he had succeeded in disking some 635 acres of the land leased by the owners to the plaintiffs. The defendant admitted that even after the trial, and up until the 5th day of June, 1946, he continued to try to get on the land to continue his operations.

The actions of the defendant, with knowledge that he was not to have a lease on the land, and the further knowledge that it was leased to someone else, clearly imply a wilful and wanton disregard for the rights of others, and a determination to carry out his own purposes to the detriment of the legal rights of those others. By his actions he rendered the land completely useless for the purpose for which the plaintiffs intended to use it, although, as the majority say, it may have been good *farming* practice. It certainly cannot be denied that what is good farming practice may also render land absolutely without value for cattle grazing purposes; and that if land is disked or plowed, it would be impossible to harvest that year's crop of grain and grass.

Since malice in fact is rarely, if ever, proved by the express declarations of the defendant to that effect, and since it may be, and is, proved by evidence of the surrounding circumstances, the jury was clearly entitled to find that such malice existed and that the plaintiffs were, as a result, entitled to punitive damages. The record shows not only these facts, but that there had been ill feeling between these parties over the same land in the past. On the trial, the defendant denied that he knew to whom the land was leased, but since the credibility of the witness is for the jury, it is surely permissible to draw an inference from the verdict that he was not believed.

The rule is well settled that where a trespass is committed from wanton or malicious motives, or a reckless disregard of the rights of others, or under circumstances of great hardship and oppression, the measure and amount of damages are matters for the jury alone. Russell v. Dennison, 45 Cal. 337.

The majority say that the defendant could not have been guilty of malice because he made a full disclosure of the facts to his attorney and was advised that under those circumstances he had a legal and enforceable lease. The attorney, whose advice is in question, was the defendant's attorney at the trial of this case. He was not a witness. In his questioning of the defendant, he asked him whether he had told him the same facts as to which he had testified, and then asked him whether or not such advice had been given. At the time the advice was solicited, the defendant knew that he did not have a lease; he knew that the owners' signatures were necessary and had not been obtained; and he also knew that the land had been leased to someone else. These facts show his lack of good faith. In order for the advice of an attorney to be a defense to an action for punitive damages, it must be shown that there was a complete disclosure of all the facts to the attorney, that such advice was sought in good faith, and that the attorney's advice was followed. The defendant's subsequent conduct also tends to show that he was trying to take the law into his own hands in that, even after the trial of the case wherein judgment was rendered against him, and it was determined that he did not have a good or enforceable lease of any kind, he admitted that he still endeavored to go on the land and continue his farming operations.

The decision of the Court in this case holding that exemplary or punitive damages are not allowable under the facts in this case is not only erroneous as a matter of law but is manifestly unjust and unfair to the plaintiffs. Instead of following the usual practice, and reversing the judgment so as to permit the plaintiffs to retry the case and present further and additional evidence which would amply sustain an award of punitive damages even in the light of the strained construction placed upon the statute by the majority decision, the majority have seen fit, without citation of authority, and contrary to the settled rule and practice of this Court, to modify the judgment by eliminating therefrom the award of punitive damages, and then affirming the judgment, so that the respondents who prevailed in the trial court will have no further opportunity to present to another court or jury their claim for punitive damages. I am convinced that this Court has no such lawful power, and in taking this action, this Court is itself violating the settled law of this state.

It may be true that the majority of this Court is out of harmony with the statutes of this state permitting and authorizing an award of exemplary damages in a proper case, but this Court did not enact such statutes, and this Court has no power to declare the public policy of this state so far as the allowance of exemplary damages is concerned. This is a matter exclusively for the Legislature. By the unwarranted action of this Court in striking down the award of exemplary damages in this case, this Court has in effect nullified and abrogated a statute which permits an award of exemplary damages.

The statement in the majority opinion that the evidence is insufficient to justify an award of exemplary damages is perfectly absurd. The facts upon which this award is based are set forth both in the majority opinion and in this dissenting opinion, and I do not believe that any unbiased, unprejudiced mind could examine these facts and arrive at an honest conclusion that the defendant Hathaway did not act wilfully and maliciously in destroying the hay and grain growing on the land which had been leased by plaintiffs. In holding to the contrary, the majority of this Court is making a mockery out of the rule that conflicts in the evidence are to be resolved by the trier of fact and that an appellate court will not disturb a finding of the jury or trial court based upon inferences which can be reasonably drawn from the testimony of witnesses. To demonstrate the absurdity of the majority holding in this case I desire to call attention to statements appearing in the opinion of this Court in the case of Nichols v. Mitchell, Cal.Sup., 1948, 197 P.2d 550. This opinion was prepared by the author of the opinion in the case at bar and contains the following statements with respect to the power of the trier of fact. This same author said in the Nichols case: "This province of the trial court to resolve 'conflicting evidence or conflicting inferences' and to reach a conclusion that will not be disturbed 'on appeal if some substantial evidence or reasonable inference' lends support thereto (Security-First National Bank v. Bruder, 44 Cal.App.2d 767, 772, 113 P.2d 3) was forcefully declared in the recent case of Hicks v. Reis, 21 Cal.2d 654, at pages 659, 660, 134 P.2d 788, at page 790: '*The trier of the facts is the exclusive judge of the credibility of the witnesses.* § 1847, Code Civ.Proc. While this same section declares that a witness is presumed to speak the truth, it also declares that "This presumption, however, may be repelled by the manner in which he testifies, by the character of his testimony * * * or his motives, or by contradictory evidence." In addition, in passing on credibility, the trier of the facts is entitled to take into consideration the interest of the witness in the result of the case. (Citing authority.) *Provided the trier of the facts does not act arbitrarily, he may reject in toto the testimony of a witness, even though the witness is uncontradicted.* (Citing cases.) * * * [As] the court, in Market Street Ry. v. George, 116 Cal.App. 572, 576, 3 P.2d 41, 43, stated: "It has always been the rule that courts and juries are not bound by mere swearing no matter how positive, unless it be credible swearing. It may bear within itself the seeds of its own destruction, as where it is inherently improbable, or its destruction may be wrought from without, as where the person swearing is in some manner impeached. In either case court and jury are entitled to disbelieve the testimony if they choose, and, if they do refuse it credence, it is of no more effect than if it had not been given. It disappears from the case and the inference opposed to it is no longer contradicted."'" We do not find any of the reasoning contained in the foregoing excerpt from the Nichols case applied in the majority opinion in the case at bar. The reason, of course, is obvious. Because in the case at bar the majority of this court has usurped the functions of the jury and trial court and overthrown a solemn judgment supported by ample evidence without regard to the settled principles of law contained in the above quoted excerpt. In other words, the majority of this court has just strong-armed the record in this case to arrive at a conclusion satisfactory to their concept of what the law should be with respect to punitive damages, and this is all that can be said in favor of the majority decision on this proposition.

The evidence clearly supports the determination of the jury that the plaintiffs are entitled to punitive damages, and the judgment should therefore be affirmed in toto.

SCHAUER, J., concurs.

32 Cal.2d 711

PEREZ et al. v. LIPPOLD.

L. A. 20305.

Supreme Court of California, in Bank.
Oct. 1, 1948.

Rehearing Denied Oct. 28, 1948.

1. Constitutional law ⇨274

Provision of First Amendment that Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof is encompassed in concept of liberty in Fourteenth Amendment, and hence state legislatures are no more competent than Congress to enact such a law. U.S.C.A.Const. Amends. 1, 14.

2. Marriage ⇨2

"Marriage" is something more than a civil contract subject to regulation by the state, and is a fundamental right of free men. Civil Code, §§ 60, 69, 69a.

See Words and Phrases, Permanent Edition, for all other definitions of "Marriage".

3. Constitutional law ⇨274

In absence of clear and present danger arising out of an emergency, a state cannot base a law impairing fundamental rights of individuals on general assumptions as to traits of racial groups. U.S.C.A.Const. Amends. 1, 14.

4. Constitutional law ⇨274
Marriage ⇨2

Statute providing that no license may be issued authorizing the marriage of a white person with a Negro, mulatto, Mongolian or member of the Malay race, is unconstitutional. Civ.Code, § 69; U.S.C.A.Const. Amend. 14.

5. Constitutional law ⇨274
Marriage ⇨2

Statute providing that all marriages of white persons with Negroes, Mongolians, members of the Malay race, or mulattoes are illegal and void, is unconstitutional. Civ.Code, § 60; U.S.C.A.Const. Amend. 14.

6. Marriage ⇨8

White person and Negro were entitled to intermarry.

7. Mandamus ⇨87

County clerk would be compelled by mandamus to issue certificate of registry and license to marry to petitioners, one of whom was a white person and the other a Negro. Civ.Code, §§ 60, 69, 69a.

SCHENK, SCHAUER, and SPENCE, JJ., dissenting.

◆

Mandamus proceeding by Andrea D. Perez and Sylvester S. Davis, Jr., petitioners, against Earl O. Lippold, as County Clerk of the County of Los Angeles.

Writ granted.

Daniel G. Marshall, of Los Angeles, for petitioners.

Harold W. Kennedy, County Counsel, and Charles C. Stanley, Jr., Deputy County Counsel, both of Los Angeles, for respondent.

TRAYNOR, Justice.

In this proceeding in mandamus, petitioners seek to compel the county clerk of Los Angeles County to issue them a certificate of registry (Civ.Code, sec. 69a) and a license to marry. (Civ.Code, sec. 69.) In the application for a license, petitioner Andrea Perez states that she is a white person and petitioner Sylvester Davis that he is a Negro. Respondent refuses to issue the certificate and license, invoking Civil Code section 69, which provides: "* * * no license may be issued authorizing the marriage of a white person with a Negro, mulatto, Mongolian or member of the Malay race."

Civil Code section 69 implements Civil Code section 60, which provides: "All marriages of white persons with negroes, Mongolians, members of the Malay race, or mulattoes are illegal and void." This section originally appeared in the Civil Code in 1872, but at that time it prohibited marriages only between white persons and Negroes or mulattoes. It succeeded a statute prohibiting such marriages and authorizing the imposition of certain criminal penalties upon persons contracting or solemnizing them. (Stats.1850, Ch. 140, p. 424.) Since 1872, Civil Code section 60 has been twice amended, first to prohibit marriages between white persons and Mongolians (Stats.1901, p. 335) and subsequently to prohibit marriages between white persons and members of the Malay race. (Stats.1933, p. 561.)

Petitioners contend that the statutes in question are unconstitutional on the grounds that they prohibit the free exercise of their religion and deny to them the right to participate fully in the sacraments of that religion. They are members of the Roman Catholic Church. They maintain that since the church has no rule forbidding marriages between Negroes and Caucasians, they are entitled to receive the sacrament of matrimony.

[1] The provision of the First Amendment to the Constitution of the United States that Congress shall make no law "respecting an establishment of religion, or prohibiting the free exercise thereof" is encompassed in the concept of liberty in the Fourteenth Amendment. State legislatures are therefore no more competent than Congress to enact such a law. Cantwell v. Connecticut, 310 U.S. 296, 303, 60 S.Ct. 900, 84 L.Ed. 1213, 128 A.L.R. 1352. They may, however, regulate conduct for the protection of society, and insofar as their regulations are directed towards a proper end and are not unreasonably discriminatory, they may indirectly affect religious activity without infringing the constitutional guarantee. Although freedom of conscience and the freedom to believe are absolute, the freedom to act is not. Cantwell v. Connecticut, supra, 310 U.S. at pages 303, 304, 60 S.Ct. at page 903.

The regulation of marriage is considered a proper function of the state. It is well settled that a legislature may declare monogamy to be the "law of social life under its dominion," even though such a law might inhibit the free exercise of certain religious practices. Reynolds v. U. S., 98 U.S. 145, 166, 25 L.Ed. 244; Davis v. Beason, 133 U.S. 333, 343, 10 S.Ct. 299, 33 L.Ed. 637. If the miscegenation law under attack in the present proceeding is directed at a social evil and employs a reasonable means to prevent that evil, it is valid regardless of its incidental effect upon the conduct of particular religious groups. If, on the other hand, the law is discriminatory and irrational, it unconstitutionally restricts not only religious liberty but the liberty to marry as well.

[2] The due process clause of the Fourteenth Amendment protects an area of personal liberty not yet wholly delimited. "While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, *to marry,* establish a home and bring up children, to worship God according to the dictates of his own conscience, and, generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." Italics added: Meyer v. Nebraska, 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042, 29 A.L.R. 1446. Marriage is thus something more than a civil contract subject to regulation by the

state; it is a fundamental right of free men. There can be no prohibition of marriage except for an important social objective and by reasonable means.

No law within the broad areas of state interest may be unreasonably discriminatory or arbitrary. The state's interest in public education, for example, does not empower the Legislature to compel school children to receive instruction from public teachers only, for it would thereby take away the right of parents to "direct the upbringing and education of children under their control." Pierce v. Society of Sisters, 268 U.S. 510, 534, 535, 45 S.Ct. 571, 573, 69 L.Ed. 1070, 39 A.L.R. 468. Again, the state's vital concern in the prevention of crime and the mental health of its citizens does not empower the Legislature to deprive "individuals of a right which is basic to the perpetuation of a race—the right to have offspring" by authorizing the sterilization of criminals upon an arbitrary basis of classification and without a fair hearing. Skinner v. Oklahoma, 316 U.S. 535, 536, 62 S.Ct. 1110, 1111, 86 L.Ed. 1655.[1]

The right to marry is as fundamental as the right to send one's child to a particular school or the right to have offspring. Indeed, "We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race." Skinner v. Oklahoma, supra, 316 U.S. at page 541, 62 S.Ct. at page 1113. Legislation infringing such rights must be based upon more than prejudice and must be free from oppressive discrimination to comply with the constitutional requirements of due process and equal protection of the laws.

I. Since the right to marry is the right to join in marriage with the person of one's choice, a statute that prohibits an individual from marrying a member of a race other than his own restricts the scope of his choice and thereby restricts his right to marry. It must therefore be determined whether the state can restrict that right on the basis of race alone without violating the equal protection of the laws clause of the United States Constitution.

"Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. For that reason, legislative classification or discrimination based on race alone has often been held to be a denial of equal protection. Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220; Yu Cong Eng v. Trinidad, 271 U.S. 500, 46 S.Ct. 619, 70 L.Ed. 1059; Hill v. Texas, 316 U.S. 400, 62 S.Ct. 1159, 86 L.Ed. 1559." Hirabayashi v. United States, 320 U.S. 81, 100, 63 S.Ct. 1375, 1385, 87 L.Ed. 1774. In the Hirabayashi case the United States Supreme Court held that despite the fact that under the Constitution of the United States "racial discriminations are in most circumstances irrelevant and therefore prohibited, it by no means follows that, in dealing with the perils of war, Congress and the Executive are wholly precluded from taking into account those facts and circumstances which are relevant to measures for our national defense and for the successful prosecution of the war, and which may in fact place citizens of one ancestry in a different category from others. * * * The adoption by Government, in the crisis of war and of threatened invasion, of measures for the public safety, based upon the recognition of facts and circumstances which indicate that a group of one national extraction may menace that safety more than others, is not wholly beyond the limits of the Constitution and is not to be condemned merely because in other and in most circumstances racial distinctions are irrelevant. * * * The fact alone that attack on our shores was threatened by Japan rather than another enemy power set these citizens apart from others who have no particular association with Japan." 320 U.S. 81, 100, 101, 63 S.Ct. 1375, 1385, 87 L.Ed. 1774. Whether or not a state could base similar measures on the peril caused by a national emergency in the face of the equal protection of the laws clause of the United States Constitution, which does not apply to the federal government, it clearly could not make such a distinction based on ancestry in the absence of an emergency.

---

[1] See also the concurring opinion of Jackson, J., indicating that sterilization of criminals as a biological experiment might be invalid: "There are limits to the extent to which a legislatively represented majority may conduct biological experiments at the expense of the dignity and personality and natural powers of a minority—even those who have been guilty of what the majority define as crimes. But this Act falls down before reaching this problem, which I mention only to avoid the implication that such a question may not exist because not discussed. On it I would also reserve judgment." 316 U.S. 546, 547, 62 S.Ct. 1116; see 51 Yale L.J. 1380.

[3] A state law prohibiting members of one race from marrying members of another race is not designed to meet a clear and present peril arising out of an emergency. In the absence of an emergency the state clearly cannot base a law impairing fundamental rights of individuals on general assumptions as to traits of racial groups. It has been said that a statute such as section 60 does not discriminate against any racial group, since it applies alike to all persons whether Caucasion, Negro, or members of any other race. In re Estate of Paquet, 101 Or. 393, 399, 200 P. 911. The decisive question, however, is not whether different races, each considered as a group, are equally treated. The right to marry is the right of individuals, not of racial groups. The equal protection clause of the United States Constitution does not refer to rights of the Negro race, the Caucasian race, or any other race, but to the rights of individuals. State of Missouri ex rel. Gaines v. Canada, 305 U. S. 337, 351, 59 S.Ct. 232, 83 L.Ed. 208; McCabe v. Atchison, Topeka & Santa Fe Ry., 235 U.S. 151, 161, 162, 35 S.Ct. 69, 59 L.Ed. 169. In construing the equal protection of the laws clause of the Constitution, the United States Supreme Court has declared that the constitutionality of state action must be tested according to whether the rights of an individual are restricted because of his race. Thus, in holding invalid state enforcement of covenants restricting the occupation of real property on grounds of race, the Supreme Court of the United States declared: "The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. * * * It is, therefore, no answer to these petitioners to say that the courts may also be induced to deny white persons rights of ownership and occupancy on grounds of race or color. Equal protection of the laws is not achieved through indiscriminate imposition of inequalities." Shelley v. Kraemer, 334 U.S. 1, 68 S.Ct. 836, 846. In an earlier case, where a Negro contended that the state's failure to give him equal facilities with others to study law within the state impaired his constitutional rights under the equal protection clause, the court rejected any consideration of the difference of the damand for legal education among white persons and Negroes, stating: "Petitioner's right was a personal one. It was as an individual that he was entitled to the equal protection of the laws, and the State was bound to furnish him within its borders facilities for legal education substantially equal to those which the State there afforded for persons of the white race, whether or not other negroes sought the same opportunity." State of Missouri ex rel. Gaines v. Canada, 305 U.S. 337, 351, 59 S.Ct. 232, 237, 83 L.Ed. 208; Sipuel v. Board of Regents, 332 U.S. 631, 68 S.Ct. 299. Similarly, with regard to the furnishing of sleeping, dining, and chair car facilities on trains, the Supreme Court of the United States has held that even though there was less demand for such facilities among Negroes than among whites, the right of a member of the Negro race to substantially equal facilities was a right of the individual and not of the racial group: "It is the individual who is entitled to the equal protection of the laws, and if he is denied by a common carrier, acting in the matter under the authority of a state law, a facility or convenience in the course of his journey which, under substantially the same circumstances, is furnished to another traveler, he may properly complain that his constitutional privilege has been invaded." McCabe v. Atchison, Topeka & Santa Fe Railway Co., 235 U.S. 151, 161, 162, 35 S. Ct. 69, 71, 59 L.Ed. 169. In these cases the United States Supreme Court determined that the right of an individual to be treated without discrimination because of

his race can be met by separate facilities affording substantially equal treatment to the members of the different races. A holding that such segregation does not impair the right of an individual to ride on trains or to enjoy a legal education is clearly inapplicable to the right of an individual to marry. Since the essence of the right to marry is freedom to join in marriage with the person of one's choice, a segregation statute for marriage necessarily impairs the right to marry.

In determining whether the public interest requires the prohibition of a marriage between two persons, the state may take into consideration matters of legitimate concern to the state. Thus, disease that might become a peril to the prospective spouse or to the offspring of the marriage could be made a disqualification for marriage. (See for example, Civ.Code §§ 79.01, 79.06.) Such legislation, however, must be based on tests of the individual, not on arbitrary classifications of groups or races, and must be administered without discrimination on the grounds of race. Yick Wo v. Hopkins, 118 U.S. 356, 373, 6 S.Ct. 1064, 30 L.Ed. 220. It has been suggested that certain races are more prone than the Caucasian to diseases such as tuberculosis. If the state determines that certain diseases would endanger a marital partner or offspring, it may prohibit persons so diseased from marrying, but the statute must apply to all persons regardless of race. Sections 60 and 69 are not motivated by a concern to diminish the transmission of disease by marriage, for they make race and disease the disqualification. Thus, a tubercular Negro or a tubercular Caucasian may marry subject to the race limitation, but a Negro and a Caucasian who are free from disease may not marry each other. If the purpose of these sections were to prevent marriages by persons who do not have the qualifications for marriage that the state may properly prescribe, they would make the possession of such qualifications the test for members of all races alike. By restricting the individual's right to marry on the basis of race alone, they violate the equal protection of the laws clause of the United States Constitution.

II. The parties, however, have argued at length the question whether the statute is arbitrary and unreasonable. They have assumed that under the equal protection clause the state may classify individuals according to their race in legislation regulating their fundamental rights. If it be assumed that such a classification can validly be made under the equal protection clause in circumstances besides those arising from an emergency, the question would remain whether the statute's classification of racial groups is based on differences between those groups bearing a substantial relation to a legitimate legislative objective. Barker Bros., Inc., v. Los Angeles, 10 Cal.2d 603, 609, 76 P.2d 97; Gulf etc. R. Co. v. Ellis, 165 U.S. 150, 165, 166, 17 S.Ct. 255, 41 L.Ed. 666; Quaker City Cab Co. v. Pennsylvania, 277 U.S. 389, 400, 48 S.Ct. 553, 72 L.Ed. 927. Race restrictions must be viewed with great suspicion, for the Fourteenth Amendment "was adopted to prevent state legislation designed to perpetuate discrimination on the basis of race or color" (Railway Mail Ass'n v. Corsi, 326 U.S. 88, 94, 65 S.Ct. 1483, 1487, 89 L.Ed. 2072; Williams v. International Brotherhood of Boilermakers, 27 Cal.2d 586, 590, 165 P.2d 903) and expresses "a definite national policy against discrimination because of race or color." James v. Marinship Corp., 25 Cal.2d 721, 740, 155 P.2d 329, 339, 160 A.L.R. 900. Any state legislation discriminating against persons on the basis of race or color has to overcome the strong presumption inherent in this constitutional policy. "Only the most exceptional circumstances can excuse discrimination on that basis in the face of the equal protection clause * * *." Oyama v. California, 332 U.S. 633, 68 S.Ct. 269, 275. We shall therefore examine the history of the legislation in question and the arguments in its support to determine whether there are any exceptional circumstances sufficient to justify it.

California's first miscegenation statute (Stats. 1850, ch. 140, p. 424) was enacted at the same time as two other statutes concerning race. It has been held that these three statutes were in pari materia and therefore to be read together. In re Estate of Stark, 48 Cal.App.2d 209, 214, 119

P.2d 961. The two companion statutes provided: "No black or mulatto person, or Indian, shall be permitted to give evidence in favor of, or against any white person. Every person who shall have one-eighth part or more of Negro blood shall be deemed a mulatto, and every person who shall have one-half of Indian blood shall be deemed an Indian." (Stats. 1850, ch. 99, § 14, p. 230; Repealed Code Civ.Proc., § 18, 1872.) No black, or mulatto person, or Indian, shall be permitted to give evidence in any action to which a white person is a party, in any Court of this State. Every person who shall have one eighth part or more of negro blood, shall be deemed a mulatto; and every person who shall have one half Indian blood, shall be deemed an Indian." (Stats., 1850, ch. 142; § 306, p. 455; Repealed Code Civ.Proc., § 18, 1872.)

In 1854 this court held that Chinese (and all others not white) were precluded from being witnesses against white persons on the basis of the statute quoted above. People v. Hall, 4 Cal. 399, 404. The considerations motivating the decision are candidly set forth. "The anomalous spectacle of a distinct people [Chinese], living in our community, recognizing no laws of this State except through necessity, bringing with them their prejudices and national feuds, in which they indulge in open violation of law; whose mendacity is proverbial; a race of people whom nature has marked as inferior, and who are incapable of progress or intellectual development beyond a certain point, as their history has shown; differing in language, opinions, color, and physical conformation; between whom and ourselves nature has placed an impassable difference, is now presented, and for them is claimed, not only the right to swear away the life of a citizen, but the further privilege of participating with us in administering the affairs of our Government." People v. Hall, supra, 4 Cal. at pages 404, 405. For these reasons, therefore, "all races other than Caucasian" were held to be included in a statute referring only to a "black or mulatto person, or Indian."

California courts are not alone in such utterances. Many courts in this country have assumed that human beings can be judged by race and that other races are inferior to the Caucasian. Respondent's position is based upon those premises. He justifies the prohibition of miscegenation on grounds similar to those set forth in the frequently cited case of Scott v. State, 1869, 39 Ga. 321, 324: "The amalgamation of the races is not only unnatural, but is always productive of deplorable results. Our daily observation shows us, that the offspring of these unnatural connections are generally sickly and effeminate, and that they are inferior in physical development and strength, to the full blood of either race."[2] Modern experts are agreed that the progeny of marriages between persons of different races are not inferior to both parents.[3] Nevertheless, even if we were to assume that interracial marriage results in inferior progeny, we are unable to find any clear policy in the statute against marriages on that ground.

Civil Code section 60, like most miscegenation statutes (see, Vernier, American Family Laws, § 44), prohibits marriages only between "white persons" and members of certain other so-called races. Although section 60 is more inclusive than most miscegenation statutes, it does not include "Indians" or "Hindus" (see, United States v. Bhagat Singh Thind, 261 U.S. 204, 214, 215, 43 S.Ct. 338, 67 L.Ed. 616); nor does it set up "Mexicans" as a separate category, although some authorities consider Mexico to be populated at least in part by persons who are a mixture of "white" and "Indian." (See, 15 Encyclopaedia Brittanica, pp. 381–382, 60 Harv.L.Rev. 1156–1158.) Thus, "white persons" may marry persons who would be considered other than white by respondent's authorities, and all other "races" may intermarry freely.

---

[2] Respondent refers to the following language in State v. Jackson, 80 Mo. 175, 179, 50 Am.Rep. 499, although stating that "we have not found any other statement to bear out the biological claims" therein: "It is stated as a well authenticated fact that if the issue of a black man and a white woman, and a white man and a black woman intermarry, they cannot possibly have any progeny, and such a fact sufficiently justifies those laws which forbid the intermarriage of blacks and whites, laying out of view other sufficient grounds for such enactments."

[3] See, Castle, Biological and Sociological Consequences of Race Crossing, 9 Am. J. of Physical Anthropology, pp. 145, 152-153; Linton, Sterling Professor Anthropology Yale Univ. and President of the American Anthropological Association, 64 Am.Merc. p. 133 (February 1947).

The Legislature therefore permits the mixing of all races with the single exception that white persons may not marry Negroes, Mongolians, Mulattoes, or Malays. It might be concluded therefrom that section 60 is based upon the theory that the progeny of a white person and a Mongolian or Negro or Malay are inferior or undesirable, while the progeny of members of other different races are not. Nevertheless, the section does not prevent the mixing of "white" and "colored" blood. It permits marriages not only between Caucasians and others of darker pigmentation, such as Indians, Hindus, and Mexicans, but between persons of mixed ancestry including white. If a person of partly Caucasian ancestry is yet classified as a Mongolian under section 60 because his ancestry is predominantly Mongolian, a considerable mixture of Caucasian and Mongolian blood is permissible. A person having five-eighths Mongolian blood and three-eighths white blood could properly marry another person of preponderantly Mongolian blood. Similarly, a Mulatto can marry a Negro. Under the theory of In re Estate of Stark, supra, that a Mulatto is a person having one-eighth or more of Negro ancestry, a person having seven-eighths white ancestry could marry a Negro. In fact two Mulattoes, each of four-eighths white and four-eighths Negro blood, could marry under section 60, and their progeny, like them, would belong as much to one race as to the other. In effect, therefore, section 60 permits a substantial amount of intermarriage between persons of some Caucasian ancestry and members of other races. Furthermore, there is no ban on illicit sexual relations between Caucasians and members of the proscribed races. Indeed, it is covertly encouraged by the race restrictions on marriage.

Nevertheless, respondent has sought to justify the statute by contending that the prohibition of intermarriage between Caucasions and members of the specified races prevents the Caucasian race from being contaminated by races whose members are by nature physically and mentally inferior to Caucasians.

Respondent submits statistics relating to the physical inferiority of certain races. Most, if not all, of the ailments to which he refers are attributable largely to environmental factors. Moreover, one must take note of the statistics showing that there is a higher percentage of certain diseases among Caucasians than among non-Caucasians.[4] The categorical statement that non-Caucasians are inherently physically inferior is without scientific proof. In recent years scientists have attached great weight to the fact that their segregation in a generally inferior environment greatly increases their liability to physical ailments.[5] In any event, generalizations based on race are untrustworthy in view of the great variations among members of the same race. The rationalization, therefore, that marriage between Caucasians and non-Caucasians is socially undesirable because of the physical disabilities of the latter, fails to take account of the physical disabilities of Caucasians and fails also to take account of variations among non-Caucasians. The Legislature is free to prohibit marriages that are socially dangerous because of the physical disabilities of the parties concerned. (See, Civ.Code §§ 79.01, 79.06.) The miscegenation statute, however, condemns certain races as unfit to marry with Caucasians on the premise of a hypothetical racial disability, regardless of the physical qualifications of the individuals concerned. If this premise were carried to its logical conclusion, non-Caucasians who are now precluded from marrying Caucasians on physical grounds would also be precluded from marrying among themselves on the same grounds. The concern to prevent marriages in the first category and the indifference about marriages in the second reveal the spuriousness of the contention that intermarriage between Caucasians and non-Caucasians is socially dangerous on physical grounds.

---

[4] Between 1930 and 1939 in California deaths resulted most frequently from diseases of the circulatory system, particularly heart diseases. These diseases were most prevalent among white persons, not including Mexicans, with the exception of Chinese, who slightly exceeded white persons. The second most important cause of death was cancer; here, white persons exceeded all others without exception. Tuberculosis, an important cause of death, occurs with greater frequency among Negroes than among white persons, not including Mexicans; but Mexicans, Indians, Chinese and Malays have materially higher death rates owing to tuberculosis than Negroes and Japanese. Diseases of the nervous system occur with less frequency among Indians, Japanese, Mexicans, and Malays than among white persons, Negroes, and Chinese. (The Population of California, Commonwealth Club of California Research Service, (1946) pp. 217 et seq.)

Respondent's contention that fertility of Negroes and Mulattoes is low is questionable. (See note 3, supra) Dr. S. J. Holmes (1937) The Negro's Struggle for Survival, p. 176, states: "The fact is that we have not adequate data on a sufficiently large scale to enable us to decide how the mixed origin of the mulatto affects fertility, if it affects it at all." Although Negro fertility rates are generally lower than those of white persons, other non-whites far exceed whites in birth rate. Further, the fertility rate of Rural-farm Negroes exceeds that of Rural-farm whites. Scientists give various interpretations of statistics on fertility, analyzing them in the light of environmental as well as hereditary factors.

Respondent also contends that Negroes, and impliedly the other races specified in section 60, are inferior mentally to Caucasians. It is true that, in the United States, catalogues of distinguished people list more Caucasians than members of other races. It cannot be disregarded, however, that Caucasians are in the great majority and have generally had a more advantageous environment, and that the capacity of the members of any race to contribute to a nation's culture depends in large measure on how freely they may participate in that culture. There is no scientific proof that one race is superior to another in native ability.[6] The data on

---

(Population of California, supra, pp. 212 et seq.; see I Myrdal, p. 134, chapter seven.)

[5] See, I Myrdal, pp. 140–144; S. J. Holmes, The Negro's Struggle for Survival, p. 130.

Respondent contends, however, that there is a racial ailment among Negroes known as sickle-cell anemia. According to the Cyclopedia of Medicine, Surgery and Obstetrics (1946) Vol. 2, p. 746, quoted by respondent, "Statistical studies indicate that 7 to 8 per cent of Negroes show the sickle-cell trait, though not necessarily suffering from sickle-cell anemia." Assuming that the sickle-cell trait is found only in Negroes, despite known extensive intermixture of the races, respondent has shown only the trait and not the prevalence of sickle-cell anemia. Civil Code section 79.01, which requires a pre-marital blood test, makes no provision for a report on sickle-cell anemia.

[6] See, I Myrdal, pp. 147–148: "These negative conclusions from many decades of the most painstaking scientific labor stand in glaring contrast to the ordinary white American's firm conviction that there are fundamental psychic differences between Negroes and whites. The reason for this contrast is not so much that the ordinary white American has made an error in observation, for most studies of intelligence show that the average Negro in the sample, if judged by performance on the test, is inferior to the average white person in the sample, and some studies show that the average Negro has certain specific personality differences from the white man, but that he has made an error in inferring that observed differences were innate and a part of 'nature.' He has not been able to discern the influence of gross environmental differences, much less the influence of more subtle life experiences. The fact should not be ignored, however, that he has also made many observational errors, because his observations have been limited and biased." See, also, Ralph Linton, Sterling Professor of Anthropology, Yale University, 64 Am.Merc. pp. 133, 139; Joseph Peterson & Lyle H. Lanier, Studies in the Comparative Abilities of Whites and Negroes, No. 5, Mental Measurement Monographs (1929); Otto Klineberg, A Study of Psychological Differences Between "Racial" and National Groups in Europe, Archives of Psychology, No. 132, vol. XX, (1931); Thomas Russell Garth (1931) Race Psychology, A Study of Racial Mental Differences; I Myrdal, pp. 144–153; Otto Klineberg, (1935) Negro Intelligence and Selective Migration; Ruth Benedict (1943) Race: Science and Politics, pp. 98–147.

which Caucasian superiorty is based have undergone considerable re-evaluation by social and physical scientists in the past two decades. Although scientists do not discount the influences of heredity on the ability to score highly on mental tests, there is no certain correlation between race and intelligence. There have been outstanding individuals in all races, and there has also been wide variation in the individuals of all races. In any event the Legislature has not made an intelligence test a prerequisite to marriage. If respondent's blanket condemnation of the mental ability of the proscribed races were accepted, there would be no limit to discrimination based upon the purported inferiority of certain races. It would then be logical to forbid Negroes to marry Negroes, or Mongolians to marry Mongolians, on the ground of mental inferiority, or by sterilization to decrease their numbers.

Respondent contends, however, that persons wishing to marry in contravention of race barriers come from the "dregs of society" and that their progeny will therefore be a burden on the community. There is no law forbidding marriage among the "dregs of society," assuming that this expression is capable of definition. If there were such a law, it could not be applied without a proper determination of the persons that fall within that category, a determination that could hardly be made on the basis of race alone.

Respondent contends that even if the races specified in the statute are not by nature inferior to the Caucasian race, the statute can be justified as a means of diminishing race tension and preventing the birth of children who might become social problems.

It is true that in some communities the marriage of persons of different races may result in tension. Similarly, race tension may result from the enforcement of the constitutional requirement that persons must not be excluded from juries solely on the ground of color, or segregated by law to certain districts within a city. In Buchanan v. Warley, 245 U.S. 60, 81, 38 S. Ct. 16, 20, 62 L.Ed. 149, L.R.A.1918C, 210, Ann.Cas.1918A, 1201, the Supreme Court of the United States declared unconstitutional a statute forbidding a "white person" to move into a block where the greater number of residences were occupied by "colored persons" and forbidding a "colored person" to move into a block where the greater number of residences were occupied by "white persons." The contention was made that the "proposed segregation will promote the public peace by preventing race conflicts." The court stated in its opinion that desirable "as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the federal Constitution." See, Cantwell v. State, 310 U.S. 296, 310, 60 S.Ct 900, 84 L.Ed. 1213, 128 A.L.R. 1352.

The effect of race prejudice upon any community is unquestionably detrimental both to the minority that is singled out for discrimination and to the dominant group that would perpetuate the prejudice. It is no answer to say that race tension can be eradicated through the perpetuation by law of the prejudices that give rise to the tension. Nor can any reliance be placed on the decisions of the United States Supreme Court upholding laws requiring segregation of races in facilities supplied by local common carriers and schools, for that court has made it clear that in those instances the state must secure equal facilities for all persons regardless of race in order that no substantive right be impaired. Sipuel v. Board of Regents, 332 U.S. 631, 68 S.Ct. 299; State of Missouri ex rel. Gaines v. Canada, 305 U.S. 337, 350, 351, 59 S.Ct. 232, 83 L.Ed. 208. In the present case, however, there is no redress for the serious restriction of the right of Negroes, Mulattoes, Mongolians, and Malays to marry; certainly there is none in the corresponding restriction of the right of Caucasians to marry. A member of any of these races may find himself barred by law from marrying the person of his choice and that person to him may be irreplaceable. Human beings are bereft of worth and dignity by a doctrine that would make them as interchangeable as trains.

Respondent relies on Pace v. Alabama, 106 U.S. 583, 1 S.Ct. 637, 27 L.Ed. 207, in which the United States Supreme Court held constitutional an Alabama statute imposing more severe punishment for adultery or fornication between a white person and a Negro than for such acts between individuals belonging to the same race. The Alabama statute also referred to intermarriage but the court considered the case as one dealing solely with adultery and nonmarital intercourse. We are not required by the facts of this case to discuss the reasoning of Pace v. Alabama except to state that adultery and non-marital intercourse are not, like marriage, a basic right, but are offenses subject to various degrees of punishment.

The rationalization that race discrimination diminishes the contacts and therefore the tensions between races would perpetuate the deprivation of rights of racial minorities. It would justify an abridgment of their privilege of holding office, of jury service, of entering the professions. The courts have made it clear that these privileges are not the prerogatives of any race.

It is contended that interracial marriage has adverse effects not only upon the parties thereto but upon their progeny. Respondent relies on Buck v. Bell, 274 U.S. 200, 47 S.Ct. 584, 71 L.Ed. 1000, for the proposition that the state "may properly protect itself as well as the children by taking steps which will prevent the birth of offspring who will constitute a serious social problem, even though such legislation must necessarily interfere with a natural right." That case, however, involved a statute authorizing sterilization of imbeciles following scientific verification and the observance of procedural guarantees. In Buck v. Bell the person sterilized was the feeble-minded child of a feeble-minded mother and was herself the mother of an illegitimate feeble-minded child. (See, Welf. & Inst.Code, § 6624.) The inheritability of mental defectiveness does not concern us here, for this case does not involve mentally defective persons. The Supreme Court of the United States later forbade the sterilization of criminals in Skinner v. Oklahoma, supra, where the Legislature failed to provide a fair hearing and set up illogical and discriminatory categories. The racial categories in the miscegenation law are as illogical and discriminatory as those condemned by the Supreme Court in Skinner v. Oklahoma; and there is a corresponding lack of a fair hearing.

Respondent maintains that Negroes are socially inferior and have so been judicially recognized (e. g., Wolfe v. Georgia Ry. & Elec. Co., 2 Ga.App. 499, 58 S.E. 899, 901), and that the progeny of a marriage between a Negro and a Caucasian suffer not only the stigma of such inferiority but the fear of rejection by members of both races. If they do, the fault lies not with their parents, but with the prejudices in the community and the laws that perpetuate those prejudices by giving legal force to the belief that certain races are inferior. If miscegenous marriages can be prohibited because of tensions suffered by the progeny, mixed religious unions could be prohibited on the same ground.[7]

There are now so many persons in the United States of mixed ancestry, that the tensions upon them are already diminishing and are bound to diminish even more in time.[8] Already many of the progeny of mixed marriages have made important contributions to the community. In any event the contention that the miscegenation laws prohibit inter-racial marriage because of its adverse effects on the progeny is belied by the extreme racial intermixture that it tolerates.

For many years progress was slow in the dissipation of the insecurity that haunts racial minorities, for there are many who believe that their own security depends on its maintenance. Out of earnest belief, or out of irrational fears, they reason in a circle that such minorities are inferior in health, intelligence, and culture, and that this inferiority proves the need of the barriers of race prejudice.

---

[7] Indeed, Father John La Farge, S.J. (1943) The Race Question and The Negro (Permissu Superiorum), p. 196, considers the tensions "not unlike."

[8] See, M. J. Herskovits (1930) The Anthropometry of the American Negro; E. B. Reuter (1931) Race Mixture; I Myrdal, pp. 132–133, 1360–1361.

Careful examination of the arguments in support of the legislation in question reveals that "there is absent the compelling justification which would be needed to sustain discrimination of that nature." Oyama v. California, 332 U.S. 633, 68 S.Ct. 269, 272. Certainly the fact alone that the discrimination has been sanctioned by the state for many years does not supply such justification. Shelley v. Kraemer, 334 U.S. 1, 68 S.Ct. 836; Oyama v. California, supra; Torao Takahashi v. Fish and Game Comm., 334 U.S. 410, 68 S.Ct. 1138; see Winters v. New York, 333 U.S. 507, 68 S. Ct. 665.

III. Even if a state could restrict the right to marry upon the basis of race alone, sections 60 and 69 of the Civil Code are nevertheless invalid because they are too vague and uncertain to constitute a valid regulation. A certain precision is essential in a statute regulating a fundamental right. "It is the duty of the lawmaking body in framing laws to express its intent in clear and plain language to the end that the people upon whom it is designed to operate may be able to understand the legislative will." In re Alpine, 203 Cal. 731, 736, 737, 265 P. 947, 949, 58 A.L.R. 1500; cases collected 50 Am.Jur. 484. "It is a fundamental rule of law that no citizen should be deprived of his liberty for the violation of a law which is uncertain and ambiguous." In re Stewart, 24 Cal.2d 344, 348, 149 P.2d 689, 691; In re Peppers, 189 Cal. 682, 686, 209 P. 896; United States v. Cohen Grocery Co., 255 U.S. 81, 89–92, 41 S.Ct. 298, 65 L. Ed. 516, 14 A.L.R. 1045; Lanzetta v. New Jersey, 306 U.S. 451, 453, 59 S.Ct. 618, 83 L.Ed. 888; Connally v. General Construction Co., 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322.

The requirement that a law be definite and its meaning ascertainable by those whose rights and duties are governed thereby applies not only to penal statutes, but to laws governing fundamental rights and liberties. Standard Chemicals & Metals Corp. v. Waugh Chemical Corp., 231 N.Y. 51, 54, 131 N.E. 566, 14 A.L.R. 1054; Small Co. v. American Sugar Refining Co., 267 U.S. 233, 239, 45 S.Ct. 295, 69 L.Ed. 589; see also State ex rel. Dickason v. Harris, 158 La. 974, 978, 105 So. 33. Thus, this court in Hewitt v. State Board of Medical Examiners, 148 Cal. 590, 595, 84 P. 39, 3 L.R.A.,N.S., 896, 113 Am.St.Rep. 315, 7 Ann.Cas. 750 declared invalid a statute regulating the practice of medicine on the ground that its provisions were too vague and uncertain to govern one's right to practice a profession. In Re Di Torio, D.C., 8 F.2d 279, 281 it was held that a provision of a statute regulating naturalization of aliens was invalid on the same ground. Although the provision in question seemed clear on its face, the court refused to apply the statute to vacate an order of admission to citizenship because "An act is void where its language appears on its face to have a meaning, but it is impossible to give it any precise or intelligible application in the circumstances under which it was intended to operate." In re Di Torio, supra, 8 F.2d at page 281 and cases there cited.

Section 60 of the Civil Code declares void all marriages of white persons with Negroes, Mongolians, members of the Malay race or Mulattoes. In this section, the Legislature has adopted one of the many systems classifying persons on the basis of race. Racial classifications that have been made in the past vary as to the number of divisions and the features regarded as distinguishing the members of each division. The number of races distinguished by systems of classification "varies from three or four to thirty four." (Boas, 7 Encyclopedia of Soc. Sciences, 25, 26.) The Legislature's classification in section 60 is based on the system suggested by Blumenbach early in the nineteenth century. Roldan v. Los Angeles County, 129 Cal.App. 267, 273, 18 P.2d 706. Blumenbach classified man into five races: Caucasian (white), Mongolian (yellow), Ethiopian (black), American Indian (red), and Malayan (brown). Even if that hard and fast classification be applied to persons all of whose ancestors belonged to one of these racial divisions,[8a] the Legislature has made no provision for applying the statute to persons of mixed ancestry. The fact is overwhelming that there has been a steady increase in the number of people in this country who belong to more than one race, and a growing number who have succeeded in identifying themselves with the Caucasian race even though they are not exclusively Caucasian. Some of these persons have migrated to this state; some are born here illegitimately; others are the progeny of miscegenous marriages valid where contracted and therefore valid in California. Pearson v. Pearson, 51 Cal. 120, 125. The apparent purpose of the statute is to discourage the birth of children of mixed ancestry within this state. Such a purpose, however, cannot be accomplished without taking into consideration marriages of persons of mixed ancestry. A statute regulating fundamental rights is clearly unconstitutional if it cannot be reasonably applied to accomplish its purpose. This court therefore cannot determine the constitutionality of the statute in question on the assumption that its provisions might, with sufficient definiteness, be applied to persons not of mixed ancestry.

[8a] See Julian S. Huxley and H. C. Haddon (1936) We Europeans, A Survey of "Racial" Problems, 1–15, 82, 106, 115–131, 215–236.

The only reference made in the statute to persons of mixed ancestry is the prohibition of marriages between a "white person" and a "mulatto." Even the term "mulatto" is not defined. The lack of a definition of that term leads to a special problem of how the statute is to be applied to a person, some but not all of whose ancestors are Negroes.[9] The only case in this state attempting to define the term "mulatto" in section 60 of the Civil Code leaves undecided whether a person with less than one-eight Negro blood is a "mulatto" within the meaning of the statute. In re Estate of Stark, 48 Cal.App.2d 209, 214, 119 P.2d 961. Even more uncertainty surrounds the meaning of the terms "white persons," "Mongolians," and "members of the Malay race."

If the statute is to be applied generally to persons of mixed ancestry the question arises whether it is to be applied on the basis of the physical appearance of the individual or on the basis of a genealogical research as to his ancestry. If the physical appearance of the individual is to be the test, the statute would have to be applied on the basis of subjective impressions of various persons. Persons having the same parents and consequently the same hereditary background could be classified differently. On the other hand, if the application of the statute to persons of mixed ancestry is to be based on genealogical research, the question immediately arises what proportions of Caucasian, Mongolian, or Malayan ancestors govern the applicability of the statute. Is it any trace of Mongolian or Malayan ancestry, or is it some unspecified proportion of such ancestry that makes a person a Mongolian or Malayan within the meaning of section 60?

To determine that a person is a Mongolian or Malayan within the meaning of the statute because of any trace of such ancestry, however slight, would be absurd. If the classification of a person of mixed ancestry depends upon a given proportion of Mongolians or Malayans among his ancestors, how can this court, without clearly invading the province of the Legislature, determine what that decisive proportion is? See, Pacific Coast etc. Bank v. Roberts, 16 Cal.2d 800, 805, 108 P.2d 439. Nor can this court assume that a predominance in number of ancestors of one race makes a person a Caucasian, Mongolian, or Malayan within the meaning of the statute, for absurd results would follow from such an assumption. Thus, a person with three-sixteenths Malay ancestry might have many so-called Malay characteristics and yet be considered a white person in terms of his preponderantly white ancestry. Such a person might easily find himself in a dilemma, for if he were regarded as a white person under section 60, he would be forbidden to marry a Malay, and yet his Malay characteristics might effectively preclude his marriage to another white person. Similarly, a person having three-eighths Mongolian ancestry might legally be classed as a white person even though he possessed Mongolian characteristics. He might have little opportunity or inclination to marry any one other than a Mongolian, yet section 60 might forbid such a marriage. Moreover, if a person were of four-eighths Mongolian or Malayan ancestry and four-eighths white ancestry, a test based on predominance in number of ancestors could not be applied.

---

[9] Black's Law Dictionary (3rd ed.) defines a Mulatto as "A person that is the the offspring of a negress by a white man, or of a white woman by a negro. * * * In a more general sense, a person of mixed Caucausian and negro blood, or Indian and Negro blood. * * * Properly a mulatto is a person one of whose parents is wholly black and the other wholly white; but the word does not always, though perhaps it does generally, require so exactly even a mixture of blood, nor is its signification alike in all the states. * * *" The same source defines a Negro as follows: "The word 'negro' means a black man, one descended from the African race, and does not commonly include a mulatto. * * But the laws of the different states are not uniform in this respect, some including in the description 'negro' one who has one-eighth or more of African blood. Term 'negro' means necessarily person of color, but not every person of color is a 'negro.'" The foregoing definitions of "Mulatto" and "Negro" are substantially the same as the definitions contained in 2 Bouv.Law Dict., Rawle's Third Revision, pp. 2266, 2331.

See also I Myrdal, An American Dilemma, p. 113: "Legislation in this respect tends to conform to social usage, although often it is not so exclusive. In some states one Negro grandparent defines a person as a Negro for legal purposes, in other states any Negro ancestor—no matter how far removed—is sufficient. In the Southern states definitions of who is a Negro are often conflicting. Since reconstruction, there has been a tendency to broaden the definition. The Northeastern states generally have no definition of Negro in law."

Section 69 of the Civil Code and section 60 on which it is based are therefore too vague and uncertain to be upheld as a valid regulation of the right to marry. Enforcement of the statute would place upon the officials charged with its administration and upon the courts charged with reviewing the legality of such administration the task of determining the meaning of the statute. That task could be carried out with respect to persons of mixed ancestry only on the basis of conceptions of race classification not supplied by the Legislature. "If no judicial certainty can be settled upon as to the meaning of a statute, the courts are not at liberty to supply one." In re Di Torio, D.C., 8 F.2d 279, 281.

[4-7] In summary, we hold that sections 60 and 69 are not only too vague and uncertain to be enforceable regulations of a fundamental right, but that they violate the equal protection of the laws clause of the United States Constitution by impairing the right of individuals to marry on the basis of race alone and by arbitrarily and unreasonably discriminating against certain racial groups.

Let the peremptory writ issue as prayed.

GIBSON, C. J., and CARTER, J., concur.

CARTER, Justice (concurring).

It is my considered opinion that the statutes here involved (secs. 60, 69, Civil Code) are the product of ignorance, prejudice and intolerance, and I am happy to join in the decision of this court holding that they are invalid and unenforceable. This decision is in harmony with the declarations contained in the Declaration of Independence which are guaranteed by the Bill of Rights and the Fourteenth Amendment to the Constitution of the United States and re-affirmed by the Charter of the United Nations, U.S.Code Congressional Service 1945, p. 964, that all human beings have equal rights regardless of race, color or creed, and that the right to liberty and the pursuit of happiness is inalienable and may not be infringed because of race, color or creed. To say that these statutes may stand in the face of the concept of liberty and equality embraced within the ambit of the above-mentioned fundamental law is to make of that concept an empty, hollow mockery.

The Declaration of Independence declares: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. * * *"

The Fifth Amendment to the Constitution of the United States provides that: "No person shall * * * be deprived of life, liberty, or property, without due process of law."

The Fourteenth Amendment to the Constitution of the United States provides: "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Charter of the United Nations contains the following declaration: "We the peoples of the United Nations determined * * * to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small * * * to promote social progress and better standards of life in larger freedom; and for these ends to practice tolerance * * *." (Preamble.) "* * * in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion * * *." (Ch. I, Art. I, sec. 3.)

In the face of these authoritive pronouncements the matter of race equality should be a settled issue. It is, at least, a settled issue so far as the fundamental law is concerned. And the only question before us is whether the Legislature may enact a valid statute in direct conflict with this fundamental law. It seems clear to me that it is not possible for the Legislature, in the face of our fundamental law, to enact a valid statute which proscribes conduct on a purely racial basis. Such are the statutes here involved. The wisdom of the broad, liberal concept of liberty and equality declared in our fundamental law should be apparent to every unprejudiced mind.

The Apostle Paul declared that: "God * * * hath made of one blood all nations of men for to dwell on all the face of the earth, and hath determined the times before appointed, and the bounds of their habitation." (The Acts of the Apostles, Ch. 17, V. 26.)

Cedric Dover writes in his book "Half-Caste": "Perhaps our Neanderthal ancesters arose from mixture between apemen of the Ice Age. Perhaps our Neolithic prototypes emerged from relations between the Aurignacian invaders of Europe and the local Neanderthals. We shall be content with the knowledge that miscegenation has influenced human evolution from the earliest times, that there has not been a pure race of our species for at least ten thousand years."

In a letter to Chastellux in 1785 Thomas Jefferson wrote: "I have supposed the black man, in his present state, might not be in body and mind equal to the white man; but it would be hazardous to affirm that, equally cultivated for a few generations, he would not become so." Notwithstanding this statement, Jefferson, who was the author of the Declaration of Independence, made it clear that the Negro is entitled to enjoy equally with others the "unalienable rights of life, liberty and the pursuit of happiness."

The Declaration of Independence is a part of the law of our land. It is to be found as part of the Statutes at Large on page 1 of volume 1. It has been given effect as a legislative enactment. Inglis v. Trustees of the Sailor's Snug Harbor, 28 U.S. 99, 3 Pet. 99, 7 L.Ed. 617, and other cases cited in U.S.C.A., pt. 1 Constitution, pp. 7, 8; Fidelity & Casualty Co. of New York v. Union Savings Bank Co., 29 Ohio App. 154, 163 N.E. 221. It declares that: "All men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. * * *" No one will question that, so far as petitioners are concerned, this case involves the pursuit of happiness in its clearest and most universally approved form.

It is a matter of law as well as historical knowledge that after the Revolution all men were not, in law, equal. Dred Scott v. Sandford, 19 How. 393, 15 L.Ed. 691. But it is well to remember that men fought, bled, and died for the truth of the proposition.

In the Dred Scott case, supra, the truth of the proposition was questioned and denied in an opinion by Chief Justice Taney. It is again a matter of historical knowledge that this decision helped to kindle the fire which brought on the Civil War. In this war men fought, bled and died for their belief in the essential equality of man.

Abraham Lincoln, in his never-to-be-forgotten Gettysburg Address, told us, because he was speaking to the future as well as of the past, that "Four score and seven years ago our fathers brought forth upon this continent, a new nation, conceived in Liberty, and dedicated to the proposition that all men are created equal." He asked whether "[A]ny nation, so conceived and so dedicated, can long endure." The Civil War was supposed to definitely and conclusively answer that question. This being so, should a state, or even a number of states, legislate to destroy that ideal when great wars have been fought to preserve it? An ideal for which men gave their lives and the lives of their families should be a precious heritage to be carefully guarded. And yet all men are not now being given equal treatment!

The freedom to marry the person of one's choice has not always existed, and evidently does not exist here today. But is not that one of the fundamental rights of a free people? Blackstone said that: "Liberty consists in being limited only by that Supreme Law which is the expression of abstract right." If the right to marry is a fundamental right, then it must be conceded that an infringement of that right by means of a racial restriction is an unlawful infringement of one's liberty. It is immaterial that perhaps only a few would wish to marry persons not of their own race or color. It is material that the few who do so desire have the right to make that choice. It is only ignorance, prejudice and intolerance which denies it. Since this state will recognize as valid a marriage performed in another state between members of these two races it follows that the marriage cannot be considered vitally detrimental to the public health, welfare and morals.

The Constitution of the State of California, Article I, section 13, provides that no person shall be deprived of life, liberty or property without due process of law. Due process of law consists not only of the individual's right to procedural due process, but his right to substantive due process—that the state, through legislation, shall not deprive him of one of his "liberties".

Our Constitution, like the Constitution of the United States, is a restriction upon the powers of the state. Upon this Court devolves the duty of guarding that Constitution and the rights it protects, as upon the Supreme Court of the United States devolves the duty of guarding the Constitution of the United States.

The student of Constitutional Law knows that the Civil War amendments to the Constitution did not accomplish their intended purpose, whch was to create a real, overall equality such as the Declaration of Independence contemplated, and which such cases as the Dred Scott case prevented from being realized. (Waite, the Negro in the Supreme Court, 30 Minn.L.Rev. 219.)

In the years following the adoption of the Thirteenth, Fourteenth and Fifteenth Amendments, many courts still did not think that there was real equality among men despite the fact that the language of the amendments is quite clear. Another round of the vicious circle was begun, this time by limiting as far as possible the language of the amendments. Many cases might be cited to support this view, but the hardest blow to liberal minded persons—the biggest step backwards into days of slavery—was the decision in Plessy v. Ferguson, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256. That case involved a Louisiana statute which provided that railroads must provide "equal but separate" accommodations for white and colored passengers, and that, under penalty, no member of either group should be permitted to use the accommodations provided for the other. Act No. 111 of 1890. The Supreme Court upheld the statute, and laid down the rule that the state had power to make regulations of this kind "in good faith for the promotion of the public good." The Court also said that the question came down to the reasonableness of the regulation. Plessy v. Ferguson, supra, 163 U.S. at page 550, 16 S.Ct. 1143. By using that language, however, the Supreme Court left the door open for a future, more enlightened generation. For, if the reasonableness of the regulation is the only test, it may and will happen that a regulation was reasonable from the point of view of the Legislature enacting it and the court first passing on it. And yet, in the light of future developments, all the reasonableness may have been lost and the regulation may have reduced itself to a mere tool of oppression—a hangover from quaint and superstitious days of yore. There are enough statutes of this kind to fill periodically a column in Collier's magazine. Most statutes thus rendered obsolete are not especially vicious, and most of them are not enforced. It is safe to assume that most of them would be struck down today if their constitutionality were challenged, because what once may have appeared reasonable has become an absurdity.

It is, of course, conceded that the state in the exercise of the police power may legislate for the protection of the health and welfare of the people and in so doing may infringe to some extent on the rights of individuals. But it is not conceded that a state may legislate to the detriment of a class—a minority who are unable to protect themselves, when such legislation has no valid purpose behind it. Nor may the police power be used as a guise to cloak prejudice and intolerance. Prejudice and intolerance are the cancers of civilization.

It is my position that the statutes now before us never were constitutional. When first enacted, they violated the supreme law of the land as found in the Declaration of Independence. It is further my position that the Fourteenth Amendment to the Constitution of the United States invalidated the statutes here involved. In a powerful dissent in Plessy v. Ferguson, supra, Justice Harlan said, 163 U.S. at page 559, 16 S.Ct. at page 1146: "Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. * * * The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guarantied by the supreme law of the land are involved * * * the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the Dred Scott case." This language needs no elaboration. The time at which this judgment has become pernicious has arrived.

Even if I concede, which I do not, that the statutes here involved were at any time reasonable, they are no longer reasonable and therefore no longer valid today. The rule is that the constitutionality of a statute is not determined once and for all by a decision upholding it. A change in conditions may invalidate a statute which was reasonable and valid when enacted. Nashville, C. & St. L. Ry. v. Walters, 294 U.S. 405, 55 S.Ct. 486, 79 L.Ed. 949; 16 C.J.S., Constitutional Law, § 71, p. 150.

In this case, there are no decisions of either this Court or the Supreme Court of the United States which uphold the validity of a statute forbidding or invalidating miscegenous marriages. As has been pointed out, even if there were precedent, it would not necessarily be binding in this case. The cases from other jurisdictions are, of course, not binding here. Under the test laid down by the United States Supreme Court in Plessy v. Ferguson, supra, the reasonableness of the regulation is therefore the decisive factor. And there are decisions rendered in this state which definitely point the way as to what is to be considered "reasonable" and in accord with the public policy of this state.

This Court has upheld the validity of miscegenous marriages, so-called, when the marriage was entered into in a jurisdiction where no prohibition existed. Pearson v. Pearson, 51 Cal. 120, 125. Under the well-settled rules of the law of Conflict of Laws, this Court could have denied validity to such marriages, provided they were "odious" to its own internal policy. It did not do so, and it has indicated in other holdings in which the problem of miscegenation was collaterally involved that it does not consider the internal policy of this state one which would lead it to refuse validity to such marriages (Res. of Conflicts of Laws, sec. 132(c)).

Some of the statutes of the type here under attack have been upheld as reasonably designed to prevent race rioting. The fact that this court grants recognition to foreign miscegenous marriages, valid where contracted, is enough to rebut that argument. Riots would either follow in both cases or in none. One author sums up the problem by asking: "Does this not mean that the miscegenation statute applies only to those who either have an inadequate knowledge of the law and/or cannot afford the train fare to a state where the attempted marriage would be valid?" (Tragen, 32 Cal.L.Rev. 269, 277.)

So far as the policy of this Court is concerned, there is no basis for upholding the statutes. But it is said that it is not the policy of the court but that of the Legislature which should control. And there again, there are strong indications of legislative trends and intentions which point the way. So far as employment under public contracts is concerned, the laws of this state forbid discrimination based on color (Labor Code, sec. 1735). So far as civil rights other than the right to marry are concerned, they are guaranteed by Civil Code section 52. The statutes forbidding miscegenous marriages here under attack are further distinguished from statutes in other jurisdictions in that they are entirely declaratory, while all the others carry with them penalties for violation. This, too, would indicate an attitude of comparative indifference on part of the Legislature, and the absence of any clearly expressed public sentiment or policy.

The legislation here under attack is also sought to be sustained on the ground that a legislative enactment duly made and based on "some evidence" is presumptively valid. The general rule to that effect may be conceded. But it does not apply to a case of this kind. In cases involving discrimination, the rule is that laid down by the Supreme Court of the United States in Korematsu v. United States, 323 U.S. 214, 216, 65 S.Ct. 193, 194, 89 L.Ed. 194, 199, where the Court speaking through Mr. Justice Black said: "* * * all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. * * * courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can." That suspicion which attaches to cases involving discrimination is sufficient to overcome the presumption of validity and constitutionality normally present when a statute is attached as unconstitutional.

Finally, the statute is sought to be upheld for "sociological" reasons. The evidence presented to sustain the statute and that tending to show it up as unreasonable falls into two groups. One is concerned with the social effect of such marriages on the parties and those close to them. That social ostracism may well result to the parties and perhaps their offspring, may be conceded. But that is something which the state is powerless to control and which it cannot prevent by legislation. It therefore furnishes no basis for legislation, either. It is something resting with the parties themselves, for them to decide. If they choose to face this possible prejudice and think that their own pursuit of happiness is better subserved by entering into this marriage with all its risks than by spending the rest of their lives without each other's company and comfort, the state should not and cannot stop them.

The other aspect of the evidence adduced is the medico-eugenic one. A great deal has been written and said about the desirability or undesirability of racial mixtures. The writers seem to be in such hopeless conflict that their lack of bias may well be questioned. Suffice it to quote the following from petitioner's brief:

"The blood-mixing however, with the lowering of the racial level caused by it, is the sole cause of the dying-off of old cultures; for the people do not perish by lost wars, but by the loss of that force of resistance which is contained only in the pure blood.

"All that is not race in this world is trash."

"The result of any crossing, in brief, is always the following: (a) lowering of the standard of the higher race, (b) physical and mental regression, and, with it, the beginning of slowly but steadily progressive lingering illness."

"Every race-crossing leads necessarily sooner or later to the decline of the mixed product. The danger for the mixed product is abolished only in the moment of the bastardization of the last higher, racially pure element."

"* * * [T]here is only one most sacred human right, and this right is at the same time the most sacred obligation, namely, to see to it that the blood is preserved pure, so that by its preservation of the best human material a possibility is given for a more noble development of these human beings."

This quotation is from Hitler's "Mein Kampf" as published in translation in New York in 1940. To bring into issue the correctness of the writings of a madman, a rabble-rouser, a mass-murderer, would be to clothe his utterances with an undeserved aura of respectability and authoritativeness. Let us not forget that this was the man who plunged the world into a war in which, for the third time, Americans fought, bled, and died for the truth of the proposition that all men are created equal.

We may take judicial notice of the fact —since it is a political and historical fact— that steady inroads have been made on the myth of racial superiority and its outgrowths.

The rest of the world never has understood and never will understand why and how a nation, built on the premise that all men are created equal, can three times send the flower of its manhood to war for the truth of this premise and still fail to carry it out within its own borders.

In 1682, Lord Nottingham said in the course of an opinion: "Pray let us so resolve Cases here, that they may stand with the Reason of Mankind when they are debated abroad. Shall that be Reason here that is not Reason in any part of the World besides?" Duke of Norfolk's Case, 3 Ch.Cas. 1, 33, 22 Eng. Repr. 931, 935.

In my opinion, the statutes here involved violate the very premise on which this country and its Constitution were built, the very ideas embodied in the Declaration of Independence, the very issue over which the Revolutionary War, the Civil War, and the Second World War were fought, and the spirit in which the Constitution must be interpreted in order that the interpretations will appear as "Reason in any part of the World besides."

EDMONDS, Justice (concurring).

I agree with the conclusion that marriage is "something more than a civil contract subject to regulation by the State; it is a fundamental right of free men". Moreover, it is grounded in the fundamental principles of Christianity. The right to marry, therefore, is protected by the constitutional guarantee of religious freedom, and I place my concurrence in the judgment upon a broader ground than that the challenged statutes are discriminatory and irrational.

In Cantwell v. Connecticut, 1940, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213, 128 A.L.R. 1352, the United States Supreme Court, for the first time expressly held that, through the due process clause of the Fourteenth Amendment, a state statute may be declared invalid if it violates the specific guarantee of religious freedom as stated in the First Amendment. The consequences of that decision were forcefully stated by Mr. Justice Jackson in West Virginia State Board of Education v. Barnette, 319 U.S. 624, 639, 63 S.Ct. 1178, 1186, 87 L.Ed. 1628, 147 A.L.R. 674, as follows: "In weighing arguments of the parties it is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own sake. The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard. The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect."

Reasonable classification, therefore, is not the test to be applied to a statute which interferes with one of the fundamental liberties which are protected by the First Amendment. The question is whether there is any "clear and present danger" justifying such legislation (Craig v. Harney, 331 U.S. 367, 372, 67 S.Ct. 1249, 1253, 91 L.Ed. 1546; Pennekamp v. Florida, 328 U.S. 331, 333, 66 S.Ct. 1029, 90 L.Ed. 1295; Cantwell v. Connecticut, supra, 310 U.S. at page 311, 60 S.Ct. at page 900, 84 L.Ed. 1213, 128 A.L.R. 1352; Herndon v. Lawry, 301 U.S. 242, 256, 57 S.Ct. 732, 81 L.Ed. 1066; Schenck v. United States, 249 U.S. 47, 52, 39 S.Ct. 247, 63 L.Ed. 470), and the burden of upholding the enactment is upon him who asserts that the acts which are denounced do not infringe the freedom of the individual. Busey v. District of Columbia, App. D.C., 138 F.2d 592, 595.

In the present case, the respondent does not claim that there is any clear and present danger justifying the restrictions imposed by sections 60 and 69 of the Civil Code. In 18 states, including New York, Illinois and Pennsylvania, where about 10% of the Negroes of the United States reside, there are no such limitations. The population of California, to a large extent, is made up of people who have come to it from other sections of the country, and if there are undesirable consequences of interracial marriages, the challenged legislation is an ineffective means of meeting the problem.

The decisions upholding state statutes prohibiting polygamy come within an entirely different category. In Reynolds v. United States, 98 U.S. 145, 25 L.Ed. 244, marriage was said to be, "from its very nature a sacred obligation", but the conviction was sustained upon the ground that polygamy violates "the principles upon which the government of the people, to a greater or less extent, rests". Later, the court characterized the practice of polygamy as being "contrary to the spirit of Christianity and of the civilization which Christianity has produced in the Western world." Mormon Church v. United States, 136 U.S. 1, 10 S.Ct. 792, 34 L.Ed. 481; see Davis v. Beason, 133 U.S. 333, 10 S.Ct. 299, 33 L.Ed. 637. In effect, therefore, these cases rest upon the principle that the conduct which the legislation was designed to prevent constituted a clear and present danger to the well being of the nation and, for that reason, the statute did not violate constitutional guarantees.

SHENK, Justice.

I dissent.

The power of a state to regulate and control the basic social relationship of marriage of its domiciliaries is here challenged and set at nought by a majority order of this court arrived at not by a concurrence of reasons but by the end result of four votes supported by divergent concepts not supported by authority and in fact contrary to the decisions in this state and elsewhere.

It will be shown that such laws have been in effect in this country since before our national independence and in this state since our first legislative session. They have never been declared unconstitutional by any court in the land although frequently they have been under attack. It is difficult to see why such laws, valid when enacted and constitutionally enforceable in this state for nearly one hundred years and elsewhere for a much longer period of time, are now unconstitutional under the same constitution and with no change in the factual situation. It will also be shown that they have a valid legislative purpose even though they may not conform to the sociogenetic views of some people. When that legislative purpose appears it is entirely beyond judicial power, properly exercised, to nullify them.

This proceeding, therefore, involves a most important state function long since recognized as such. Indeed as late as June 7, 1948, it has been recognized by the Supreme Court of the United States "that the regulation of the incidents of the marital relation involves the exercise by the

States of powers of the most vital importance." Sherrer v. Sherrer, 334 U.S. 343, 68 S.Ct. 1087, 1092. Because of the far-reaching effect of an order of this court in connection with this basic social relationship the subject is worthy of somewhat extended discussion in support of our statutes.

According to the verified petition for the Writ of Mandamus to compel the issuance of a marriage license, Andrea D. Perez is a white person and Sylvester S. Davis, Jr. is a Negro. Respondent county clerk rests his refusal to issue a certificate and license to them on the ground that he is expressly prohibited from so doing by the provisions of section 69 of the Civil Code, and upon the further ground that their purported marriage in this state would be illegal and void. (Section 60, Civil Code.)

Section 69 of the Civil Code contains the following proviso: "* * * no license may be issued authorizing the marriage of a white person with a Negro, mulatto, Mongolian or member of the Malay race." And complementary section 60 of the same code reads: "All marriages of white persons with negroes, Mongolians, members of the Malay race, or mulattoes are illegal and void."

Petitioners first contend that the above quoted statutory provisions deprive them of the religious freedom guaranteed by the First and Fourteenth Amendments of the federal Constitution and Article I, section 4, of the Constitution of this state. They allege that they are members and communicants of the Roman Catholic Church; that it is the dogma, belief and teaching of the church that a person of the white race and a person of the Negro race, if otherwise eligible, are entitled to receive conjointly the sacrament of matrimony and to intermarry; that the refusal of respondent to issue the license denies to them the right to participate fully in the sacramental life of the religion in which they believe, prohibits the free exercise by them of their religion, and violates the guaranty of the free exercise and enjoyment of their religious profession and worship. It is further alleged that section 69 of the Civil Code is arbitrary, capricious and without reasonable relation to any purpose within the competency of the state to effect.

Respondent on the other hand contends that the classifications contained in sections 60 and 69 of the Civil Code do not transgress the petitioners' freedom of religious worship; that such classifications are reasonably designed to promote the general welfare and the interests of individual members of the races mentioned, and that the regulation is therefore a proper exercise of the police power of the state.

At the outset it may be noted that the petitioners' alleged right to marry is not a part of their religion in the broad sense that it is a duty enjoined by the church, or that penalty and punishment may in some manner ensue (cf. Reynolds v. United States, 98 U.S. 145, 161, 25 L.Ed. 244); but rather that their marriage is permissive under the dogma, beliefs and teaching of the church to which they claim membership and that the sacrament of matrimony will be administered to them by a priest of the church if and when a license issues. In this connection Father John LaFarge, executive editor of "America", the national Catholic weekly, in a book entitled "The Race Question and The Negro" (Permissu Superiorum), (1943), states at page 196: "The Catholic Church does not impose any impediment, diriment impediment, upon racial intermarriage, in spite of the Church's great care to preserve in its utmost purity the integrity of the marriage bond.

"On the other hand, where such intermarriages are prohibited by law, as they are in several states of the Union, the Church bids her ministers to respect these laws, and to do all that is in their power to dissuade persons from entering into such unions."

The foregoing is mentioned to show that the attitude of the church has no particular bearing on the asserted rights of the petitioners. Its attitude is one of respect for local laws and an admonition to her clergy to advise against their infringement.

Other considerations are presented in connection with petitioners' contentions that their religious liberty is being infringed. The First Amendment to the

United States Constitution declares that Congress shall make no law respecting an establishment of religion or prohibit the free exercise thereof. The due process of law clause of the Fourteenth Amendment embraces this fundamental concept of liberty as expressed in the First Amendment and renders the states likewise incompetent to transgress it. However, this religious liberty "embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be." Cantwell v. Connecticut, 310 U.S. 296, 303, 60 S.Ct. 900, 903, 84 L.Ed. 1213, 128 A.L.R. 1352; Murdock v. Pennsylvania, 319 U.S. 105, 110, 63 S.Ct. 870, 87 L.Ed. 1292, 146 A.L.R. 81; Gospel Army v. City of Los Angeles, 27 Cal.2d 232, 163 P.2d 704. It has long been held that conduct, consisting of practices and acts, remains subject to regulation for the health, safety and general welfare. For example, a legislative determination that monogamy is the "law of social life" has been held to prevail over the practice of polygamy and bigamy as a duty required, encouraged or suffered by religion. Reynolds v. United States, supra, 98 U.S. 145, 25 L.Ed. 244; Davis v. Beason, 133 U.S. 333, 10 S.Ct. 299, 33 L.Ed. 637; Cleveland v. United States, 329 U.S. 14, 67 S.Ct. 13, 91 L.Ed. 12.

The reasoning behind this construction of the Constitution is obvious. The determination of proper standards of behaviour must be left to the Congress or to the state legislatures in order that the well being of society as a whole may be safeguarded or promoted. The protection of the individual's exercise of religious worship afforded by our state Constitution, Article I, section 4, corresponds with that furnished by the federal guaranty as interpreted by the United States Supreme Court. Our Constitution expressly provides that the free exercise of religion guaranteed "shall not be so construed as to * * * justify practices inconsistent with the peace or safety of this State."

Moreover, the right of the state to exercise extensive control over the marriage contract has always been recognized. The institution of matrimony is the foundation of society, and the community at large has an interest in the maintenance of its integrity and purity. Sharon v. Sharon, 75 Cal. 1, 16 P. 345; 16 Cal.Jur. 909. The Supreme Court of the United States has stated: "Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature." Maynard v. Hill, 125 U.S. 190, 205, 8 S.Ct. 723, 726, 31 L.Ed. 654. And: "Marriage, while from its very nature a sacred obligation, is nevertheless, in most civilized nations, a civil contract, and usually regulated by law. Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal." Reynolds v. United States, supra, 98 U.S. 145, 165, 25 L.Ed. 244. In the language of the Supreme Court of Missouri: "The right to regulate marriage, the age at which persons may enter into that relation, the manner in which the rites may be celebrated, and the persons between whom it may be contracted, has been assumed and exercised by every civilized and Christian nation." State v. Jackson, 80 Mo. 175, 179, 50 Am. Rep. 499. Further: "There can be no doubt as to the power of every country to make laws regulating the marriage of its own subjects; to declare who may marry, how they may marry, and what shall be the legal consequences of their marrying. The right to regulate the institution of marriage; to classify the parties and persons who may lawfully marry; to dissolve the relation by divorce; and to impose such restraints upon the relation as the laws of God, and the laws of propriety, morality and social order demand, has been exercised by all civilized governments in all ages of the world." Kinney v. Commonwealth, 30 Grat., Va., 858, 862, 32 Am. Rep. 690.

It is apparent from what has been said that if the law under attack bears a substantial relationship to the health, safety, morals or some other phase of the general welfare of the people of this state, it would not be invalid because incidentally in conflict with the conduct and practice of a particular religious group. Similarly if there is a rational basis for the law, if it is reasonable, and all within a given class are treated alike, there is not violation of the due process or equal protection clauses of the Fourteenth Amendment to the United States Constitution. See State of Missouri ex rel. Gaines v. Canada, 305 U.S. 337, 59 S.Ct. 232, 83 L.Ed. 208; Buck v. Bell, 274 U.S. 200, 47 S.Ct. 584, 71 L.Ed. 1000; Radice v. New York, 264 U.S. 292, 44 S.Ct. 325, 68 L.Ed. 690; Patsone v. Pennsylvania, 232 U.S. 138, 34 S.Ct. 281, 58 L.Ed. 539; Noble State Bank v. Haskell, 219 U.S. 104, 31 S.Ct. 186, 55 L.Ed. 112, 32 L.R.A.,N.S., 1062, Ann.Cas.1912A, 487.

The prohibition of miscegenetic marriages is not a recent innovation in this state nor is such a law by any means unique among the states. A short history of miscegenetic marriage laws in this state and elsewhere will contribute to a better understanding of the problem at hand. A law declaring marriages between white persons and Negroes to be illegal and void was enacted at the first session of our Legislature. (Stats.1850, Ch. 140, p. 424.) Section 60 of the Civil Code declaring certain marriages invalid has existed since the advent of our codes in 1872, at which time it extended only to intermarriage between white persons and Negroes or mulattoes. It succeeded the prohibition against such marriages found in the above mentioned Statutes of 1850. Section 60 was amended in 1905 to include marriages between white persons and Mongolians (Stats.1905, p. 554). The provisions of the law here attacked have remained unchallenged for nearly one hundred years and have been unchanged so far as the marriage of whites with Negroes is concerned. To indicate that the subject matter is not merely of ancient legislative consideration it should be noted that in 1933 the District Court of Appeal decided that sections 60 and 69 did not prohibit the marriage in this state of a white woman and a Filipino—a member of the Malay race. Roldan v. Los Angeles County, 129 Cal.App. 267, 18 P.2d 706. That case was decided on January 27, 1933. Without delay the Legislature amended both sections to extend the prohibition to marriages also as between white persons and members of the Malay race. The amendatory measures passed both houses of the Legislature and were signed by the Governor on April 20th of the same year Stats.1933, p. 561) thus rendering nugatory the decision in the Roldan case—which was the obvious purpose of the legislation. As above indicated the present concern with the legislation is only as it affects marriages between white persons and Negroes.

Twenty-nine states in addition to California have similar laws. (Rhodes, "Annulment of Marriage" (1945); Charles S. Manguin, Jr., "The Legal Status of the Negro" (1940).) Six of these states have regarded the matter to be of such importance that they have by constitutional enactments prohibited their legislatures from passing any law legalizing marriage between white persons and Negroes or mulattoes. Several states refuse to recognize such marriages even if performed where valid (see Charles S. Manguin, Jr., "The Legal Status of the Negro" (1940); In re Takahashi's Estate, 113 Mont. 490, 129 P. 2d 217), particularly if an attempt has been made by residents of a state to evade the law. Eggers v. Olson, 104 Okl. 297, 231 P. 483; State v. Kennedy, 76 N.C. 251, 22 Am.Rep. 683. The infrequency of such unions is perhaps the chief reason why prohibitive laws are not found in the remaining states. (Reuter, "Race Mixture" (1931), p. 39; Rhodes, "Annulment of Marriage" (1945), pp. 101, 102.)

The ban on mixed marriages in this country is traceable from the early colonial period. For example, Maryland forbade the practice of marriage unions between Negroes or Indians and white persons as early as 1663. Laws forbidding marriages between Negroes and whites were passed in Massachusetts in 1705, in Delaware in 1721, in Virginia in 1726, and in North Carolina in 1741. In 1724 it was decreed in France that no Negro-white marriages were to take place in Louisiana. Most of the remaining states enacted similar legislation in the period between the formation of the United States and the Civil War.

Research has not disclosed a single case where a miscegenetic marriage law has been declared invalid. As stated in Re Estate of Monks, 48 Cal.App.2d 603, 612, 120 P.2d 167, 173: "Many states have statutes prohibiting such alliances, and we have had presented no instance of successful constitutional attacks upon them or any of them." Not only the state courts but the federal courts as well have uniformly sustained the validity of such laws. One of the most recent decisions upon the subject is that of the United States Circuit Court of Appeals for the 10th Circuit in the case of Stevens v. United States, 146 F.2d 120, 123, decided December 18, 1944. The court there said: "Section 12, supra [Title 43, Oklahoma St.1941], making unlawful marriages between persons of African descent and persons of other races or descents is challenged on the ground that it violates the Fourteenth Amendment. Marriage is a consentient covenant. It is a contract in the sense that it is entered into by agreement of the parties. But it is more than a civil contract between them, subject to their will and pleasure in respect of effects, continuance, or dissolution. It is a domestic relation having to do with the morals and civilization of a people. It is an essential institution in every well organized society. It affects in a vital manner public welfare, and its control and regulation is a matter of domestic concern within each state. A state has power to prescribe by law the age at which persons may enter into marriage, the procedure essential to constitute a valid marriage, the duties and obligations which it creates, and its effects upon the property rights of both parties. Maynard v. Hill, 125 U.S. 190, 8 S.Ct. 723, 31 L.Ed. 654. And within the range of permissible adoption of policies deemed to be promotive of the welfare of society as well as the individual members thereof, a state is empowered to forbid marriages between persons of African descent and persons of other races or descents. Such a statute does not contravene the Fourteenth Amendment."

In Pace v. Alabama, 106 U.S. 583, 1 S.Ct. 637, 27 L.Ed. 207, the United States Supreme Court had before it a statute of the State of Alabama declaring that "if any white person and any negro * * * intermarry or live in adultery or fornication with each other, each of them must, on conviction, be imprisoned in the penitentiary or sentenced to hard labor for the county for not less than two nor more than seven years." A Negro man and white woman had been convicted in the courts of Alabama of fornication. Upon writ of error to the United States Supreme Court it was contended that the statute was in conflict with the equal protection of law clause of the United States Constitution because greater punishment was provided than by another law relating to the same offense committed by peoples of the same race. The Supreme Court of the United States in upholding the statute and affirming the judgment of conviction stated: "The defect in the argument of counsel consists in his assumption that any discrimination is made by the laws of Alabama in the punishment provided for the offense for which the plaintiff in error was indicted when committed by a person of the African race and when committed by a white person. The two sections of the Code cited are entirely consistent. The one prescribes, generally, a punishment for an offense committed between persons of different sexes; the other prescribes a punishment for an offense which can only be committed where the two sexes are of different races. * * * Whatever discrimination is made in the punishment prescribed in the two sections is directed against the offense designated and not against the person of any particular color or race. The punishment of each offending person, whether white or black, is the same."

In State v. Tutty, C.C., 41 F. 753, 762, 7 L.R.A. 50, where a statute was held not in deprivation of rights under the federal Constitution, it was said: "The court will not discuss the argument of defendants' counsel to the effect that the intermarriages of whites and blacks do not constitute an evil or an injury against which the state should protect itself. This is a question which has been, as we have seen, the subject of repeated judicial deliverances; but it is more properly, in the opinion of this court, within the range of legislative duty. It is enough, for the purpose of its duty, for the court to ascertain that by a legitimate and settled policy the state of Georgia has declared such marriages unlawful and void; for while, in this country, the home life of the people, their decency and their morality, are the bases of that vast social structure of liberty, and obedience to law, which excites the patriotic pride of our countrymen and the admiration of the world, and while these attributes of our citizenship should be cherished and protected by all in authority, and the creatures who defy them should be condemned by all, the courts, in their judicial functions, are rarely concerned with the policy of the laws which are made to protect the community. The policy of the state upon this subject has been declared, as we have seen, by its supreme court as well as by its statutes, and it is enough to say that this court is unable to discover anything in that policy with which the federal courts have the right or the power to interfere."

In Scott v. Georgia, 39 Ga. 321, the Supreme Court of Georgia said of a provision of the state Constitution prohibiting marriages between whites and Negroes, and declaring all such marriages void: "With the policy of this law we have nothing to do. It is our duty to declare what the law is, not to make law. For myself, however, I do not hesitate to say, that it was dictated by wise statesmanship, and has a broad and solid foundation in enlightened policy, sustained by sound reason and common sense. The amalgamation of the races is not only unnatural, but is always productive of deplorable results. * * * The power of the Legislature over the subject matter when the Code was adopted, will not, I suppose, be questioned. The Legislature certainly had as much right to regulate the marriage relation by prohibiting it between persons of different races as they had to prohibit it between persons within the Levitical degrees, or between idiots. Both are necessary and proper regulations. And the regulation now under consideration is equally so."

In State v. Jackson, supra, 80 Mo. 175, 50 Am.Rep. 499, the Supreme Court of Missouri reversed a judgment sustaining a demurrer to an indictment charging a white woman with violation of a statute making marriages between white persons and Negroes a felony. The court said that the law might "interfere with the tastes of negroes who want to marry whites, or whites who wish to intermarry with negroes, but the State has the same right to regulate marriage in this respect that it has to forbid the intermarriage of cousins and other blood relations. If the State desires to preserve the purity of the African blood by prohibiting intermarriage between whites and blacks, we know of no power on earth to prevent such legislation. It is a matter of purely domestic concern. The 14th amendment to the Constitution of the United States * * * has no such scope as seems to have been accorded it by the circuit court. * * * All of one's rights as a citizen of the United States will be found guaranteed by the Constitution of the United States. If any provision of that instrument confers upon a citizen the right to marry any one who is willing to wed him, our attention has not been called to it. If such be one of the rights attached to American citizenship all our marriage acts forbidding intermarriage between persons within certain degrees of consanguinity are void * * * [T]he condition of a community, moral, mental and physical, which would tolerate indiscriminate intermarriage for several generations, would demonstrate the wisdom of laws which regulate marriage and forbid the intermarriage of those nearly related in blood."

The Supreme Court of Oklahoma, in Eggers v. Olson, supra, 104 Okl. 297, 231 P. 483, 486, said: "The inhibition, like the incestuous marriage, is in the blood, and the reason for it is stronger still." The court quoted from 18 R.C.L., sec. 31, p. 409, in part, as follows: "'Civilized society has the power of self-preservation, and, marriage being the foundation of such society, most of the states in which the negro forms an element of any note have enacted laws inhibiting intermarriage between the white and black races. * * *

Statutes forbidding intermarriage by the white and black races were without doubt dictated by wise statesmanship, and have a broad and solid foundation in enlightened policy, sustained by sound reason and common sense. The amalgamation of the races is not only unnatural, but is always productive of deplorable results. The purity of the public morals, the moral and physical development of both races, and the highest advancement of civilization, under which the two races must work out and accomplish their destiny, all require that they should be kept distinctly separate, and that connections and alliances so unnatural should be prohibited by positive law and subject to no evasion.'"

The miscegenation law of our neighboring state of Oregon (sec. 2163, Or.L.) was held valid by the supreme court of that state in Re Paquet's Estate, 101 Or. 393, 200 P. 911, 913. In so holding the court directed attention to 8 R.C.L. sec. 381 where it is said: "Miscegenation is a purely statutory offense, consisting in the intermarriage of a person of the white race with a negro or a colored person. Most states in which the negro or colored people form an appreciable element have enacted these laws inhibiting intermarrying between the white and black races, and the offense thereby created is usually of the grade of a felony. There can be no doubt as to the power of every country to make laws regulating the marriage of its own subjects; to declare who may marry, how they may marry, and what shall be the legal consequences of their marrying; and accordingly, although miscegenation statutes have been persistently attacked on the ground that they are violative of the United States Constitution, they have been universally upheld as a proper exercise of the power of each state to control its own citizens." (See also 36 Am.Jur., Miscegenation, sec. 3.)

The foregoing views are representative of the general tenor of judicial opinion which has been expressed elsewhere. Without further amplification reference may be made to cases in Arizona (State v. Pass, 1942, 59 Ariz. 16, 121 P.2d 882; Kirby v. Kirby, 1922, 24 Ariz. 9, 206 P. 405), in Colorado (Jackson v. City and County of Denver, 1942, 109 Colo. 196, 124 P.2d 240), in Montana (In re Takahashi's Estate, supra, 1942, 113 Mont. 490, 129 P.2d 217—Japanese-White), in Alabama (Green v. State, 1877, 58 Ala. 190, 29 Am.Rep. 739), in Virginia (Kinney v. Commonwealth, supra, 1878, 30 Grat. 858, 32 Am. Rep. 690), in Indiana (State v. Gibson, 1871, 36 Ind. 389, 10 Am.Rep. 42), in Arkansas (Dodson v. State, 1895, 61 Ark. 57, 31 S.W. 977), in Texas (Frasher v. State, 1877, 3 Tex.App. 263, 30 Am.Rep. 131), in Tennessee (Lonas v. State, 1871, 50 Tenn. 287), in Pennsylvania (The Philadelphia and West Chester R. R. Co. v. Miles, 2 Am.Law Rev. 358).

The foregoing authorities form an unbroken line of judicial support, both state and federal, for the validity of our own legislation, and there is none to the contrary. Those authorities appear to have passed upon all attacks on such legislation on constitutional grounds, but notwithstanding their unanimity it is declared by some of the majority that there is a sort of racial discrimination which solely formed the basis for the enactments and by another of the majority that the constitutional guarantee of freedom of religion has been infringed. However, it is the law that if there is some factual background for the legislation, that circumstance forms an appropriate reason for the enactments, and it is then proper to consider the rules of law which govern the courts in that connection.

In passing upon the validity of any statutory enactment the power of the courts is not unlimited. It is circumscribed by well recognized rules, some of which as applicable to the case are: that all presumptions and intendments are in favor of the constitutionality of a statute; that all doubts are to be resolved in favor of and not against the validity of a statute; that before an act of a co-ordinate branch of our government can be declared invalid by the courts for the reason that it is in conflict with the Constitution, such conflict must be clear, positive and unquestionable; that in the case of any fair, reasonable doubt of its constitutionality the statute should be upheld, and the doubt be resolved in favor of the expressed will of the

Legislature; that it is also to be presumed that the Legislature acted with integrity and with a purpose to keep within the restrictions and limitations laid down in the fundamental law; that when the constitutionality of a statute depends on the existence of some fact or state of facts, the determination thereof is primarily for the Legislature and the courts will acquiesce therein unless the contrary clearly appears; that the enactment of the statute implies, and the conclusive presumption is, that the Governor and the members of the Legislature have performed their duty, and have ascertained the existence of facts justifying or requiring the legislation; that this is true even in the absence of an express finding of those facts embodied in the act; and that the courts may not question or review the legislative determination of the facts. (5 Cal.Jur. p. 628 et seq. and the many cases there cited.) These presumptions apply with particular emphasis to statutes passed in the exercise of the police power (11 Am.Jur. p. 1088, and many cases cited).

A recent statement by this court recognizes the general rule. In Re Porterfield, 28 Cal.2d 91, 103, 168 P.2d 706, 714, 167 A.L.R. 675, with supporting authorities, it is said: "Constitutionality of purpose and application is generally to be presumed. It has often been said that it is only when it clearly appears that an ordinance or statute passes definitely beyond the limits which bound the police power and infringes upon rights secured by the fundamental law, that it should be declared void."

Pertinent to the immediate question is Galeener v. Honeycutt, 173 Cal. 100, 104, 159 P. 595. This court there approved the doctrine announced in earlier cases. It was said that it had never since been questioned that, when the right to enact a law depends upon the existence of a fact, the passage of the act implies, and the conclusive presumption is, that the existence of the fact has been ascertained by the legislative body. Se also In re Spencer, 149 Cal. 396, 400, 86 P. 896, 117 Am.St.Rep. 137, 9 Ann.Cas. 1105; Martin v. Superior Court, 194 Cal. 93, 101, 227 P. 762; Pacific Gas & Elec. Co. v. Moore, 37 Cal.App.2d 91, 95, 98 P.2d 819.

It is not within the province of the courts to go behind the findings of the legislature and determine that conditions did not exist which gave rise to and justified the enactment. Only when, beyond reasonable doubt, all rational men would agree that the factual background did not warrant the enactment of a statute which was ostensibly designed to preserve the general welfare can we say that a statute is arbitrary and capricious. In re Miller, 162 Cal. 687, 124 P. 427; People v. George, 42 Cal.App.2d 568, 109 P.2d 404. It is a well settled rule of constitutional exposition, that if a statute may or may not be, according to the circumstances, within the limits of legislative authority, the existence of the circumstances necessary to support it must be presumed. Sweet v. Rechel, 159 U.S. 380, 393, 16 S.Ct. 43, 40 L.Ed. 188. When a question of fact is debated and debatable, and the extent to which a special constitutional limitation should be applied is under consideration, the conclusion may properly be influenced by a widespread and long continued belief concerning it, and this is within judicial cognizance. Muller v. Oregon, 208 U.S. 412, 421, 28 S.Ct. 324, 52 L.Ed. 551, 13 Ann.Cas. 957.

The Legislature is, in the first instance, the judge of what is necessary for the public welfare. Earnest conflict of opinion makes it especially a question for the Legislature and not for the courts. Erie R. Co. v. Williams, 233 U.S. 685, 699, 701, 34 S.Ct. 761, 58 L.Ed. 1155, 51 L.R.A.,N.S., 1097, citing other cases. "It is established that a distinction in legislation is not arbitrary, if any state of facts reasonably can be conceived that would sustain it, and the existence of that state of facts at the time the law was enacted must be assumed. * * * It makes no difference that the facts may be disputed or their effect opposed by argument and opinion of serious strength. It is not within the competency of the courts to arbitrate in such contrariety. * * * And it is not required that we * * * be convinced of the wisdom of the legislation." Rast v. Van Deman & Lewis, 240 U.S. 342, 357, 365, 366, 36 S.Ct. 370, 374, 60 L.Ed. 679, L.R.A.1917A, 421, Ann.Cas.1917B, 455, citing cases. "We need not labor the point, long settled, that, where legislative action is within the scope of the police power, fairly debatable questions as to its reasonableness, wisdom, and propriety are not for the determination of the courts, but for that of the legislative body on which rests the duty and responsibility of decision. * * * We may not test in the balances of judicial review the weight and sufficiency of the facts to sustain the conclusion of the legislative body * * *." Standard Oil Co. v. Marysville, 279 U.S. 582, 584, 586, 49 S.Ct. 430, 73 L.Ed. 856, and cited cases. Underlying questions of fact which may condition the constitutionality of legislation carry with them the presumption of constitutionality in the absence of some factual foundation of record for overthrowing the statute. O'Gorman & Young v. Hartford Fire Ins. Co., 282 U.S. 251, 257, 258, 51 S.Ct. 130, 75 L.Ed. 324, 72 A.L.R. 1163.

Again the United States Supreme Court has reiterated in Borden's Farm Products Co v. Baldwin, 293 U.S. 194, at page 209, 55 S.Ct. 187, 192, 79 L.Ed. 281: "When the classification made by the legislature is called in question, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of the existence of that state of facts, and one who assails the classification must carry the burden of showing by a resort to common knowledge or other matters which may be judicially noticed, or to other legitimate proof, that the action is arbitrary. * * * The principle that the State has a broad discretion in classification, in the exercise of its power of regulation, is constantly recognized by this Court". People v. Western Fruit Growers, 22 Cal.2d 494, 506-508, 140 P.2d 13; Western Union Tel. Co. v. Hopkins, 160 Cal. 106, 122, 116 P. 557; Postal Tel. Cable Co. v. County of Los Angeles, 160 Cal. 129, 116 P. 566. Whether the legislation is wise or unwise as a matter of policy is a question with which the courts are not concerned. Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 447, 448, 54 S.Ct. 231, 78 L.Ed. 413, 88 A.L.R. 1481.

Courts are neither peculiarly qualified nor organized to determine the underlying questions of fact with reference to which the validity of the legislation must be determined. Differing ideas of public policy do not properly concern them. The courts have no power to determine the merits of conflicting theories, to conduct an investigation of facts bearing upon questions of public policy or expediency, or to sustain or frustrate the legislation according to whether they happen to approve or disapprove the legislative determination of such questions of fact. Norman v. Baltimore & O. R. Co., 294 U.S. 240, 55 S.Ct. 407, 79 L.Ed. 885, 95 A.L.R. 1352, affirming 265 N.Y. 37, 191 N.E. 726, 92 A.L.R. 1523; 11 Am.Jur. p. 823, 824, and cases cited; see article, "Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Actions", 38 Harv.L.Rev. 6. The fact that the finding of the Legislature is in favor of the truth of one side of a matter as to which there is still room for difference of opinion is not material. What the people's legislative representatives believe to be for the public good must be accepted as tending to promote the public welfare. It has been said that any other basis would conflict with the spirit of the Constitution and would sanction measures opposed to a republican form of government. Atlantic Coast Line R. Co. v. Georgia, 234 U.S. 280, 34 S.Ct. 829, 58 L.Ed. 1312; Matter of Viemeister v. White, 179 N.Y. 235, 72 N.E. 97, 70 L.R.A. 796, 103 Am.St.Rep. 859, 1 Ann.Cas. 334; State ex rel. Sullivan v. Dammann, 227 Wis. 72, 277 N.W. 687; Stettler v. O'Hara, 69 Or. 519, 139 P. 743, L.R.A.1917C, 944, Ann.Cas.1916A, 217, affirmed 243 U.S. 629, 37 S.Ct. 475, 61 L.ED. 937.

Text and authorities which constitute the factual basis for the legislative finding involved in the statute here in question indicate only that there is a difference of opinion as to the wisdom of the policy underlying the enactments.

Some of the factual considerations which the legislature could have taken into consideration are disclosed by an examination of the sources of information on the biological and sociological phases of the problem and which may be said to form a background for the legislation and support the reasoning found in the decisions of the courts upholding similar statutes. A reference to a few of those sources of information will suffice.

On the biological phase there is authority for the conclusion that the crossing of the primary races leads gradually to retrogression and to eventual extinction of the resultant type unless it is fortified by reunion with the parent stock. (W. A. Dixon, M. D., Journal of American Medical Association, Vol. 20, p. 1 (1893); Frederick L. Hoffman, statistician, Prudential Life Insurance Co. of America, American Economics Association, Vol. 11 (1896) "Race Traits and Tendencies of the American Negro"; C. E. Woodruff, "The Expansion of Races" (1909).) In September, 1927, in an article entitled, "Race Mixture", which appeared in "Science", Vol. 66, page X, Dr. Charles B. Davenport of the Carnegie Foundation of Washington, Department of Experimental Evolution, said: "In the absence of any uniform rule as to consequences of race crosses, it is well to discourage it except in those cases where, as in the Hawaiian-Chinese crosses, it clearly produces superior progeny," and that the Negro-white and Filipino-European crosses do not seem to fall within the exception.

In Volume 19 of the Encyclopedia Americana (1924), page 275, it is said: "The results of racial intermarriage have been exceedingly variable. Sometimes it has produced a better race. This is the case when the crossing has been between different but closely allied stocks. * * * Prof. U. G. Weatherly writes: 'It is an unquestionable fact that the yellow, as well as the negroid peoples possess many desirable qualities in which the whites are deficient. From this it has been argued that it would be advantageous if all races were blended into a universal type embodying the excellencies of each. But scientific breeders have long ago demonstrated that the most desirable results are secured by specializing types rather than by merging them.

" 'The color line is evidence of an attempt, based on instinctive choice, to preserve those distinctive values which a racial group has come to regard as of the highest moment to itself.' "

In an address before the Commonwealth Club of California on July 9, 1948, Mr. William Gemmill, South African delegate to the International Labor Organization and one well acquainted with social conditions and sociological manifestations in that continent, made the statement that in South Africa, where the European population is greatly outnumbered by the natives, both classes are adamant in opposition to intermarriage and that the free mixing of all the races could in fact only lower the general level.

A collection of data and references on the result of miscegenation is found in "The Menace of Color" (1925) by J. W. Gregory (F.R.S., D.Sc., Professor of Geology in the University of Glasgow). On page 227 he says that the intermixtures which have been beneficial to the progress of mankind have been between nearly related peoples and that the results of a mixture of widely divergent stock serve to warn against the miscegenation of distinct races. Dr. J. A. Mjoen of the Winderen Laboratory, Norway, is credited by Professor Gregory (at p. 229) with the conclusion from special studies that the evidence is sufficient to call for immediate action against the intermarriage of widely distinct races. Gregory states that where two such races are in contact the inferior qualities are not bred out, but may be emphasized in the progeny, a principle widely expressed in modern eugenic literature. Simlar views asserting the unfortunate results of crossings between dissimilar races, including the American Negro-White, are ascribed by the author to Prof. H. Lundborg (1922); E. D. Cope, American Geologist; Elwang (1904); Prof. N. S. Shaler (1904); Emile Gaboriau and Gustav Le Bon, France; E. L. Hoffman of the Prudential Insurance Co. of America (1923); Prof. A. E. Jenks; and Herbert Spencer (1892).

In March, 1926, the Carnegie Institution of Washington, D. C., accepted a gift from one who expressed his interest in the problem of race crossing with special reference to its significance for the future of any country containing a mixed population. The work was undertaken by the Department of Genetics, Carnegie Institution. An advisory committee was organized consisting of W. V. Bingham, Charles B. Davenport, E. L. Thorndike, and Clark Wissler. Mr. Morris Steggerda was selected as field investigator. Mr. Steggerda had had excellent training in genetics and psychology, and had shown a marked fitness for the study and analysis of the individual. The main project was carried out in Jamaica, B. W. I., by studying in detail and comparatively, 100 each of adults of full-blooded Negroes (Blacks), Europeans (Whites), and White-Black mixtures of all degrees (Browns). Half of the hundred were of each sex. In addition to the main project some 1200 children of school and pre-school age were observed and measured. Finally in 1929, an extensive report was published by the Carnegie Institution, in book form entitled "Race Crossing in Jamaica", by B. C. Davenport and Morris Steggerda, in collaboration with others. The results of their investigation indicated that the crossing of distinct races is biologically undesirable and should be discouraged.

W. E. Castle, Bussey Institution, Harvard University, in an article entitled "Biological and Social Consequences of Race Crossing" printed in Volume 9, American Journal of Physical Anthropology (April, 1926), states on page 152: "If all inheritance of human traits were simple Mendelian inheritance, and natural selections were unlimited in its action among human populations, then unrestricted racial intercrossing might be recommended. But in the light of our present knowledge, few would recommend it. For, in the first place, much that is best in human existence is a matter of social inheritance, not of biological inheritance. Race crossings disturb social inheritance. That is one of its worst features." This then leads to a consideration of the sociological phase.

The writings of Father John LaFarge, S.J., are typical of many who have considered the subject of race-crosses from a sociological standpoint. Reference has been made to his work "The Race Question and the Negro" (1943). Under the heading "The Moral Aspect", he writes: "[T]here are grave reasons against any general practice of intermarriage between the members of different racial groups. These reasons, where clearly verified, amount to a moral prohibition of such a practice.

"These arise from the great difference of condition which is usually experienced by the members of the respective groups. It is not merely a difference of poverty or riches, of lesser or greater political power, but the fact that identification with the given group is far-reaching and affects innumerable aspects of ordinary daily life. * * *

"Where marriage is contracted by entire solitaries, such an interracial tension is more easily borne, but few persons matrimonially inclined are solitaries. They bring with them into the orbit of married life their parents and brothers and sisters and uncles and aunts and the entire social circle in which they revolve. All of these are affected by the social tension, which in turn reacts upon the peace and unity of the marriage bond.

"When children enter the scene the difficulty is further complicated unless a complete and entirely self-sacrificing understanding has been reached beforehand. And even then the social effects may be beyond their control. * * *

"In point of facts as the Negro group becomes culturally advanced, there appears no corresponding tendency to seek intermarriage with other races."

The foregoing excerpts from scientific articles and legal authorities make it clear that there is not only some but a great deal of evidence to support the legislative determination (last made by our Legislature in 1933) that intermarriage between Negroes and white persons is incompatible with the general welfare and therefore a proper subject for regulation under the police power. There may be some who maintain that there does not exist adequate data on a sufficiently large scale to enable a decision to be made as to the effects of the original admixture of white and Negro blood. However, legislators are not required to wait upon the completion of scientific research to determine whether the underlying facts carry sufficient weight to more fully sustain the regulation.

A review of the subject indicates that the statutory classification was determined by the Legislature in the light of all the circumstances and requirements (see also California Physicians' Service v. Garrison, 28 Cal.2d 790, 802, 172 P.2d 4, 167 A.L.R. 306; Livingston v. Robinson, 10 Cal.2d 730, 76 P.2d 1192); that under our tripartite system of government this court may not substitute its judgment for that of the Legislature as to the necessity for the enactment where it was, as here, based upon existing conditions and scientific data and belief; that even in the field of fundamental rights it has always been recognized that where the Legislature has appraised a particular situation and found a specific condition sufficiently important to justify regulation, such determination is given great weight when the law is challenged on constitutional grounds.

Those favoring present day amalgamation of these distinct races irrespective of scientific data of a cautionary nature based upon the experience of others, or who feel that a supposed infrequency of interracial unions will minimize undesirable consequences to the point that would justify lifting the prohibition upon such unions, should direct their efforts to the Legislature in order to effect the change in state policy which they espouse—as was done in Massachusetts in 1843, Kansas in 1859, New Mexico in 1866, Washington in 1868, Rhode Island in 1881, Minnesota and Michigan in 1883, and Ohio in 1887.

The contention is also advanced that the statute must fall before the equal protection clause of the Fourteenth Amendment because of lack of a sufficient showing of clear and present danger arising out of an emergency. The cases relied upon are Oyma v. California, 332 U.S. 633, 68 S.Ct. 269; Sipuel v. Board of Regents, 332 U.S. 631, 68 S.Ct. 299; Railway Mail Ass'n v. Corsi, 326 U.S. 88, 65 S.Ct. 1483, 89 L.Ed. 2072; Hirabayashi v. United States, 320 U.S. 81, 63 S.Ct. 1375, 87 L.Ed. 1774; State of Missouri ex rel. Gaines v. Canada, supra, 305 U.S. 337, 59 S.Ct. 232, 83 L.Ed. 208; Williams v. International etc. of Boilermakers, 27 Cal.2d 586, 165 P.2d 903; and James v. Marinship Corp., 25 Cal.2d 721, 155 P.2d 329, 160 A.L.R. 900 (see also Shelley v. Kraemer (McGhee v. Sipes), 334 U.S. 1, 68 S.Ct. 836; Hurd v. Hodge, 334 U.S. 24, 68 S.Ct. 847). These cases, in general, hold that legislation discriminating against particular persons, or groups of persons because of race, must have exceptional circumstances or some compelling necessity as the source of enactment. These cases have been analyzed. They have widely divergent factual backgrounds and are not controlling. Here there is no lack of equal treatment. Sections 60 and 69 of our Civil Code do not discriminate against persons of either the white or Negro races. Pace v. Alabama, supra, 106 U.S. 583, 1 S.Ct. 637, 27 L.Ed. 207; Jackson v. City and County of Denver, supra, 109 Colo. 196, 124 P.2d 240; In re Paquet's Estate, supra, 101 Or. 393, 200 P. 911. Each petitioner has the right and the privilege of marrying within his or her own group. The regulation does not rest solely upon a difference in race. The question is not merely one of difference, nor of superiority or inferiority, but of consequence and result. The underlying factors that constitute justification for laws against miscegenation closely parallel those which sustain the validity of prohibitions against incest and incestuous marriages (Penal Code, sec. 285; Civil Code, sec. 59; 42 C.J.S., Incest, § 1), and bigamy (Penal Code, sec. 281; Civil Code, sec. 61; Davis v. Beason, supra, 133 U.S. 333, 10 S.Ct. 299, 33 L.Ed. 637; Reynolds v. United States, supra, 98 U.S. 145, 25 L.Ed. 244). Moreover the argument based upon equal protection does not take into proper account the extensive control the state has always exercised over the marriage contract, nor of the further fact that at the very time the Constitution of the United States was being formulated miscegenation was considered inimical to the public good and was frowned upon by the colonies, and continued to be so regarded and prohibited in states having any substantial admixture of population at the time the 14th amendment was adopted. In view of this fact, and the unanimity of judicial decision sustaining such statutes, it seems impossible to believe that any constitutional guaranty was intended to prohibit this legislation.

It has been suggested that sections 60 and 69 of the Civil Code are unconstitutional because not sufficiently comprehensive. More specifically it is said that such legislation does not preclude the possibility of progeny as a result of purported marriages entered into by persons who have concealed or failed to disclose their racial origin, nor the possibility of illegitimate progeny of mixed matings or of issue from such racially mixed marriages validly contracted in other states by residents of this state. However it is definitely established that the states, in seeking a remedy, are not required to extend regulation to all cases which might possibly be reached. Radice v. New York, supra, 264 U.S. 292, 44 S.Ct. 325, 68 L.Ed. 690. "They may mark and set apart the classes and types of problems according to the needs and as dictated or suggested by experience." Skinner v. State of Oklahoma, 316 U.S. 535, 540, 62 S.Ct. 1110, 1112, 86 L.Ed. 1655; People of State of New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 49 S.Ct. 61, 73 L.Ed. 184, 62 A.L.R. 785. The equal protection clause does not prevent the legislature from recognizing "degrees of evil". Truax v. Raich, 239 U.S. 33, 36 S.Ct. 7, 60 L.Ed. 131, L.R.A.1916D, 545, Ann.Cas.1917B, 283; Tigner v. Texas, 310 U.S. 141, 60 S.Ct. 879, 84 L.Ed. 1124, 130 A.L.R. 1321. Nor is the legislature prevented by the equal protection clause from confining "its restrictions to those classes of cases where the need is deemed to be clearest." Miller v. Wilson, 236 U.S. 373, 384, 35 S.Ct. 342, 344, 59 L.Ed. 628, L.R.A.1915F, 829. "[W]here a given situation admittedly presents a proper field for the exercise of the police power, the extent of its invocation and application is a matter which lies very largely in legislative discretion." Zahn v. Board of Public Works, 195 Cal. 497, 514, 234 P. 388, 395. The need for prohibiting all miscegeny, together with administrative impracticalities inherent in any such attempt, were proper matters for the legislature to consider. And the fact, if it be a fact, that some people contract such marriages within this state illegally, or others contract such marriages validly outside the state and subsequently reside here, does not lend support to any contention of unconstitutionality of the statute.

Finally, it is argued that sections 60 and 69 are too vague and uncertain to constitute valid regulation in that they lack definitions of descriptive terms, such as mulatto, and are uncertain as to the mode of proof of race. After almost one hundred years of continuous operation of the present and pre-existing similar laws, the claimed obstacles to the application of the statute are more theoretical than real. In any event the contention is not a matter for consideration in this proceeding. In the application for a marriage license the petitioner Perez states that she is a white person and the petitioner Davis states that he is a Negro. The petition for the writ contains allegations of the same facts. There is therefore no indefiniteness in the code sections that can avail the petitioners; nor is there here any problem of proof. It is the well-established rule that a charge of unconstitutionality can be raised only in a case where that issue is involved in the determination of the action, and then only by the person or a member of the class of persons adversely affected. American Fruit Growers v. Parker, 22 Cal.2d 513, 140 P.2d 23; In re Willing, 12 Cal.2d 591, 597, 86 P.2d 663; Max Factor & Co. v. Kunsman, 5 Cal.2d 446, 55 P.2d 177; People v. Globe Grain & Mill. Co., 211 Cal. 121, 294 P. 3; A. F. Eatabrook Co. v. Ind. Acc. Comm., 177 Cal. 767, 177 P. 848; In re Estate of Monks, supra, 48 Cal.App. 2d 603, 610–612, 120 P.2d 167, involving the miscegenation law of Arizona—see also Kirby v. Kirby, supra, 24 Ariz. 9, 206 P 405; and State v. Pass, supra, 59 Ariz. 16, 121 P.2d 882—Jackson v. City and County of Denver, supra, 109 Colo. 196, 124 P.2d 240, involving a miscegenation statute of that state. Here there is no possible uncertainty in the statute as applied to the petitioners.

The alternative writ should be discharged and the peremptory writ denied.

SCHAUER and SPENCE, JJ., concur.

Rehearing denied: SHENK, SCHAUER and SPENCE, JJ., dissenting.

87 Cal.App.2d 915

HAREM CORPORATION v. STATE BOARD OF EQUALIZATION et al.

Civ. 13763.

District Court of Appeal, First District,
Division 2, California.
Oct. 13, 1948.
Rehearing Denied Nov. 12, 1948.
Hearing Denied Dec. 9, 1948.

1. Intoxicating liquors 🔑108(9)

In determining whether a particular establishment qualifies under the constitution as a bona fide restaurant for the sale of liquor it is the province of board to ascertain the facts, and existence of bona fides is not to be determined merely from expressed intention of licensee, but it must be ascertained objectively on basis of all physical characteristics and actual mode of operation of the business. Gen. Laws, Act 3796, § 53; Const. art. 20, § 22.

2. Intoxicating liquors 🔑108(5)

Finding that allegation that liquor licensee operated premises as a restaurant was untrue was sustained by substantial evidence. Gen. Laws, Act 3796, § 53; Const. art. 20, § 22.

3. Intoxicating liquors 🔑106(4)

The constitution plainly contemplates the coexistence of two businesses, sale of food, and sale of liquors, and the existence of one business was made a prerequisite to the operation of the other, and where the sale of liquors was operated by licensee and sale of food by another, on-sale liquor license was properly suspended. Gen. Laws, Act 3796, § 53; Const. art. 20, § 22.

◆

Appeal from Superior Court, Alameda County; S. Victor Wagler, Judge.

Proceeding by State Board of Equalization, and others against Harem Corporation, which resulted in the suspension of respondent's on-sale liquor license indefinitely. From a judgment sustaining a decision of the board, the respondent appeals.

Judgment affirmed.

Donahue, Richards, Rowell & Gallagher and Orlando J. Bowman, all of Oakland, for appellant.

Fred N. Howser, Atty. Gen., J. Albert Hutchinson, Deputy Atty. Gen., and Leo T. Englert, Deputy Atty. Gen., for respondents.

GOODELL, Justice.

The respondent Board filed an accusation alleging that appellant on May 22, 1947 and thereafter did on its premises "sell, serve or otherwise dispose of alcoholic beverages, other than beer, for consumption on said premises, over or at a public bar or in a public barroom which was not then and there equipped and maintained for the sale and service of meals to the public, and in which meals were not then and there actually sold and served to the public." This charged a violation of section 22, Article XX of the Constitution and of section 53 of the Alcoholic Beverage Control Act, Stats.1935, p. 1123, as amended, Act 3796, Deering's General Laws. The Board's hearing, conducted by a hearing officer, resulted in a finding that "ever since May 22, 1947 the respondent has not conducted, and is not now conducting, the premises herein concerned as a bona fide public eating place * * *" The Board suspended appellant's on-sale liquor license indefinitely. Appellant then sought in the Superior Court an annulment of the Board's order by a writ of review. After a hearing judgment went in favor of the Board and this appeal was taken.

The issue tried in the Superior Court was tendered by appellant in its petition by the allegation "That plaintiff is and at all times herein mentioned has been operating as a restaurant at 22nd Street and Broadway * * * Oakland * * *" This was found to be "untrue and without support of the evidence."

The issue on this appeal is thus stated by appellant: "Did appellant sell liquor in a bona fide restaurant, or in a public bar?"

[1] "In determining whether or not a particular establishment qualifies under the Constitution it is the province of the board to ascertain the facts, for example, the physical aspects, equipment and supplies, the amount of food and liquor sold, and the manner in which the business is

conducted * * * The existence of bona fides is not to be determined merely from the expressed intention of the licensee, but, like the determination of whether a place is a 'saloon' or a 'restaurant,' it must be ascertained objectively on the basis of all the physical characteristics and the actual mode of operation of the business. * * *" Covert v. State Board of Equalization, 29 Cal.2d 125, 133, 173 P.2d 545, 549.

The uncontradicted evidence at the Board hearing shows that appellant has a lease on the ground floor of the building at the southwest corner of 22nd Street and Broadway in Oakland. Within the leased area there are four rooms. In three of them liquor is sold across the bar, but in none of the three rooms are there any facilities for the preparation or service of food. In the other room there is a large restaurant but no bar. The kitchen connected with the restaurant is thoroughly equipped for the cooking and preparation of food but none of the kitchen or restaurant equipment is owned by appellant. On March 1, 1947, appellant, the lessee of the whole place, made a sublease to E. S. Ferrante and his wife of part of the ground floor, for the term of three years. The Ferrantes bought from a former sublessee all the kitchen and restaurant equipment for $27,500. Since then they have operated the large room under the name "The Cigar Box Restaurant", which room is connected by a doorway with the rooms where the bars are situated.

The lease is 22 typewritten pages in length and contains 35 articles embracing about as many subjects. Its preamble recites that the Second Party (Ferrante) "desires to operate a restaurant concession at the above described premises upon the terms and conditions hereinafter set forth." By article 2 appellant grants to Ferrante "the exclusive right, privilege and commission to maintain and operate a restaurant" on the premises. Article 3 calls for the deposit of $1000. as a guarantee of performance by Ferrante. Article 4 provides for a "total guaranteed payment" by Ferrante of at least $13,500. (which is $375. a month for three years) "for the concession heretofore described" payable in monthly installments. In addition it calls for certain percentages of Ferrante's gross monthly sales, with provisions for the checking and auditing of such sales by appellant. The agreement speaks of "Second Party's business" and of "moneys collected by Second Party in the operation of his business;" it provides that "Second Party shall conduct all of his business in the premises on a strictly cash basis." In article 8(h) "Second Party agrees to conduct his business in the premises under the name of 'The Cigar Box Restaurant' * * *" Article 11 speaks of "acceptance of possession of the premises" by Second Party. By Article 14 appellant reserves the right to enter the premises at any and all times during business hours to inspect the same also "to post notices of nonresponsibility" therein. Article 18 provides for reentry and repossession by appellant in case of a breach.

While the document speaks in several places of a "restaurant concession" it is, after all, a lease pure and simple. It contains the provisions frequently found in leases of business property, some of which have been mentioned. There is nothing in it showing any connection or identity of the restaurant with the bars operated by appellant or suggesting any unity of operation, management or control. The only provision which mentions potables is the following condition found in section 7: "Second Party agrees that he will not use or permit the premises to be used for any other purpose than for the sale of food and non-alcoholic beverages, with the exception of wine and beer * * *" a limitation contrary to actualities for Ferrante when asked "Is any liquor of any kind sold in the restaurant?" answered "Beer and wine, and the liquor that is brought in from the bar and served on the tables with the food."

The percentages of the gross monthly sales of the restaurant are nothing but rental under the language of the lease, which provides, as we have seen, for a "total guaranteed payment" of at least $13,500. payable in monthly installments of $375. Such percentages are "In addition to the minimum guaranteed payment."

Hence they do not make the appellant a co-owner or partner. The testimony is undisputed that appellant has no share in the restaurant profits and could not be held for losses, if any. Ferrante testified "I just operate the restaurant end of it—that is what my profits are derived from." He hires the restaurant help and buys the food and supplies. When asked what was done whenever the restaurant got calls from the bars for food he answered "We serve it, or the cocktail girls from the bar come and pick it up. * * * Q. They pay for it? A. Yes * * * Q. And when the people in your restaurant want drinks, they are brought from the bar into the restaurant? A. Yes. Q. And vice versa? A. Yes." It appears that when food is ordered in the bars it is paid for by the waitress before it leaves the restaurant.

[2] The only decision which we are called upon to make is whether there is substantial evidence to support the finding of the court that appellant's allegation that it operated the premises as a restaurant was untrue. The evidence shows without conflict that the restaurant was operated not by appellant but by Ferrante and that the three bars were operated by appellant. It shows that the restaurant was operated under a three-year lease which granted Ferrante "the exclusive right, privilege and commission [concession?] to maintain and operate a restaurant." It shows, further, that Ferrante owns all the restaurant and kitchen equipment and that he operates the restaurant business without any control or supervision by appellant, and whatever profit is made is Ferrante's own; that appellant has no interest in the restaurant business and Ferrante has no interest in the business done at appellant's three bars. Under this evidence the court could not have made any other finding.

Section 22 of Article XX of the Constitution, adopted in 1934, reads: "* * * Intoxicating liquors, other than beers, shall not be consumed, bought, sold, or otherwise disposed of for consumption on the premises, in any public saloon, public bar or public barroom within the State; provided, however, that subject to the aforesaid restriction, all intoxicating liquors may be kept and may be bought, sold, served, consumed, and otherwise disposed of in any bona fide hotel, restaurant, cafe, cafeteria, railroad dining or club car, passenger ship, or other public eating place, or in any bona fide club after such club has been lawfully operated for not less than one year. * * *"

It is not within our province to say that the restaurant operated by Ferrante is not a bona fide restaurant, cafe or eating place, but simply to say, under the issue presented by appellant's petition for review, that appellant does not operate it.

It must be admitted that if a patron of the restaurant, seated at one of the tables, ordered a drink it would be obtained from the bar and brought to him at the table where he was eating, and, on the other hand, if a patron of one of the bars ordered food it would be obtained from the restaurant and brought to him in the bar, without his going into the restaurant, but it does not follow from such situation that the holder of the liquor license sells liquor in a bona fide restaurant, cafe or other public eating place.

[3] As said in the Covert case, 29 Cal. 2d 134, 173 P.2d 545, "the Constitution plainly contemplated the coexistence of two businesses—sale of food and sale of liquors" and "the existence of one business was made a prerequisite to the operation of the other". The record in this case presents an instance where one of these businesses, the sale of liquors, is operated by appellant, the other, the sale of food, by Ferrante.

The judgment is affirmed.

NOURSE, P. J., and DOOLING, J., concur.

Hearing denied; CARTER, J., dissenting.

88 Cal.App.2d 6

In re HARKER'S ESTATE.

DOWNS v. STATE.

Civ. 16491.

District Court of Appeal, Second District,
Division 1, California.
Oct. 14, 1948.

1. Time 🔑10(1)

The statute providing for a discount if inheritance tax is paid within six months from due date provides for a "specified period of time" within statute extending period of time for performance of an act required by law to be performed within a specified period to and including next day following last day of period which is not a holiday, if last day falls upon a holiday, and by number of days equaling holidays which occur during the period. Revenue and Taxation Code, § 14161; Code Civ. Proc. § 12a; St.1933, p. 306, § 7.

See Words and Phrases, Permanent Edition, for all other definitions of "Specified Period of Time"

2. Time 🔑10(1)

Under statute extendng time for performance of an act required by law to be performed within specified period to and including next day following last day of period which is not a holiday, if last day falls upon a holiday, and by number of days equaling holidays which occurred during period, six-months period from due date in which inheritance tax could be paid with statutory discount credit was computable by first determining the date on which six-months period would ordinarily have expired, with one day being added when ordinary expiration date fell on Sunday, and adding another day for a legal holiday which fell within the period. Revenue and Taxation Code, § 14161; Code Civ.Proc. § 12a; St.1933, p. 306, § 7.

◆

Appeal from Superior Court, Los Angeles County; Harold B. Jeffery, Judge.

Proceeding in the matter of the estate of Mabel Barnes Harker, deceased, wherein Edna B. Downs, as executrix of the last will and codicils thereto of Mabel Barnes Harker, deceased, applied for refund of inheritance tax erroneously paid. From an order denying application, executrix appeals.

Order reversed and cause remanded.

Haas & Home and John D. Home, all of Los Angeles, for appellant.

James W. Hickey, Chief Inheritance Tax Atty., and Raymond G. LaNoue, Deputy Inheritance Tax Atty., both of Sacramento, for respondent.

DORAN, Justice.

This is an appeal from an order denying the application of the executrix for refund of inheritance tax erroneously paid.

The record on appeal consists of the clerk's transcript and a settled statement in lieu of a reporter's transcript. There is no dispute as to the facts.

Briefly, the facts are as follows: Mabel Barnes Harker, the decedent, died October 6, 1946. On April 8, 1947, Edna B. Downs, the executrix and appellant herein paid the state inheritance tax to the county treasurer, "under protest and under a claim that the said executrix was entitled to a 5% discount credit on account of said tax. A written protest accompanied the payment." "On September 12, 1947, the court made its order fixing the inheritance tax due the State of California at $2,418.67, which sum, less 5% or $120.94, makes the correct amount of inheritance tax payable to the State of California as $2,297.73. The order fixing the tax was duly entered in the office of the clerk of the court. In making the payment the executrix overpaid the amount of inheritance tax due the State of California in the sum of $871.02, the tax being paid on a high contingency. On October 25, 1947, the executrix and the controller of the State of California entered into a stipulation stipulating that the Superior Court of the County of Los Angeles, State of California might forthwith make its order ordering the auditor of the County of Los Angeles to draw his warrant upon the treasurer of the County of Los Angeles in favor of the executrix in the sum of $750.08, payable out of any inheritance tax moneys in his hands or custody and ordering the county treasurer to pay said warrant out of any inheritance tax funds in hand, and that the executrix might file in the estate proceedings an application for the refund of an additional sum of $120.94, the said sum of $120.94 being the difference between $750.08, the amount of refund claimed to be payable by the controller of the State of California, and $871.02, the amount of refund claimed to be payable by the executrix. The court on October 30, 1947, pursuant to said stipulation made its order directing the payment of the sum of $750.08 as a refund on account of the overpayment, leaving unpaid the sum of $120.94.

"On October 30, 1947, the executrix filed her application for refund of inheritance tax erroneously paid, setting forth the foregoing facts, and additional facts concerning the computation of time in which the tax could be paid and the discount allowed, and praying that the sum of $120.94 be directed to be paid to her in accordance with the law."

Section 14161 of the Revenue and Taxation Code reads: "In the event that an inheritance, but no additional, tax is imposed by this part on any transfer, and the inheritance tax is paid within six months from the date it is due and payable, a discount equal to 5 per cent of the amount of the tax payable is allowed against the tax."

It is appellant's contention that the payment which was made on April 8th was "within six months" as provided in the above section. Respondent on the contrary contends that the payment "made on April 8, 1947, came too late."

The controversy revolves around the construction and interpretation to be given to section 12a of the Code of Civil Procedure which reads as follows:

"As to any act provided or required by law to be performed within a specified period of time, such period of time is hereby extended—

"(a) To and including the next day which is not a holiday (other than a special holiday), if the last day of such period falls upon a holiday; and

"(b) By such number of days as equals the number of holidays (other than special holidays) appointed by the President or by the Governor and which occur within or during such period; and

"(c) In any event, as to any such period of time which commenced prior to the date this act takes effect, but not less than ten days.

"The term 'special holiday' is used herein in the same sense as used in section 10 of the Political Code."

Section 7 of St.1933, p. 306, is as follows: "The provisions of section 12a, hereby added to the Code of Civil Procedure, apply also to sections 659, 659a, 946, 953a, and 974 to 982 of the Code of Civil Procedure and the periods of time severally therein prescribed or provided for, and to all other provisions of law, howsoever stated or wheresoever expressed, providing or requiring an act to be performed on a particular day or within a specified period of time. The mention of said sections herein or the specific amendment by this act of sections 660 and 939 of this code are not intended and shall not be construed to exclude the application of the provisions of said section 12a to such other provisions of law whether the latter are expressed in this or any other code or statute, ordinance, rule or regulation."

Appellant's position is as follows: "The decedent died on October 6, 1946. The six months period in which the tax could be paid with the 5 per cent discount credit, would ordinarily have expired April 6, 1947. April 6, 1947, was Sunday and therefore fell within the ordinary computation of time which extended the time one day to April 7, 1948. Code Civ.Proc., Secs. 12 and 12a, Subd. (a). The President of the United States and the Governor of the State of California each proclaimed November 28, 1946, a holiday, designating the same as Thanksgiving Day, which said holiday so proclaimed fell within the said six months period. Code Civ. Proc., Sec. 12a, Subd. (b). Time was therefore extended one additional day to April 8, 1947. Code Civ. Proc., Sec. 12a, Subd. (b). The tax was paid on April 8, 1947, and the executrix therefore should have been entitled to receive the 5 per cent discount. The court therefore erred in denying the application."

Respondent contends that section 12a does not apply and in that connection argues that, "The Legislature, we believe, when it used the qualifying adjective 'specified', did so advisedly. It meant, we believe, to confine the operation of Section 12a to those acts only which by the terms of a particular statute were required to be performed within a precise period of elapsed time. It meant, we believe, to accord to the word 'specified' the connation of definiteness and preciseness."

With regard to the date respondent argues, "The vice, as we see it, in appellant's argument is this: She first computes the six months' period without reference to subdivision (b), Section 12a, Code of Civil Procedure, an arrives at April 7, 1947, as the last day of the six months' period, April 6, 1947, falling on Sunday. She then takes one extra day by virtue of the section, which brings her up to and including April 8, 1947. Such construction, we believe, is patently wrong. If appellant is entitled to one extra day by force and effect of subdivision (b) of Section 12a then April 7th is that day, and since it was not a holiday, the tax had to be paid on that day to obtain the benefit of the 5 per cent discount."

[1] It should be noted at the outset that section 12a specifically recites that its provisions apply to section 974 to 982 of the Code of Civil Procedure. Section 981a of the Code of Civil Procedure provides that appeals must be dismissed "where the appealing party fails to bring such appeal to trial within one *year* from the date of filing such appeal." (Italics added.) Thus a "year" is a definitely "specified period of time" within the meaning and application of section 12a. The conclusion is inevitable therefore that if a "year", which may be either 365 or 366 days, is sufficiently specific, then a calendar month is also sufficiently specific and is likewise included within the meaning and application of its provisions.

[2] As to the calculation of time as contemplated by section 12a, appellant's solution appears to be the logical one for as pointed out by appellant in substance, the "specified period of time" is first extended according to paragraph (a) "to and including the next day" etc.; "*and*" then by "such number of days" etc. as provided by paragraph (b). It is noteworthy that these two paragraphs are connected by the word "and" which as contended by appellant "expresses the relation of addition or connection, and signifies that something is to follow in addition to that which precedes". Indeed respondent's construction and application of section 12a would defeat its evident purpose for the "period of time" could not then be extended "by such number of days as equals the number of holidays" designated and occurring "within or during such period", if the last day of such period happens to fall on a holiday.

For the foregoing reasons, the order is reversed and cause remanded.

YORK, P. J., and WHITE, J., concur.

---

88 Cal.App.2d 11

PEOPLE v. HOUSTON.

Cr. 2079.

District Court of Appeal, Third District, California.

Oct. 14, 1948.

1. Assault and battery 🔑**92**

Evidence sustained conviction for assault with a deadly weapon. Pen.Code, § 245.

2. Criminal law 🔑**1202(1)**

Where value of property stolen in another jurisdiction was not shown by record, conviction for larceny, after trust in other jurisdiction defining larceny after trust as the unlawful appropriation of property valued at $35 or more, would be deemed to have been a misdemeanor under California statute defining grand theft as the stealing of personal property of value exceeding $200, and conviction of larceny after trust in other jurisdiction would be disregarded in determining whether defendant was an habitual criminal under

California statute. Pen.Code, § 487, 644; D.C.Code 1929, T. 6, § 98.

3. Criminal law ⚷1202(1)

When information charging defendant to be an habitual criminal charges defendant with a specified former felony conviction, and with having served imprisonment therefor, and, upon arraignment and reading of information, defendant admits, without reservation that he is guilty, in absence of an issue of defendant's sanity or lack of understanding, it will be assumed that defendant knowingly admitted serving the sentence as charged in information. Pen. Code, § 644.

4. Criminal law ⚷1202(3)

Evidence supported charges that defendant served sentences for the former convictions of felonies of perjury and stealing a cow, and justified finding defendant an habitual criminal after conviction of assault with a deadly weapon. Pen.Code, §§ 245, 487, 644.

5. Larceny ⚷23

A cow was within statute penalizing as grand theft the taking of a "bovine animal". Pen.Code, § 487.

See Words and Phrases, Permanent Edition, for all other definitions of "Bovine Animal".

6. Criminal law ⚷1202(7)

Where record of defendant's imprisonment for felony in sister state was not competent evidence of defendant's imprisonment because not certified to by Secretary of State or other officer as required by statute, but record was merely cumulative proof of service of sentence, admission of record against defendant charged with being an habitual criminal was not prejudicial. Pen.Code, § 644; Code Civ.Proc. § 1918, subd. 7.

7. Criminal law ⚷1202(7)

Defendant, charged with being an habitual criminal, waived objection to incompetency of prison record of prior felony conviction and service of sentence in sister state, by failing to object to offer of record in evidence, and record could be considered on appeal in support of judgment adverse to defendant. Pen.Code, § 644.

8. Criminal law ⚷1036(1)

The competency or admissibility of evidence may not be raised for the first time on appeal, and, when inadmissible evidence has been admitted at trial without objection, it may be considered in support of judgment.

9. Criminal law ⚷921

An objection to the competency of testimony must be made at the trial, and can not for the first time be raised on motion for new trial.

H. S. Clewett, of Paradise, P. H. McCarthy, Jr., F. Nason O'Hara and Herbert S. Johnson, all of San Francisco, for appellant.

Appeal from Superior Court, Butte County; Harry Deirup, Judge.

George Houston was convicted of assault with a deadly weapon and found to be an habitual criminal, and he appeals.

Affirmed.

Fred N. Howser, Atty. Gen., and Doris H. Maier, Deputy Atty. Gen., for respondent.

THOMPSON, Justice.

The appellant was charged under Section 245 of the Penal Code, by an amended information filed in Butte County, with an assault with a deadly weapon, to-wit, a knife, and with three prior convictions of felonies and the serving of sentences therefor in state or federal prisons. The first prior felony was for "larceny after trust and grand larceny," committed in the District of Columbia. The second prior felony was for perjury committed in the same jurisdiction, with an allegation that he served sentence therefor, and the third prior felony was for "the crime of cow stealing, a felony," committed in Louisiana. The defendant pleaded not guilty of the principal offense of an assault with a deadly weapon. He admitted that he had been convicted of each of the prior offenses, and that he served sentences in a federal prison for the first two alleged prior felonies. While he admitted conviction of the Louisiana charge of stealing a cow, he claimed that the judgment in that case was suspended.

He was tried with a jury on the chief issue of an assault with a deadly weapon, and also on the issue of having served sentence in Louisiana state prison for the former felony of stealing a cow. Separate verdicts were returned against him on both issues. The court accordingly determined that the defendant had been duly convicted of the principal offense of assault with a deadly weapon, and of two former felonies, for each of which he served sentence in a federal or state prison, to-wit, the former felony of perjury committed in the District of Columbia, and the stealing of a cow in Louisiana. Judgment was pronounced against him for the principal crime of assault with a deadly weapon, and the two prior convictions of perjury and the stealing of a cow, which are felonies. He was therefore found to be an habitual criminal under the first paragraph of Section 644 of the Penal Code. He was sentenced to state prison for the term prescribed by law. A motion in arrest of judgment and for a new trial were denied. From the judgment and orders this appeal was perfected.

The appellant does not question the validity of the judgment convicting him of the principal offense of assault with a deadly weapon. But he challenges the authority of the court to determine that he is an habitual criminal, because: First, the prior charge of "larceny after trust," according to the statute of the District of Columbia, may be for the stealing of property of a minimum value of $35, and since the value of the property stolen does not appear in this record, we must assume he was convicted on that charge of only a misdemeanor under the statutes of California; second, the evidence fails to show that he served sentence in a federal prison for the prior offense of perjury; third, there is no evidence to support the alleged serving of sentence for the prior charge of stealing a cow in Louisiana, since the certified record of his imprisonment in that state, which was admitted in evidence, without objection, as exhibit 5, duly sworn to and acknowledged by the Warden before a notary public, lacked due authentication since it did not contain the seal of the court, or the certificate of the Secretary of State.

We are convinced the defendant was duly convicted and sentenced for the principal offense of assault with a deadly weapon, and that he was properly adjudged to be an habitual criminal under the first paragraph of Section 644 of the Penal Code, having suffered conviction and having served sentences in federal and state prisons upon two former felonies included therein, to-wit, perjury and the stealing of a cow.

[1] The verdict and judgment of guilty of the crime of assault with a deadly weapon is supported by the evidence. Indeed, the appellant does not question the validity of that judgment.

[2] The Attorney General concedes that the first alleged prior conviction of "larceny after trust," committed in the District of Columbia, must be deemed to have been a mere misdemeanor under the statute of California, and that it may, therefore, not be considered in determining that the defendant is an habitual criminal. In re Wolfson, 30 Cal.2d 20, 180 P.2d 326. Grand theft, under Section 487 of the Penal Code of California, is the stealing of personal property of a value exceeding $200. Section 98 of the criminal code of the District of Columbia, D C. Code 1929, T. 6, § 98, defines the crime of "larceny after trust" as the unlawful appropriation of property of the value of $35 or more. We shall therefore disregard the charge of prior conviction of larceny after trust.

The only issues we are called upon to determine are whether there is ample evidence to support the charges of having served sentences for the former convictions of the felonies of perjury and stealing a cow, and whether the court erred in receiving in evidence the prison record of the defendant in the State of Louisiana.

The record in this case clearly indicates that the defendant pleaded guilty to the charge of former conviction in the District of Columbia of "the crime of perjury, a felony" and that "the said defendant served a term of imprisonment therefor in Leavenworth Penitentiary." The information so charged. The defendant was represented by counsel. On arraignment, the information was read to the defendant. He then pleaded *not guilty* to the principal offense of which he was charged. The court then required separate pleas as to the alleged prior felonies as charged. The defendant's attention was called to the first alleged prior felony, which had just been read to him, and which specifically charged that he had served sentence therefor at "Leavenworth Penitentiary" and he was asked "Is that true?" to which he replied "Yes, sir." The same formal question was asked regarding the charge of perjury, in the District of Columbia, which had just been read to him, in which the information alleged that he had "served a term of imprisonment therefor at Leavenworth Penitentiary." The court then said, "Is that true?" to which the defendant replied "Yes, sir." When the defendant was asked if he had served sentence on the last charge of former conviction of "stealing a cow," in Louisiana, he replied, "No, sir, I got a suspended sentence out of it." The plea of not guilty to that last charge of serving sentence for stealing a cow, was then entered. There could have been no misunderstanding by the defendant or his attorney regarding the defendant's pleas or admissions with respect to serving sentences for the prior felonies charged. Following the previously mentioned proceedings, Mr. Leonard, the district attorney, stated in open court that the prosecution "has *no further burden of proof* on the first two [prior charges] and does have the burden of proof on the last one, is that correct?" The court said "Yes." Mr. Leonard then said, "That [the plea of not having served sentence on the last charge of stealing a cow] *is the only one in issue.*" Mr. Clewett, the defendant's attorney, confirmed his understanding to that effect, by then stating, "That is the only one in issue."

[3] Regarding the prior charge of perjury, the defendant personally and clearly admitted that he had been convicted and that he served imprisonment in the Leavenworth Penitentiary therefor. When an information definitely charges the defendant with a specified former conviction of a felony, and with having served imprisonment therefor in a federal or state prison, and upon arraignment and the reading of the information to him, he admits, without reservation, that he is guilty thereof, in the absence of an issue of his sanity or lack of understanding it must be assumed the defendant knowingly admitted that he served the sentence as charged in the information. To determine otherwise would be quibbling with the facts. In re Valenzuela, 71 Cal.App.2d 198, 200, 162 P.2d 301. It has been held that when the information charges a prior conviction of a felony, *but fails to allege that the defendant served sentence therefor*, his admission of the conviction *as charged* furnishes no evidence that he actually served imprisonment therefor. In re Gilliam, 26 Cal.2d 860, 866, 161 P.2d 793. But that is not the record in this case. The authorities relied upon by the appellant in that regard are all distinguishable on the fact that in such cases the serving of sentence was not alleged and therefore not admitted. We conclude there is ample evidence that the defendant served sentence for the crime of perjury, as charged.

[4, 5] The evidence is sufficient to support the verdict of the jury and the judgment that the defendant suffered a former conviction in Louisiana for stealing a cow, and that he served imprisonment therefor in the Louisiana State Penitentiary. Under Section 487 of the Penal Code of California, the stealing of a cow constitutes grand theft. The third paragraph of that section provides that when the property taken is an automobile, horse, mare, gelding, any *bovine animal,* etc., it constitutes grand theft. The dictionary defines a bovine animal as an ox or a cow. Vol. 5, Words and Phrases, Perm.Ed., page 737; State v. District Court of Fifth Jud.Dist., 42 Nev. 218, 174 P. 1023, 1025.

On cross-examination the defendant admitted that he had served imprisonment upon conviction of the theft of the cow, which was the only theft with which he was charged. For the purpose of impeachment, after a long examination in chief, on the principal charge of assault with a deadly weapon, he was asked, "didn't you testify the first time you had been convicted of a felony was in 1939, * * * When Mr. Clewett asked you" to which he replied, "He asked me about *the theft* [of the cow], that is what I was saying, *I went in* [to the penitentiary] *in 1936, and come out in 1939.*" (Italics added.) He was then asked, "Were you also convicted of cow stealing in Calcasieu County, Louisiana, and sentenced to the Louisiana State Penitentiary?" to which he replied, "I just answered that one, yes." The Louisiana penitentiary record, which was received in evidence, without objection, and marked People's exhibit number 5, confirms the preceding admission of the defendant. It shows that he was convicted of stealing a cow, on October 26, 1935, and sentenced to the state penitentiary for a term of from fifteen to forty-five months; that he was received in prison November 2, 1935, and discharged August 2, 1939. That substantially conforms to defendant's statement that "I went in in 1936, and come out in 1939." The evidence of the prison record is therefore merely cumulative proof of that admission of service of sentence.

[6] The court did not err in receiving as evidence People's exhibit number 5, being the prison record of defendant's imprisonment in the Louisiana State Penitentiary upon conviction October 26, 1935, of the crime of stealing a cow. It is signed by the Warden of that penitentiary. The record is certified to by the Warden, as custodian of the record, and sworn to by him before a notary public under seal. It is not certified by the Secretary of State or other officer, pursuant to Section 1918, subdivision 7, of the Code of Civil Procedure. But it was certified to by the Warden having custody of the prison record as required by Section 969b of the Penal Code. It was received in evidence without objection. Even though the prison record was not competent evidence of defendant's imprisonment for the reason that it was not certified to by the Secretary of State or other officer as required by Section 1918, subdivision 7, of the Code of Civil Procedure, and that its competency was not waived by failure to object to the evidence, which we do not concede, that evidence was not prejudicial. People v. Beatty, 132 Cal. App. 376, 379, 22 P.2d 757.

[7-9] We are of the opinion the defendant in this case waived the objection to the competency of the prison record of a prior conviction of felony and service of sentence in the State of Louisiana, by failing to object to its offer. It has been uniformly held that the competency or admissibility of evidence may not be raised for the first time on appeal, and that, when it has been admitted at the trial without objection, it may be considered in support of the judgment. People v. Willis, 30 Cal. App.2d 419, 86 P.2d 670; People v. Kelly, 77 Cal.App.2d 23, 174 P.2d 342; People v. Simmons, 28 Cal.2d 699, 723, 172 P.2d 18; Holzer v. Read, 216 Cal. 119, 123, 13 P.2d 697; People v. D'A Philippo, 220 Cal. 620, 625, 32 P.2d 962; 2 Cal.Jur., p. 263, sec. 82; 4 Cal.Jur. Ten-Year Supp., p. 1046, sec. 616c. It has also been held that an objection to the competency of testimony must be made at the trial, and cannot for the first time be raised on motion for new trial. Clark v. Gridley, 35 Cal. 398; 10 Cal.Jur., p. 824, sec. 111.

In support of his contention that the court erred in receiving in evidence the verified copy of his prison record in Louisiana, he relies on the case of People v. Foster, 3 Cal.App.2d 35, 39 P.2d 271. What is said in that case regarding the competency of an unauthenticated prison record of a former conviction of the defendant in another state, is inapplicable to the facts of this case. No preliminary foundation was laid in that case. Although that opinion does not so state, an examination of the record discloses the fact that the prison record was received in evidence over the strenuous and repeated objections of the defendant that it was incompetent, irrelevant, immaterial, hearsay, and that "the proper foundation [for its reception] *has not been laid.*" (Italics added.) Unlike that case, no objection of any character was made in this case to the introduction of the prison record.

Likewise, in the case of People v. Darling, 120 Cal.App. 453, 7 P.2d 1094, 1095, wherein an unauthenticated record of a former conviction of felony in another state was held to be improperly admitted in evidence, the defendant fully preserved his right by objecting to the record on the ground that there was "nothing to show that the person making the certificate was the legal custodian of the original of such record." All that the court there held was that "their reception in evidence *over objection* was prejudicial error." (Italics added.)

We conclude there was sufficient competent evidence in this case of defendant's former convictions and service of sentences in federal and state penitentiaries for the two crimes of perjury and stealing a cow. The court therefore properly adjudged the defendant to be an habitual criminal under the provisions of the first paragraph of Section 644 of the Penal Code.

For the foregoing reasons the motions in arrest of judgment and for a new trial were properly denied.

The judgment and the orders are affirmed.

ADAMS, P. J., and PEEK, J., concur.

---

88 Cal.App.2d 42

PEOPLE v. HOLT.

Cr. 663.

District Court of Appeal, Fourth District, California.

Oct. 15, 1948.

1. Criminal law 🔑511(2)

An accomplice's testimony is sufficiently corroborated by evidence from which accused's connection with crime charged may reasonably be inferred.

2. Criminal law 🔑511(7)

A defendant's admission, tending to connect him with crime charged, is sufficient corroboration of accomplice's testimony.

3. Criminal law 🔑511(7)

In burglary prosecution, defendant's admissions were sufficient to corroborate accomplice's testimony as tending to connect defendant with commission of offense.

Appeal from Superior Court, Orange County; Kenneth Morrison, Judge.

Raymond Parl Holt was convicted of burglary in the second degree, and from a judgment committing him to the Youth Authority, he appeals.

Affirmed.

N. D. Meyer, public defender, and Samuel Dreizen, deputy public defender, both of Santa Ana, for appellant.

Fred N. Howser, Atty. Gen. and Howard S. Goldin, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The defendant was charged with having committed burglary on April 15, 1948, by entering a cabin cruiser known as the "M. Scoggin" and located at Newport Beach Harbor, with intent to commit the crime of theft. After trial by the court without a jury he was found guilty of burglary in the second degree. His application for probation was heard and denied, and he has appealed from a judgment by which he was committed to the Youth Authority for the term prescribed by law.

The owner of the boat testified that he and his wife left the boat between 4:00 and 6:00 p. m. on April 15, 1948, locking the door to the cabin but leaving some windows open; that they returned about 10:30 that evening; that he at once discovered that the cabin had been entered; and that his leather coat, certain groceries and about $34 in money had been taken. He identified a leather coat which was produced in court as the one which had been taken from his boat, and also identified certain canned goods as being the same brands as those he had left on the boat.

A 15-year-old boy testified that he was with the appellant about noon on April 15, 1948, at which time they looked over some of the boats at the Newport docks, where the boat in question was located; that toward night on that day they obtained a row boat and continued rowing on the bay after dark; that they entered four or five boats, some of which he entered and some of which the appellant entered; that they took their row boat to the end of the dock where the "M. Scoggin" was located; that while the appellant entered another boat he himself entered the "M. Scoggin" through a window and took a sack of groceries; that as they started to row away he told the appellant that there were some clothes and other articles on the "M. Scoggin", whereupon the appellant suggested that they go back and "get some more canned goods out of there"; that they returned and the appellant entered the "M. Scoggin" through a window; that the appellant returned with more canned goods and with a leather coat; that the leather coat produced in court was similar to the one the appellant had removed from the boat; that they then went to the other side of the bay and parked under an overpass bridge where they remained all night; that they then had with them all of the things taken from the "M. Scoggin"; that they built a fire and cooked and ate some of the food; and that they separated toward night of the next day. He further stated that they ate some of the groceries taken and that he himself had taken "a few of the bills."

A police officer testified that he had a conversation with the appellant concerning the burglary of this particular boat at about 4:15 a. m. on April 17, 1948, in the police station, with five other officers present. At this time the appellant stated that he had ridden around the bay in a row boat with the 15-year-old boy, that he himself had not entered any of the boats but that the boy had done so, and that the boy had gone aboard the "M. Scoggin". He further admitted "being under the arches with Poole, (the boy in question) and admitted having possession of the articles there with Poole." After this evidence was introduced counsel for appellant moved for dismissal on the ground of the insufficiency of the evidence, which motion was argued and denied. The appellant then introduced no testimony in his own behalf and waived argument.

[1, 2] The sole contention on this appeal is that there is no sufficient corroboration of the testimony of the 15-year-old boy who was, admittedly, an accomplice. It is well settled that corroborating evidence is sufficient if it tends to connect the defendant with the commission of the offense, and if the connection of the accused with the crime may reasonably be inferred therefrom. People v. Yeager, 194 Cal. 452, 229 P. 40. It has frequently been held that a defendant's own admission tending to connect him with the crime is sufficient corroboration. People v. Armstrong, 114 Cal. 570, 573, 574, 46 P. 611; People v. Sullivan, 144 Cal. 471, 473, 77 P. 1000; People v. Baker, 25 Cal.App.2d 1, 3, 76 P.2d 111; People v. Hickok, 28 Cal.App.2d 574, 580, 83 P.2d 39; People v. Derenzo, 46 Cal.App.2d 411, 415, 115 P.2d 858; People v. White, 48 Cal.App.2d 90, 94, 119 P.2d 383.

[3] The appellant here admitted having ridden around the bay with the boy in question and admitted that one of them had entered the "M. Scoggin", although he claimed that this was done by the boy. He confirmed the boy's testimony that they then spent the remainder of the night under the arches of an overpass bridge and admitted that they had "possession of the articles under there." The officer testified that his conversation with the appellant on the early morning of April 17 related to the burglary of the boat in question and to what had been done by the appellant on the evening in question. Appellant's present contention that his replies and admissions were general, without specifying a particular boat, a particular time or particular articles, is without merit. The only reasonable inference from the evidence is that the appellant was talking about the time in question and the articles removed from this boat, and that he then admitted his participation therein in practically all respects except for his contention that the actual entry into the boat was made by the boy. His admissions corroborate the boy's testimony in many impor-

tant respects, and tend to connect him with the commission of the offense. The contention here made is entirely without merit. People v. Wiley, 33 Cal.App.2d 424, 91 P.2d 907.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

---

87 Cal.App.2d 818

PEOPLE v. HARRIS.

Cr. 4212.

District Court of Appeal, Second District, Division 2, California.
Oct. 5, 1948.

As Corrected Oct. 13, 1948.

1. Robbery 🔑24(1)

Evidence sustained conviction of robbery in the first degree.

2. Criminal law 🔑742(1)

Whether witness was prejudiced against defendant to the extent that he would perjure himself to effect defendant's conviction of robbery, and whether the witness told the truth notwithstanding his felonious character and the claim that he was an accomplice were for jury.

3. Robbery 🔑24(1)

Testimony of witness, who drove defendant and two others to place where robbery was committed, that defendant and the others hurriedly returned by back way to automobile with property they had not had before and urged witness to drive rapidly, created more than a suspicion of guilt and tended to connect the defendant with the robbery. Pen.Code, § 1111.

4. Robbery 🔑26

Evidence by two other persons that the defendant participated in the robbery charged made the identification of defendant by a prosecuting witness a question of fact to be determined first by the jury and secondly by the trial judge. Code Civ. Proc. §§ 1847, 2061.

5. Criminal law 🔑566

One accused of crime need not be identified to an absolute certainty or positively or in a manner free from inconsistencies.

6. Criminal law 🔑1159(5)

If the testimony of the identifying witnesses is worthy of credence and convinces the jury, the latter's finding is final unless the trial judge should, with his intimate knowledge of the witnesses' behavior, upset the verdict.

7. Criminal law 🔑566

It is not essential that witness identifying defendant be free from doubt as to such identity.

8. Criminal law 🔑453

A witness identifying defendant may testify that in his belief, opinion, or judgment, the defendant is the person who perpetrated the crime.

9. Criminal law 🔑566

The want of positiveness in the identification of the defendant goes only to the weight of the testimony.

10. Criminal law 🔑543(2)

Under statute vesting in trial court the discretion of permitting the introduction of the testimony previously given by witness who is no longer in the state, only question for a decision is whether witness cannot with due diligence be found within state, and court is not authorized to inquire into nature of evidence, nature of relations between accused and witness, or into character of latter.

11. Criminal law 🔑1153(6)

Where, by exercise of a reasonable discretion, trial court determines that witness is beyond borders of state, court's order allowing testimony of witness previously given to be read will not be disturbed.

12. Criminal law 🔑543(2)

Where it was proved that witness who had testified at preliminary hearing was out of the state at the time of the trial, no further proof was necessary as to acts of diligence to secure attendance of such witness.

13. Criminal law 🔑234

Sustaining of objections on preliminary hearing to questions calling for whether police officers had talked to witness before he agreed to testify, and for length of time witness was in custody at the time, did not deprive defendant of right to cross-examination, nor were such rulings erroneous.

14. Criminal law 🔑739(2)

The weight to be given to the testimony of alibi witnesses concerning whereabouts of defendant one year before was for jury.

15. Criminal law 🔑655(1)

The law does not require the judge to maintain a sphinx-like attitude and merely to announce his decision upon mooted points, but requires that he see to it that no factual issue is left in a fog when by proper statement or inquiry testimony may be made clear.

16. Criminal law 🔑655(1)

The primary duty of the trial judge is to see that justice is administered, and this cannot under all circumstances be done by silence and by inaction in the presence of controversy.

17. Criminal law 🔑655(1)

The trial judge is in the most favorable position to know when factual issues need clarification, and it becomes his duty to exercise his best judgment to the end that such need is satisfied.

18. Criminal law 🔑656(1), 1166½(12)

Action of the trial judge in interpreting answers given by witness and statements following probation officer's testimony that someone other than probationer had written certain reports, "Is there anything unusual about that? Some of those reports are pretty complicated", was neither erroneous nor prejudicial.

19. Criminal law 🔑655(5)

In any controversy which must be determined by jury of laymen, care must be exercised by trial judge at every stage of proceeding to make no pronouncement or to utter no sentiment that might be construed as an aspersion upon honor of counsel who is obliged to exert his earnest endeavors to effectuate a just result, particularly where facts are rendered obscure by contradictory witnesses and inability to express themselves in commendable English.

20. Criminal law 🔑1166½(12)

Where defense counsel insisted that district attorney be required to make his arguments in an opening address, statement by trial judge that, "You have none to answer. The district attorney will only answer your arguments", and when defendant's counsel stated "That is the law but not the fact", statement by the court, "It will be the fact in this case, and you ought to know better than to presume to make such statement", was not prejudicial.

21. Criminal law 🔑717

Counsel should not interpose objections to statute before the jury and thereupon complain that he is a victim of an unauthorized ruling.

22. Ciminal law 🔑1035(3)

Defendant cannot complain for first time on appeal to remarks made by the court during the course of the trial.

23. Criminal law 🔑1044, 1053

Statements and rulings made by court during course of the trial must be excepted to and motion must be made to strike objectionable remarks from the record, and request must be made that the jury be instructed to disregard them, otherwise no complaint may be made on appeal.

Appeal from Superior Court, Los Angeles County; William R. McKay, Judge.

Sidney Harris was convicted of robbery in the first degree, and he appeals.

Judgment affirmed.

William B. Neeley, Public Defender, by J. F. Harvey, Deputy Public Defender, both of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., and James A. Doherty, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

From a judgment of conviction of robbery in the first degree after verdict appellant seeks a reversal on account of (1) insufficiency of the evidence, (2) allowing the testimony of a witness given at the preliminary hearing to be read in evidence and (3) comments and questions of the trial judge. While the correctness of the rulings, including the denial of the motion for a new trial, has not been easy to determine, yet a scrutiny of the record and a balancing of the arguments induce the conclusion that a reversal would be error.

On November 12, 1946, the witness Tomp operated a mercantile establishment in the southeastern area of the city of Los Angeles. At the noon hour of that day three Negroes entered the store. One of the trio having asked to purchase a raincoat, Mr. Tomp led them to the section where such merchandise was on display. The first raincoat having been too small, Tomp turned to get one larger, whereupon he was slugged on the back of his head with a gun which caused him to be a "bit groggy" and to lose blood. Then he felt a "big gun" against his body and one man threatened to blow off Tomp's head; another said, "kill him." Tomp saw one robber take money from the cash register, after which they beat him into unconsciousness. On being revived that night at a hospital he discovered that his wrist watch, his wallet and overcoat were gone. On account of the blows on his head he was hospitalized for 12 days and suffered a partial loss of memory. Appellant was duly brought to trial which resulted in the judgment now under review.

The Proof Sufficient.

No question having been raised as to the occurrence of the robbery, the sole problem with reference to the sufficiency of the evidence is to determine that appellant was connected with the crime. Mr. Tomp's testimony has rendered this difficult by reason of his hesitancy at first to identify appellant as one of the robbers and his inefficiency as a witness apparently due to his ignorance of semantics. He distinctly remembered a big wart on the face of one of the men as he greeted them. At the trial appellant was shown to have such a wart. The language of Mr. Tomp which appellant contends is too tenuous to support a finding of appellant's identity as one of the robbers is as follows:

[1] "I think I seen Harris there. * * * I think he resembled one of them. * * * The wart is similar to the one I saw—He resembles one of these men. * * * I remember him. He resembled one of them—He was one of them." Having observed the witness and his behavior, his emphasis and his inflections, the jury were able to determine from his language that he was sufficiently definite in identifying appellant. While it is true that a mere resemblance is not proof of identity, yet resemblance alone is not relied upon. The victim twice testified: "I am sure he is one of them." The declaration (1) of resemblance and (2) of certainty of identity indicates that the merchant conceived resemblance to be the equivalent of identity. This interpretation of his meaning is borne out by his answer to the question whether at the preliminary examination he testified that Harris "resembled" one of the men "but not quite." His answer was: "Well, not quite. He resembles one of them but not quite." In reply to the question whether that "means you did not recognize Harris," he testified, "I didn't exactly recognize him. I say he resembled him." This indicates that he uses *recognize* when he is *certain* of identity, but uses *resemble* when his identification is less than certain.

Any doubt raised by Tomp's testimony that appellant was one of Tomp's assailants is dispelled by the testimony of the witnesses Long and Darnell. The latter knew Harris intimately and conveyed him and his companions to Tomp's store without knowledge of their purpose. On their return they jumped the back fence of Tomp's place and ran to Darnell's car. Appellant then had a wrist watch not seen before and the others had a rainslicker and a box. They urged him to drive rapidly and he complied. On arriving at Slauson avenue, an east-west cross-town boulevard, the three men left his machine and boarded an interurban train.

[2, 3] Appellant attacked Darnell's testimony on the grounds that he was prejudiced against Harris and was an accom-

plice and had been convicted of a felony. Darnell denied the prejudice. The question whether the witness was prejudiced to the extent that he would perjure himself to effect appellant's conviction was one of fact for the jury. They likewise had the task of finding whether Darnell told the truth notwithstanding (1) his felonious character and (2) the claim that he was an accomplice. There is nothing to indicate that Darnell was consciously an accomplice. The jury were justified in finding that he had been an innocent participant in providing the conveyance. At any rate, he was believed by the jury and their finding became final as will hereafter appear. His testimony was of such character as to create "more than a suspicion of guilt," and "it tends * * * to connect the defendant with the offense charged." People v. Malone, 82 Cal.App.2d 54, 185 P.2d 870, 874; Penal Code, sec. 1111; People v. Trujillo, 32 Cal.2d 105, 194 P.2d 681; People v. Hamilton, Cal.App., 188 P.2d 817. Clearly, then the testimony of Darnell, who saw appellant enter Tomp's store just before the crime was committed and who witnessed his exit therefrom promptly after the crime in possession of one of Tomp's stolen articles, is, if believed by the jury, sufficient corroboration of the victim's testimony. A person never sinks so low that he cannot speak the truth sometimes. He may be competent though of degraded character. It is solely for the jury and the trial court to determine whether he speaks the truth. People v. Cox, 66 Cal.App. 287, 293, 226 P. 14.

The witness Long testified that he sat alone in his car on the parking lot in the rear of Tomp's store about 1:45 p. m. of the day of the robbery. He saw the driver in the blue-green car park behind the store. He passed within two feet of him, and at the preliminary hearing learned that it was Jimmie Darnell. "Then all at once two or three guys jump over this fence. * * * They jumped in the Darnell's car, and boy, he just spun the wheels and got out of there." The actions of the trio were so unusual that Long took the license number of the car and gave it to the police. It is true that Long testified at the preliminary hearing that appellant did not look like one of the accused. He testified also that he "didn't pay that much attention because I was trying to figure why they were jumping over the fence. * * * It was raining that day." Though not certain of appellant's identity he would not deny that Harris was one of the three men.

[4] The jury had the testimony of two witnesses that the blue-green car was at the rear of Tomp's store at the noon hour when the merchant says he was robbed; that three Negroes jumped over the fence and entered the automobile; that some of them exhorted Darnell to hasten his departure; that they had articles which had been taken from Tomp. With such corroboration they might well believe the victim's story and his identification of appellant, which was a fact to be determined first by the jury and secondly by the trial judge. People v. Friday, 18 Cal.App.2d 197, 198, 63 P.2d 303; People v. Quinn, 12 Cal.App.2d 752, 754, 55 P.2d 1277; Code Civ.Proc., secs. 1847, 2061.

[5-9] It is not required that one accused of crime be identified to an absolute certainty or positively or in a manner free from inconsistencies. If the testimony of the identifying witnesses is worthy of credence and convinces the jury, the latter's finding is final unless the trial judge should with his intimate knowledge of the witness' behavior upset the verdict. People v. Slobodion, 31 Cal.2d 555, 559, 191 P.2d 1; People v. Farrington, 213 Cal. 459, 463, 2 P.2d 814; People v. Houser, 85 Cal.App.2d 686, 193 P.2d 937; People v. Friday, 18 Cal.App.2d 197, 198, 63 P.2d 303. It is not essential that the witness be free from doubt as to one's identity. He may testify that in his belief, opinion or judgment the accused is the person who perpetrated the crime. The want of positiveness goes only to the weight of the testimony. People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778; People v. Coston, 82 Cal.App.2d 23, 30, 185 P.2d 632; Commonwealth v. Reid, 123 Pa.Super. 459, 187 A. 263, 266.

Reading Darnell's Previous Testimony Not Error.

[10-12] Appellant contends that he was grievously prejudiced by the ruling which

permitted the testimony of Darnell given at the preliminary hearing to be read in evidence, Darnell being out of the state at the date of the trial. The propriety and validity of such a ruling are by statute vested in the discretion of the trial court. People v. Dunn, 29 Cal.2d 654, 660, 177 P.2d 553; People v. Bernstein, 70 Cal.App.2d 462, 468, 161 P.2d 381. Because that court is authorized to exercise such discretion it is not empowered to inquire into the nature of the evidence, the nature of the relations between the accused and the witness or into the character of the latter. The sole test to be applied when an offer of such testimony is made is whether the witness cannot with due diligence be found within the state. If upon the exercise of a reasonable discretion the court determines the fact to be that the witness is beyond the borders of this state, its order allowing the testimony to be read will not be disturbed. There is no showing of bad faith upon the part of the district attorney. Darnell returned to Texas pursuant to the order of the court below, as a part of his probationary punishment after conviction of a crime. There is no evidence that he was sent there for the purpose of aiding the prosecution and it is presumed that the district attorney did no irregular act for the purpose of accomplishing appellant's conviction. Code Civil Proc., sec. 1963, subd. 15. The only question presented to the trial court was whether Darnell was at the time of trial in Texas. That fact having been proved to the court "no futile acts of diligence to secure attendance are required." People v. Guernsey, 80 Cal.App.2d 463, 467, 180 P.2d 27, 29; People v. Padilla, 81 Cal.App. 528, 532, 254 P. 585; People v. Caballero, 41 Cal.App. 146, 151, 182 P. 321; People v. Flannery, 3 Cal.App. 41, 44, 84 P. 461.

Darnell's previous testimony is attacked upon the further ground that "defense counsel at the preliminary had been improperly denied the right to cross-examine the witness." The only two instances specified by appellant are the following:

(1) "Q. Did the police officers talk to you about this case before you agreed to testify?

"Mr. Fredericks: Wait a minute. That assumes something not in evidence and we object to it on that ground.

"The Court: Objection sustained."

(2) "Q. By Miss McDonald: How long were you held in custody at that time? A. With them men?

"Q. How long after November 15? How long were you held?

"Mr. Fredericks: I object to that as being immaterial.

"The Court: Objection sustained."

[13] Certainly neither objections nor rulings deprived the defendant of the privilege of cross-examination. That the rulings were correct is elemental. The examing magistrate made no order forbidding further inquiry by Harris while Darnell was on the stand.

The Alibi.

Evidence of an alibi was the testimony of Silas Cook and his son Vamious. Both testified that Harris lived at their home and was in bed six weeks; that they saw him every day. The testimony of neither of them is characterized by such accuracy or intelligence as to require its adoption by the jury. Vamious, nineteen, testified that he had known appellant all his life; that the latter came to the Cook home September 15, 1946; that he stayed there until a date variously described as November 13, November 15 and November 30; that Harris was ill; that the witness and his mother cared for the sick man; he "remembered" that Harris got out of bed the "last part of November"; that he was in bed a month and two weeks. He fixed the events by no incident in the news or by any kind of memorandum. He merely "remembered" them one year later.

[14] Neither had the father any aids to his memory. He testified that Harris came to his home "around November * * * he came in November * * * about November 6th * * * was there about two months and a half to the 5th of January * * * he was there from September 15 to November 30 * * * and each day I saw him * * * I arrived home at 1:30 a. m., retired at 2, arose at 10:30. * * *

I just know he was there; I remember it." The jury were not obliged to believe that he just remembered accurately dates or events antedating his testimony by a year. Even though they had believed a portion of it, yet they could reasonably have found that Vamious was mistaken by one day and that according to other evidence appellant was at Tomp's store on November 12. Whatever their reasoning they exercised their prerogative of determining that the alibi was not established.

No Reversible Error in the Trial Court's Questions or Comments.

Appellant assigns four statements of the trial judge as prejudicial error: (1) The judge assumed to interpret Tomp's meaning by an answer given on cross-examination when he said: "His testimony is he isn't positive of the man for certain but he resembles him." (2) Also, when in the same connection the judge stated: "He says he doesn't remember whether he saw him there or not. Isn't that right?" (3) When the probation officer testified that from both the handwriting and the context of the reports some one other than the probationer wrote the reports, the judge asked: "Is there anything unusual about that? Some of those reports are pretty complicated." (4) When defense counsel insisted that the district attorney be required to make his arguments in an opening address the judge stated: "You have none to answer. The district attorney will only answer your arguments."

"Mr. Harvey: That is the law but not the fact.

"The Court: It will be the fact in this case, and you ought to know better than to presume to make such a statement. Now proceed."

[15-18] With reference to items (1), (2) and (3) the law does not require the judge to maintain a sphinx-like attitude and merely to announce his decision upon mooted points. On the contrary, he must see to it that no factual issue is left in a fog when by proper statement or inquiry the testimony might be made clear. His primary duty is to see that justice is administered, and this cannot under all circumstances be done by silence and inaction in the presence of a controversy. No agency of the law is in so favorable a position as is the trial judge to know when factual issues need clarification. It therefore becomes his duty to exercise his best judgment to the end that such need is satisfied. People v. Golsh, 63 Cal.App. 609, 614, 219 P. 456; People v. Mendez, 193 Cal. 39, 46, 223 P. 65; People v. Miller, 41 Cal.App.2d 252, 258, 106 P.2d 239.

[19-21] With reference to the item (4) which appellant contends indicated a prejudice or an opinion adverse to him, it must be conceded that the language of the judge does appear from the diction used to indicate an impatience with the objection of counsel. In any controversy which must be determined by a jury of laymen who are not familiar with the practice and the zeal of advocates, care should be exercised by the judge at every stage of the proceeding to make no pronouncement or to utter no sentiment that might be construed as an aspersion upon the honor of counsel who is obliged to exert his earnest endeavors to effectuate a just result. Especially should this rule obtain where the facts, as in the instant case, are rendered obscure by contradictory witnesses and by the complainant's inability to express himself in commendable English. However, the statement of the judge in view of the entire record does not appear to have been prejudicial. In making the above comment it is to be observed that the language of counsel was not wholly free from criticism. He appeared to be complaining that he was a victim of an unjust ruling, whereas in fact he had objected to the enforcement of a statute. Counsel should not interpose objections to such a law and thereupon complain that he is the victim of an unauthorized ruling.

[22, 23] But conceding error to obtain in the court's language in all the four assignments, appellant cannot complain of it for the first time on appeal. Counsel's correct course was to except to the ruling or to the language to which he objected and to move to strike from the record any prejudicial remarks of the court and to request that the jury be instructed to disregard them. People v. Galuppo, 81 Cal.App.2d

843, 849, 185 P.2d 335; People v. Mendez, supra, 193 Cal. 48, 223 P. 65. Failing thus to establish his record, in vain will he assail the conduct of the trial judge.

The judgment and the order denying appellant's motion for a new trial are affirmed.

McCOMB and WILSON, JJ., concur.

---

87 Cal.App.2d 906

MATTHEWS et al. v. ANDRADE et al.

Civ. 13775.

District Court of Appeal, First District, Division 1, California.

Oct. 13, 1948.

Constitutional law 🔑215

The attempted enforcement by court of privately imposed restrictions against the use or occupation of any buildings or any lot by persons of the Mexican race or any other race but the Caucasian race violated the Federal Constitution and judgment granting injunction against such use would be reversed.

Appeal from Superior Court, Alameda County; Benjamin C. Jones, Judge.

Action by Mouzon Matthews and others against Rafael Andrade and others to enjoin the defendants from occupying a building within restricted district. From a judgment for plaintiffs the defendants appeal.

Judgment reversed.

Allen G. Norris and Leroy A. Broun, both of Centerville, for appellants.

Breed, Robinson & Stewart, of Oakland, for respondents.

PETERS, Presiding Justice.

Defendants were enjoined from using or occupying a designated parcel of real property in Alameda County, on the ground that the parcel in question was subject to certain restrictions, one of which reads as follows: "No person or persons of the Mexican race, or other than the Caucasian race shall use or occupy any buildings or any lot, except that this covenant shall not prevent occupying by domestic servants of a different race domiciled with an owner, tenant, or occupant thereof." It was found that defendants are of the "Mexican race" as those terms are used in the restrictive covenant, and that they own and have been using and occupying a building within the restricted district, and the injunction issued. Defendants appeal.

The attempted enforcement by court action of such privately imposed restrictions is violative of the federal Constitution. Shelley v. Kraemer, (McGhee v. Sipes), 1948, 334 U.S. 1, 68 S.Ct. 836; Cumings v. Hokr, 31 Cal.2d 844, 193 P.2d 742; Cassell v. Hickerson, 31 Cal.2d 869, 193 P.2d 743; Davis v. Carter, 31 Cal.2d 870, 193 P.2d 744; Ex parte Laws, 31 Cal.2d 846, 193 P.2d 744.

The judgment appealed from is reversed.

WARD and BRAY, JJ., concur.

NELSON v. CALIFORNIA TRUST CO. et al.

Civ. 16361.

District Court of Appeal, Second District, Division 1, California.

Oct. 15, 1948.

Hearing Granted Dec. 13, 1948.*

Trusts 🔑151(1)

Where trust was created solely for settlor's benefit, and declaration of trust provided that no interest of the settlor, who was the income beneficiary, should be liable for any debt of settlor or subject to any judgment rendered against him, and clause in declaration that on settlor's death remainder of trust estate should be distributed to his heirs in accordance with laws of succession was merely incidental, corpus and income of trust were subject to judgment of settlor's judgment creditor against settlor. Gen.Laws, Act 652, § 103.

---

* Subsequent opinion 202 P.2d 1021.

◆

Appeal from Superior Court, Los Angeles County; Alfred E. Paonessa, Judge.

Action for declaratory relief by Russell Nelson against the California Trust Company, a corporation, and Fred H. Bixby, Jr., also known as Fred Hathaway Bixby, Jr., for declaration that corpus and income of trust established by Fred H. Bixby, Jr., with California Trust Company as trustee, were subject to plaintiff's judgment against Fred H. Bixby, Jr. from a judgment for the plaintiff, the California Trust Company appeals.

Judgment affirmed.

Swanwick, Donnelly & Proudfit and Donald O. Welton, all of Los Angeles, for appellant.

Hahn, Ross, Goldstone & Saunders, of Los Angeles, for respondent.

DORAN, Justice.

This is an appeal by defendant, California Trust Company from the judgment in an action for declaratory relief.

The record reveals that plaintiff recovered a judgment against defendant Bixby on November 7, 1946, in the sum of $6,826.69; that theretofore to-wit, on February 16, 1937, defendant Bixby had created a trust, "to defeat then existing and subsequent claims of the creditors of said Fred H. Bixby, Jr."; that defendant California Trust Company is the trustee of said trust which at the time of its creation consisted of $75,000 delivered to said trustee by said Bixby; "That garnishment was levied on said California Trust Company upon said judgment, under execution issued on or about November 16, 1946, and that said California Trust Company failed and refused, and still fails and refuses to make any return or answer to said execution." It is also alleged that, "said failure and refusal of said California Trust Company to make a return or answer was for the purpose of evading collection of said judgment by plaintiff." A copy of the so-called declaration of trust is part of plaintiff's complaint. The complaint also alleges that trust property is sufficient to satisfy the judgment.

Defendant Bixby's answer contains the following: "Answering Paragraph V of plaintiff's First Cause of Action said defendant alleges that said defendant executed without consideration said Declaration of Trust in plaintiff's complaint referred to for the purpose of conserving for himself as sole beneficiary of said trust the funds transferred to the trustee upon the execution thereof and in accordance with the provisions thereof sought to render said funds constituting the corpus of said trust immune from the claims of any subsequent creditors of said defendant; this defendant further alleges that at the time of the execution of said trust instrument said defendant had income from other sources more than sufficient to pay his then expenses and obligations but that subsequent to the execution of said declaration of Trust said other income became and is now insufficient to meet the claims of said defendant's presently existing creditors; that in accordance with defendant's general intent and purpose to meet the claims of his creditors and his lawful obligations as the same become due and to preserve said defendant's good credit rating in the community this defendant alleges that it is his desire that the judgment of plaintiff herein be satisfied by California Trust Company, one of the defendants herein, out of income from the principal of said trust and if the same be not sufficient, out of the corpus thereof and this defendant joins with plaintiff in seeking a decree of this Court that the corpus and income of said trust be declared subject to the judgment of this plaintiff and to all lawful claims of this defendant's creditors."

Defendant trust company's answer denies that its refusal to make a return to the execution levied by plaintiff "was for the purpose of evading collection" of plaintiff's judgment and alleges that no return was made because to do so would disclose "confidential information which it was defendant's duty, by the terms of its trust agreement and section 103 of the Bank Act [Gen. Laws, Act 652, § 103], not to divulge." The answer also alleges that defendant Bixby "has a wife, Jane Bixby, a father, Fred H. Bixby, and a mother, Florence G. Bixby, now living who would constitute his heirs at law if he were now deceased; that the said Fred H. Bixby, Jr., also has sisters living and may at the time of his death leave children surviving him who may constitute his heirs at law," and that, "by the terms of said declaration of trust the beneficiaries of said trust for whom the principal is held by this defendant are the heirs at law of said Fred H. Bixby, Jr., as determined by the laws of succession of the State of California, in effect at the time of his death." "The terms of said declaration of trust" as noted in defendant trust company's answer, refers to the following provision of the trust agreement; "Upon the death of said trustor and beneficiary Fred H. Bixby, Jr., * * * all of the residue and remainder of said Trust Estate shall be by said Trustee, or its successor, distributed and delivered to the heirs at law of said Fred Bixby, Jr., in accordance with the laws of succession of the State of California then in effect, and income accrued and/or undistributed at the time of the death of said Fred H. Bixby, Jr., shall belong and go to the Beneficiaries entitled to the next eventual estate in the same proportion or proportions as the principal thereof."

It is contended by appellant that "The trust corpus may not be used to satisfy judgment against Bixby" and that "As a creditor of Bixby, the Respondent has no greater rights than Bixby has to reach the corpus of the Bixby trust." It is also contended that "Bixby can only receive the income and under no circumstances any part of the principal."

It should be emphasized at the outset that under the terms of the trust agreement, Bixby is the only named beneficiary; the single reference to any one else in the trust agreement is confined to the above quoted provision providing for the disposition of the "residue" upon the death of the trustor. And in that connection appellant argues, "appellant has contested this action only for the purpose of protecting the contingent remaindermen and not for the purpose of protecting the interest of Bixby."

It is evident from the foregoing that the trust in question was created for Bixby's sole benefit; the clause referring to the "residue" is merely incidental. Indeed, if such provision were eliminated, the property of the estate upon Bixby's death would be distributed "to the heirs at law" in the same manner. In other words the clause simply means that upon Bixby's death the trust property shall be distributed according to law. And until Bixby dies there are no heirs, hence, until then Bixby is the only individual who, under the terms of the trust agreement, can lawfully claim any interest in the estate. Who the heirs maye be is purely problematical; until the testator dies their identity is unknown. Indeed, it is possible that upon the death of the testator there may be no "contingent remaindermen." Hence appellant, to adopt appellant's language in part, is contesting "this action only for the purpose of protecting the contingent remaindermen," to-wit, an uncertainty.

That plaintiff and respondent has a valid claim and is entitled to collect the judgment from the trust estate there can be no question. The trust agreement specifically provides that, "No interest of Fred H. Bixby, Jr., beneficiary hereunder in this trust, nor any part of such interest, shall in any event * * * be liable for any debt of his, or subject to any judgment rendered against him, or to the process of the court in aid of execution of any judgment so rendered." The law is well settled that such a trust for such a purpose is inoperative. In McColgan v. Walter Magee, Inc., 172 Cal. 182, at page 186, 155 P. 995, 997, Ann.Cas.1917D, 1050, appears the following:

"For this reason and upon grounds of public policy, it is further held that one cannot by any disposition of his own property put the same or the income thereof beyond the reach of his creditors, so long as he himself retains the right to receive and use it. * * * In Pacific Nat. Bank v. Windram, 133 Mass. 175, the court said: 'Creditors of the beneficiary have no right to complain that the founder did not give his property for their benefit, or that they cannot reach a greater interest in the property than the debtor has, or ever had. But when a man settles his property upon a trust in his own favor, with a clause restraining his power of alienating the income, he undertakes to put his own property out of the reach of his creditors, while he retains the beneficial use of it. The practical operation of the transaction is that he transfers a portion only of his interest, retaining in himself a beneficial interest, which he attempts by his own act to render inalienable by himself and exempt from liability for his debts. To permit a man thus to attach to a valuable interest in property retained by himself the quality of inalienability and of exemption from his debts, seems to us to be going further than a sound public policy will justify.' "

And in Sheean v. Michel, 6 Cal.2d 324, 57 P.2d 127, 130, the court declares:

"This court should not be expected to grant a certificate of approval to a plan the result of which is to tie up property for the benefit of the trustor and his family free from any application thereof to the payment of the trustor's just obligations. This view is sustained by the sound public policy, stated in the following cited authorities, that a person may not be permitted to have absolute and uncontrolled ownership of property for his own purposes and at the same time be able to keep it from his creditors." (See cases cited.)

Although the trust agreement provides that the trustee has a "first lien on the trust estate" "for its own services as such trustee," there is no showing that there is not sufficient to satisfy plaintiff's judgment in addition to such charges.

For the foregoing reasons, the judgment is affirmed.

YORK, P. J., and WHITE, J., concur.

BROCK v. HALL.

Civ. 13613.

District Court of Appeal, First District, Division 2, California.

Oct. 13, 1948.

Hearing Granted Dec. 9, 1948.*

1. Trusts ⚿112

Doctrine of implied gifts providing that intention of testator must be ascertained from will as a whole and that, when whole will shows without doubt intention to make a certain disposition which is not declared in express or adequate words, courts will carry such intended disposition into effect by implication, may be applied to inter vivos trusts.

2. Trusts ⚿112

In construing trusts cognizable in equity, court endeavors to ascertain intention of grantor.

3. Trusts ⚿112, 119

Necessity of upholding certainty of written instruments and parol evidence rule equally to wills and inter vivos trusts.

4. Trusts ⚿112

Ordinarily, only intention which has found expression in trust instrument determines nature and extent of its provisions, but intention of grantor need not have been expressed by specific words but may be derived from entire instrument as a whole, from its general scheme, or from informal language used by necessary implication which is not based on conjecture, but so strong that a contrary intention cannot be supposed to have existed in grantor's mind.

5. Trusts ⚿112

Terms of a trust are determined by intention of settlor at time of creation of trust, but not by his subsequent intention.

6. Trusts ⚿112

Fact that an express gift is stated for one situation may be used together with other indicia from whole of trust instrument as basis for implying a gift in another situation for which it was not made by express words. Civ.Code, § 1638.

---

* Subsequent opinion 206 P.2d 360.

7. Trusts 🔑112

Where trust instrument showed primary intent that two daughters of trustor benefit equally from income and corpus and provided that surviving issue of either would take deceased's share and that in absence of issue, surviving husband and sister each would take one-half, and that if either daughter died unmarried survivor would take deceased's entire share, a "gift by implication" in favor of surviving daughter upon death of married sister survived by neither husband nor issue would be sustained in absence of extrinsic evidence showing circumstances under which construction absurd on the face vesting reversion in living trustor would obtain meaning.

See Words and Phrases, Permanent Edition, for all other definitions of "Gift by Implication".

8. Trusts 🔑119

Where trust instrument showed primary intent that two daughters benefit equally from income and corpus and gave share of deceased daughter, who was married but died leaving no issue or husband surviving, to her surviving sister by implication, living trustor would be entitled to show by extrinsic evidence that a literal construction of the trust agreement permitted reversion of such share to himself by showing circumstances under which such construction, absurd on face of the instrument, would obtain meaning.

GOODELL, J., dissenting.

Appeal from Superior Court, City and County of San Francisco; Herbert C. Kaufman, Judge.

Action by Mildred Hall Brock against Elbert J. Hall, substituted as defendant for the trustee of a certain trust, to compel distribution to herself of the entire estate remaining in the hands of the trustee. From the judgment, plaintiff appeals.

Judgment reversed.

Lloyd W. Dinkelspiel, Donald W. Falconer, and Heller, Ehrman, White & McAuliffe, all of San Francisco, for appellant.

Pillsbury, Madison & Sutro, Maurice D. L. Fuller, and Francis N. Marshall, all of San Francisco, for respondent.

NOURSE, Presiding Justice.

This is an appeal by plaintiff Mildred Hall Brock from a judgment on an order sustaining without leave to amend a demurrer to her complaint for distribution to herself of the entire estate remaining in the hands of the trustee of a certain trust. On stipulation the trustor, her father Elbert J. Hall, was substituted as defendant for the trustee, against whom the action was originally brought and who continues the administration of the estate.

The trust deed, appended to the complaint, shows that on March 20, 1924, the trustor transferred to the trustee a sizable amount in bonds in trust for the benefit of his then minor daughters, Mildred Miriam, the appellant, and Carolyn Mary. It was provided that each of the two beneficiaries would from the age of eighteen to the age of thirty-five receive half of the income of the trust and on the reaching of the age of thirty-five one-half of the corpus absolutely. In the case of death of beneficiaries the trust agreement contains the following provisions, the interpretation of which is decisive of this appeal:

"In the event of the death of said Mildred Miriam Hall, or said Carolyn Mary Hall, the portion of said trust property or of the income thereof belonging to such deceased shall, if such deceased shall have married and leave issue, go to and vest in such issue, or if such deceased shall be married and leaving her surviving a husband but no issue, then one-half of her respective share of said trust property shall go to such surviving husband absolutely and discharged of these trusts, and the remaining one-half * * * to the survivor of said Mildred Miriam Hall and Carolyn Mary Hall; or if either of the last mentioned persons shall die, never having married, then the share of such deceased in said trust property shall * * * go to and vest in the other of them surviving."

The complaint alleged further in substance that appellant reached the age of thirty-five and that as to her portion of the trust estate the trust then terminated but that it continued as to the portion of her younger sister Carolyn; that said sister married James Grover, who subsequently died in the year 1945, and that some months later, on October 2nd, 1945, said Carolyn Hall Grover died leaving no children.

The court below held that the complaint did not state a cause of action as the contingency alleged to have occurred was not one giving plaintiff under the trust agreement the right to her sister's share of the trust estate. As there was no ambiguity in the words "never having married" the court declined to add a provision which the trustor had not written in the trust.

Appellant concedes that the words of the separate provisions of the trust instrument are not ambiguous and that the words "never having married" do not cover the situation alleged in the complaint, towit, that deceased had been married but died without husband or issue surviving. However she argues that if all the provisions of the trust are read together, a gift to her in that situation must by necessary implication be found, either from the four corners of the instrument, or on the basis of extrinsic evidence to be introduced by her. She claims that the words "never having married," though an inadequate expression, were intended to mean "without husband or issue surviving." The grounds for this contention will be detailed later. Respondent claims that as trustor he did not dispose of the trust estate in the events which actually have occurred; that therefore there was a constructive trust in his favor and that as matter of law he, not the appellant, is entitled to the trust estate under the facts alleged. He denies that the doctrine of implied gifts applies to inter vivos trusts; and that there is no basis for the proposed implication in the instrument in this case.

[1-3] Although the doctrine of implied gifts was developed mainly with respect to wills, there is no reason why it should not be applied to inter vivos trusts and it has been so applied. The principle is that the intention of the testator must be ascertained from his will as a whole, and that when the whole will shows without doubt the intention to make a certain disposition, which is not declared in express or adequate words, the courts will carry such intended disposition into effect by implication. 2 Page on Wills, sec. 930; 57 Am.Jur. 782, Wills, sec. 1192; Estate of Franck, 190 Cal. 28, 31, 210 P. 417, quoted by this court in Estate of Weber, 76 Cal.App. 723, 725, 726, 245 P. 776. As the purpose is better to approximate the intention of the grantor, the doctrine seems especially appropriate as to trusts, which are cognizable in equity, which always endeavors to ascertain the intention of the grantor. Lemmon v. Wilson, 204 S.C. 50, 28 S.E.2d 792, 799. The court may also have some more latitude in effectuating the intentions of the trustor in an inter vivos trust as there one of the reasons which restrict the freedom of interpretation of wills is not present; the necessity to uphold the certainty of written instruments and the parol evidence rule apply equally to wills and inter vivos trusts, but the additional reason given as to wills "that the testator's lips have been sealed" (Symonds v. Sherman, 219 Cal. 249, 256, 26 P.2d 293) has no application. Although we did not find in our State any cases in which the principle of implied gifts was applied to inter vivos trusts there are such cases in other jurisdictions, for instance First Nat. Bank & Trust Co. of Yonkers v. Palmer, 261 N.Y. 13, 184 N.E. 477; Manufacturers Trust Co. v. Chase National Bank, 171 Misc. 49, 11 N.Y.S.2d 895, affirmed 282 N.Y. 790, 27 N.E.2d 202; Bank of New York v. Vanneck, Sup. 68 N.Y.S.2d 226, 234; See also In re Scott's Trust, 322 Pa. 1, 184 A. 245, and compare the Restatement, Property, sec. 115a (with Appendix p. 16 et seq.), where the implication of cross-remainders is even held applicable to real property deeds, which are even more strictly construed than wills. 57 Am.Jur. 716. We hold that the fact that the instrument to be construed is an inter vivos trust agreement does not exclude the possibility of finding an implied gift.

[4] The court below was of the opinion that the rule that ordinarily only the

intention which has found expression in the instrument determines the nature and extent of its provisions (Chater v. Carter, 238 U.S. 572, 584, 35 S.Ct. 859, 59 L.Ed. 1462; Moxley v. Title Ins. & Trust Co., 27 Cal.2d 457, 165 P.2d 15, 163 A.L.R. 838; Title Ins. & Trust Co. v. Duffill, 191 Cal. 629, 642, 218 P. 14), was in itself sufficient to decide the case against appellant. However, this universally accepted rule has as its complement that the intention of the grantor need not have been expressed by specific words, but may be derived from the entire instrument as a whole, from its general scheme, or from informal language used, by necessary implication, i. e., implication not based on conjecture, but so strong that a contrary intention cannot be supposed to have existed in his mind. Estate of Blake, 157 Cal. 448, 466, 467, 108 P. 287; Estate of Heard, 25 Cal.2d 322, 326, 327, 153 P.2d 553; Estate of Franck and Estate of Weber, supra.

A classic statement of both rules combined was given by Gray, C. J., in Metcalf v. Framingham Parish, 128 Mass. 370, 374 as follows:

"The decision of this question doubtless depends upon the intention of the testator as manifested by the words that he has used, and an omission to express his intention cannot be supplied by conjecture. But if a reading of the whole will produces a conviction that the testator must necessarily have intended an interest to be given which is not bequeathed by express and formal words, the court must supply the defect by implication, and so mould the language of the testator as to carry into effect, so far as possible, the intention which it is of opinion that he has on the whole will sufficiently declared."

[5] The above statement was quoted with approval by the United States Supreme Court in Robison v. Portland Orphan Asylum, 123 U.S. 702, 707, 8 S.Ct. 327, 31 L.Ed. 293 and in Young Women's Christian Home v. French, 187 U.S. 401, 412, 23 S.Ct. 184, 47 L.Ed. 233. When we try to apply these principles to the instrument before us we find expressed in it, as a whole, a clear intention and scheme to set apart the whole of the trust estate primarily for the benefit of the two daughters each for one-half. So little did the trustor think of the possibility that any part of such a portion should return to him that he speaks of such a portion as "belonging to such deceased," even when it has not yet vested in her absolutely. In case of death of either of the daughters he provides in the first place that if the deceased daughter leaves issue, this issue shall take the whole portion of the deceased to the exclusion of everybody else; next if the deceased leaves no issue but a husband surviving then the trustor does not give all of the portion of the deceased to her said husband but only half of it; the other half he does not wish to revert to himself but he gives it to the surviving sister over and above the portion given directly to her, showing in so doing that he does not intend to benefit himself from any part of the trust estate so long as it can benefit one of the principal beneficiaries. There remains one more contingency to provide for, namely that a daughter dies leaving neither issue nor husband surviving in which situation on the basis of the preceding provisions a gift of all the portion to the remaining daughter must be expected. There actually follows as a final provision a gift of all the portion of the deceased to her surviving sister, but instead of describing the final contingency as "if such deceased shall leave neither husband nor issue surviving" it is described as if she shall die, "never having married," description probably induced by the unnecessary reference to the deceased having married in the two prior provisions, which provide for the issue or husband of the deceased. But whatever may have been the origin of the inadequate expression used, there can be no doubt reading all the provisions together that trustor intended to describe the remaining contingency, that the deceased would leave neither husband nor issue. If the last provision as written had stood alone we would have been compelled to hold that the gift to the surviving daughter was conditioned on her deceased sister never having married, but the provision directly preceding shows

clearly that this was not what trustor intended as he there made a gift to the surviving daughter notwithstanding the fact that the deceased had married, a gift restricted to half of the portion because of the survival of the husband. It would be absurd to say that the trustor wished the surviving sister to take all if the deceased sister died unmarried, to take half if she died married and leaving only a husband but to take nothing if the deceaesed died married and not leaving anybody for whom provision should be made. Although appellant argued the absurdity of such construction at length, respondent trustor did not suggest any reason why he should have intended this irrational result. He contends that the fact that he is contesting appellant's construction shows sufficiently that his intention was not what appellant supposed it to be. This is not so. His attitude in these proceedings only shows his present desire. "The terms of the trust are determined by the intention of the settlor at the time of the creation of the trust, and not by his subsequent intention." 2 Scott on Trust 830. Too often a party to an instrument who has changed his mind tries to use involuntary omissions or inadequacies of language in the instrument as loopholes by which to avoid the consequences of his former intention, an attitude not to be encouraged by the courts by a too strict interpretation. We can find here a gift by implication in the contingency which occurred without any conjecture. Our choice is between a rational scheme of disposition implied in the trust agreement as a whole and an adherence to the express language only, resulting in an absurdity which respondent himself does not even try to explain. "When courts find it necessary to consider wills or contracts, it is usual to assume that the party promulgating the instrument acted upon rational considerations and to reasonable effects and ends." Cleveland Clinic Foundation v. Humphrys, 6 Cir., 97 F.2d 849, 857, 121 A.L.R. 163. Our statute does not require the express language to govern the interpretation of contracts, where it involves an absurdity. Civil Code sec. 1638; Bennett v. Potter, 180 Cal. 736, 741, 183 P. 156; Jackson v. Puget Sound Lumber Co., 123 Cal. 97, 100, 55 P. 788. There can here be neither doubt whether the trustor intended the surviving daughter to take in the contingency that happened nor what he intended her to take. There is no conjecture where there is only one reasonable possibility.

[6] Respondent argues that implication cannot be used to add an unexpressed gift in one contingency in behalf of the same person to whom a gift is made by express words in an opposite contingency and distinguishes Estate of Blake, supra, on that ground. There is no merit in the distinction. To the contrary the fact that an express gift was stated for one situation has often been used together with other indicia from the whole of the instrument as basis for implying a gift in another situation for which it was not made by express words. In Re Selner's Estate, 261 App.Div. 618, 26 N.Y.S.2d 783, affirmed 287 N.Y. 664, 39 N.E.2d 287, an express residuary gift to testator's three sons was only made in the event his wife predeceased him; in case he left the wife surviving the residue was given in trust to the sons to pay the income to the wife for life without express disposition of the corpus of the trust. The wife survived and the court sustained by implication a bequest of the corpus to the sons stating, 26 N.Y.S.2d at page 786: "When a will does not contain a mention of particular property, or of an estate, or an express bequest or devise of such property or estate, in one contingency, then such property or estate may not be, in another contingency, the subject of a bequest or devise by implication through the medium of a construction of the testament. * * * If, however, the property or estate claimed to be bequeathed or devised by implication, in a contingency which has occurred, has been made the subject of an express bequest or devise in another contingency, which did not occur, then effect may be given to such bequest or devise by implication, in the contingency which did occur, if a reading of the entire will makes manifest that such was the intention of the testator." See for other applications of the same principle of implication in

addition to an express gift to the same beneficiary: City Bank Farmers' Trust Co. v. Hentz, 107 N.J.Eq. 283, 152 A. 331; In re Lytell's Estate, 178 Misc. 996, 36 N.Y.S.2d 1004. First Nat. Bank & Trust Co. of Yonkers v. Palmer; Manufacturers Trust Co. v. Chase Nat. Bank and Bank of New York v. Vanneck, all mentioned supra as examples of implications of gifts in inter vivos trusts belong to this same class. In the first mentioned case for instance the trustor had instituted two identical trusts for the benefit of her husband, a sister of her hubsand and in each trust for one of her two sons. The income of each trust was to be paid as follows: During the life of the sister-in-law to her $1500 a year; the remaining income with certain deductions to the husband during his life. If the husband should die before his sister the income payable to him was to go to his son, or to the son's descendants. There was no express provision for the disposition of the income in the contingency which happened, to wit, that the husband would survive his sister and die before the son. The majority of the court raised a gift by implication to the son, although the trustor herself claimed the income. Three judges dissented. However in the later Manufacturers Trust case, supra, the Court of Appeals of New York was unanimous in upholding the raising of the gift by implication.

There has even developed an established rule that if an estate for life is given determinable upon marriage, with a gift over on the marriage but without any express gift over in case of death, a gift over to the same beneficiary is implied on death without marriage. In re Schriever's Estate, 221 N.Y. 268, 116 N.E. 995, 57 Am. Jur. 787; 122 A.L.R. 120.

[7] In the case before us we also hold that on the face of the instrument as a whole a gift by implication to the surviving daughter is indicated in the contingency alleged to have occurred.

We are aware that the cases are not consistent and that cases can be found which in a situation comparable to the one before us, refuse to imply a gift on the ground that that would be making a will for the testator (or a trust agreement for the trustor). However, as suggested by Simes (Future Interests, Vol. 2, p. 255), if the instrument contains language sufficient to indicate an intention that the beneficiary take in the contingency which occurred, the gift is not made by the court, but by the trustor himself quite as effectively as if he did so in express words.

We are also aware that in this jurisdiction, although the principle of implied gift is expressly recognized, only a restricted number of cases actually applies it. However, it is said in Estate of Blake, supra, 157 Cal. at page 468, 108 P. at page 295: "the tendency of modern cases is rather to extend than narrow the rule of raising devises by implication" and we think that such development is in line with the general progress to "flexible rationalism" in interpretation seen by Wigmore (On Evidence, sec. 2461).

[8] As we hold that the implied gift proposed can be found from the four corners of the alleged instrument we need not decide whether extrinsic evidence would be admissible to support such implication. However we wish to point out that trustor will still be entitled to support by such evidence the literal construction of the several provisions of the trust agreement by showing circumstances or relations under which a construction which seems absurd on the face of the instrument would obtain meaning. Such evidence would tend to sustain not to vary the instrument. Mahana v. Los Angeles E & M Co., 82 Cal.App. 710, 715, 256 P. 279. Evidently appellant would then be entitled to rebuttal.

The judgment is reversed.

DOOLING, J., concurs.

GOODELL, Justice (dissenting).

I dissent.

The prevailing opinion cites First National Bank, etc. v. Palmer, 261 N.Y. 13, 184 N.E. 477, a four-to-three decision. The dissenting opinion in that case written by Judge Kellogg, concurred in by Judges Pound and Crouch, states the correct rule as I see it. Chater v. Carter, 238 U.S. 572, 35 S.Ct. 859, 59 L.Ed. 1462, is to the same effect. In Title Ins. & Trust Co. v. Duffill, 191 Cal. 629, 642, 218 P. 14, 18, our Supreme Court, in citing the Chater case says: "In seeking the true construction of a declaration of trust, the guiding principle must be the intention of the settlor—his intention as expressed. Not, what did he intend to say? but, What did he intend by what he did say? must be the test."

I think the case was correctly decided in the trial court.

---

88 Cal.App.2d 18

BRODERICK v. TORRESAN et al.

Civ. 13798.

District Court of Appeal, First District, Division 1, California.

Oct. 15, 1948.

As Modified Oct. 20, 1948.

Rehearing Denied Oct. 29, 1948.

1. Mechanics' liens ⇨288(1)

In proceeding to foreclose a mechanic's lien on a building, wherein defendants contended that plaintiff failed to comply with specifications, and wherein plaintiff contended that there had been changes and substitutions in specifications, whether changes and substitutions were authorized was for trier of facts.

2. Appeal and error ⇨989

An appellate court's power begins and ends with a determination of whether there is any substantial evidence to support the findings.

3. Appeal and error ⇨996

Where two inferences are reasonably deducible from facts, appellate court is forbidden to substitute its deductions for those of the trial court.

4. Appeal and error ⇨931(1)

All conflicts in the evidence must be resolved in favor of respondent and all reasonable inferences must be indulged in favor of findings of the trier of facts.

5. Mechanics' liens ⇨263(8)

If defendants in proceeding to foreclose a mechanic's lien on building deemed that order, refusing to hear evidence that two actions by subcontractors to foreclose liens were pending, was unjust and unfair, defendants should have invoked statute permitting impleading of claimants to moneys withheld by owner in response to notices of mechanics' liens. Code Civ.Proc. § 1184a, 1195.

6. Trial ⇨133(6)

Where trial was had before court without jury, and when counsel for plaintiff remarked to counsel for defendants, "your whole defense is a piece of bunk", trial judge immediately stated that he would disregard the remark, making of the remark did not require reversal of judgment for plaintiff.

7. Interest ⇨22(1)

In proceeding to foreclose mechanic's lien on building, interest should not have been allowed on portion of judgment covering extras not furnished pursuant to the contract.

◆

Appeal from Superior Court, San Mateo County; A. R. Cotton, Judge.

Proceeding by Thomas J. Broderick against Louisa Torresan and Sante Torresan to foreclose a mechanic's lien on a building constructed by plaintiff for defendants, wherein defendants filed a cross-complaint. From a judgment for plaintiff and from an order denying defendants' motion for new trial, defendants appeal.

Judgment modified and, as modified affirmed.

Alfred Del Carlo, of San Francisco, for appellants.

Chas. C. Sullivan, of San Francisco, for respondent.

WARD, Justice.

Appellants' opening brief states that this is an appeal from a judgment in favor of plaintiff and against defendants foreclosing a mechanic's lien on a building constructed for defendants in accordance with a contract and plans and specifications, allegedly signed by all of the interested parties, and "from the order denying defendants' motion for a new trial." The quoted portion is not supported by the notice of appeal and in any event the order is not appealable and will be disregarded.

The complaint, in addition to the ordinary language seeking foreclosure of a mechanic's lien, sets forth that a written contract dated March 12, 1946, was entered into between plaintiff and defendants for the erection of a one-story building pursuant to plans and specifications filed with the county recorder for the agreed price of $10,860, payable in five equal installments. The fifth payment is alleged to be due thirty-five days after completion. Of the original contract price there remains unpaid the sum of $1,344. It is also alleged that defendants, after the execution of the original contract, requested extras as set forth in the complaint, which required work, labor and materials amounting to the sum of $1,253.20.

Defendants denied that any extra work had been requested and alleged that plaintiff failed to complete the building in accordance with the plans and specifications. In an amended cross-complaint they set forth eight particulars wherein plaintiff failed to live up to the contract and the plans and specifications. Defendants state the amount required to complete the building and claim damages in the sum of $5,000, which figure includes $3,350 general damages. Plaintiff denied the pertinent allegations of the amended cross-complaint.

The court found for the plaintiff and cross-defendant and gave judgment in the sum of $2,597.20, with legal interest from December 12, 1946, the date the money became due on the contract.

Defendants present six points as the basis for a reversal. Four, listed as I, II, IV and V, are addressed to the sufficiency of the evidence to support the court's findings. They are: I. Whether the contract and plans were signed by the parties. II. Whether the plans and specifications filed in the recorder's office were substitutes. IV. Was plaintiff authorized to make changes and additions culminating in a bill for $1,418.42? V. Did defendants suffer detriment by plaintiff's cutting down the rear of the building and putting a sun porch thereon?

[1] The county recorder's office identified the contract, with specifications attached, filed in his office. Plaintiff testified, referring to the plans and specifications: "Yes, Mrs. Torresan and her husband and I signed those." Plaintiff also testified to the request for certain changes and additions to the plans, and as to the cost and details thereof. The issue was for the trial judge. Fish v. Security-First Nat. Bank, 31 Cal.2d 378, 189 P.2d 10. A deputy building inspector testified that he examined the building and checked with the plans and specifications and that there were some minor changes, but that he approved the building in his capacity as a building inspector. Whether defendants suffered detriment by the substitution of the sun porch is, like the matters previously set forth, purely a question of fact.

[2-4] Defendants introduced evidence that tended to contradict that of plaintiff and may have raised a suspicion that plaintiff's testimony was not one hundred percent correct. Defendants completely overlook the well-established rule that an appellate court's power begins and ends with a determination of whether there is any substantial evidence to support the findings. In re Estate of Bristol, 23 Cal.2d 221, 143 P.2d 689; In re Estate of Meister, 77 Cal.App.2d 487, 489, 175 P.2d 574. "(1) When two inferences are reasonably deducible from the facts the appellate court is forbidden to substitute its deductions for those of the trial court; (2) all conflicts must be resolved in favor of respondent and all reasonable inferences must be indulged in favor of the findings; (3) the power of the appellate court begins and ends with its determination that there is or is not substantial evidence to support the finding." Barham v. Khoury, 78 Cal.App.2d 204, 211, 177 P.2d 579, 583.

[5] Defendants claim that the trial court erred in refusing to hear evidence that two actions by subcontractors to fore-

close liens were pending. It is argued in the briefs that if the present judgment is allowed to stand defendants may be forced to make double payment on the same claims. Assuming that defendants at the time of the ruling concluded that the order was unjust and unfair, they should have invoked the provisions of the Code of Civil Procedure. "Upon the demand of the owner the court shall require all claimants to the moneys withheld by the owner in response to such notices [of mechanics' liens] to be impleaded in said action, to the end that the respective rights of all parties may be adjudicated and settled therein." Code Civ. Proc., sec. 1184a. "Any number of persons claiming liens may join in the same action and when separate actions are commenced, the court may consolidate them." Code Civ.Proc., sec. 1195. However, before the submission of the case in this court, plaintiff and defendants entered into the following written stipulation: "It is stipulated that in the event the judgment of the trial court is affirmed the amount of the lien claim of W. P. Fuller & Co., in the sum of $495.00, upon which suit was instituted against respondent and appellants and in which suit respondent is one of the defendants and a default was entered against him in the Superior Court of the State of California, in and for the County of San Mateo, and the amount of the lien claim of California Terrazzo Co., in the sum of $225.00, and upon which suit was likewise instituted against respondent and appellants in said Court and upon which a default was entered against respondent, appellants having since the judgment in this action purchased each of the above claims and each of the causes of action instituted thereon to enforce said liens from their said owners and which appellants are now the owners of each of the same, may upon satisfaction of each of said claims being delivered to respondent properly acknowledged for filing or recording, be deducted from the amount of the judgment."

[6] Exception is taken to the trial court's order overruling defendants' objections to the admission of evidence, and to certain remarks made by plaintiff's counsel. An examination of the record does not disclose that defendants were precluded from presenting relevant and material evidence. Counsel for plaintiff remarked to counsel for defendants: "* * * your whole defense is a piece of bunk." The trial judge immediately said: "I will disregard the remark." In defendants' brief and during the trial the remark is referred to as an insult. Counsel for defendants states that the comment * * * was clearly uncalled for." This court agrees that it was, but in the absence of a jury, and in view of the trial court's statement that the remark would be disregarded, it may not be considered as prejudicial to the extent of justifying an order reversing the judgment.

[7] The trial court erred in allowing interest on the total amount of the judgment from December 12, 1946. The judgment represents the balance due on the contract plus the charges for extras. Defendants contend that although interest on materials and labor furnished pursuant to the contract can be allowed from the date the money became due, interest on the portion of the judgment covering extras should be allowed only from the date of the judgment. It is said in Combs v. Eberhard, 120 Cal.App. 25, 30, 7 P.2d 338, 341: "However, as to the extras furnished by the contractor and the labor and materials furnished by the other two plaintiffs direct to the defendant, the fair and reasonable value was required to be ascertained by the judgment of the court and therefore interest should be allowed only from the date of the judgment."

The parties have stipulated that the amount of this excess interest is $80.47. The findings, conclusions and judgment are hereby modified to provide that the sum of $80.47, interest on the amount of extras, to-wit, $1,253.20, from the date of the filing of the complaint, viz., December 14, 1946, to the date of the judgment by the superior court to-wit, November 13, 1947, be deducted from the judgment of $2,862.38 in accordance with the stipulation of the parties. When the stipulation contained herein relative to the W. P. Fuller & Co. and California Terrazzo Co. lien claims are complied with, the trial court is directed to modify the findings of fact and conclusions of law and the judgment in accordance with the stipulation. As so modified, the judgment will stand affirmed. Respondent to recover his costs on appeal.

PETERS, P. J., and BRAY, J., concur.

◆

87 Cal.App.2d 784

SILVA v. CITY AND COUNTY OF SAN FRANCISCO.

Civ. 13730.

District Court of Appeal, First District, Division 1, California.

Oct. 5, 1948.

Hearing Denied Dec. 2, 1948.

1. Eminent domain 🔑277

Where city board of supervisors ordered that city block be taken from private ownership and put to public use as a playground and board added sum to be allocated for purchase of realty in the block but there had been no actual entry or physical interference with plaintiff's property, suit in the nature of inverse condemnation action would not lie.

2. Eminent domain 🔑63

Compensation for taking of private property for public use is not payable until there is a taking or progress is made in contemplated improvement.

3. Eminent domain 🔑130, 134

In determining damages in eminent domain proceeding, prospective price which might be procured for property is not controlling, but rather purpose to which land is intended and to which it may be adapted should be considered; and, in closely disputed matters, rights of individual are subordinate to those of governmental agency. Code Civ.Proc. § 1249.

4. Eminent domain 🔑174

Petition or complaint for condemnation should be filed within time prescribed in statute or ordinance; and, if in county proceedings no requirement is imposed by ordinance, complaint may be filed in accordance with resolution if such resolution contains all essentials of an ordinance. Code Civ.Proc. § 1249.

5. Evidence 🔑18

District Court of Appeal may judicially notice that real estate values do not remain constant.

6. Appeal and error 🔑949

If petition for declaratory relief is refused, parties are not entitled to review unless it affirmatively appears that trial court abused its discretion. Code Civ.Proc. §§ 1060, 1061.

7. Declaratory judgment 🔑62

To entitle one to a declaratory judgment, not only must controversy be a "justiciable controversy" as distinguished from a dispute of a hypothetical character, but it must be definite and concrete touching legal relations of parties having adverse legal interests and must be of character which admits of specific and conclusive relief by judgment within field of judicial determination, and judgment must decree what parties may or may not do. Code Civ.Proc. §§ 1060, 1061.

See Words and Phrases, Permanent Edition, for all other definitions of "Justiciable Controversy".

8. Declaratory judgment 🔑81

Where city board of supervisors resolved that block be taken from private ownership and put to public use as a playground and that condemnation proceedings could be brought when necesary, but there had been no taking, no entry, and no physical interference with property, landowner was not entitled to declaratory judgment determining value of property if and when city should in fact condemn it. Code Civ. Proc. §§ 1060, 1061.

Appeal from Superior Court, City and County of San Francisco; Thos. M. Foley, Judge.

Action by Reynaldo J. Silva, as administrator of the estate of Jessie A. Silva, deceased, against the City and County of San Francisco, a municipal corporation, for a declaratory judgment determining the value of plaintiff's property in view of possible condemnation thereof. From the judgment, plaintiff appeals.

Judgment affirmed.

Lloyd Macomber, of San Francisco, for appellant.

John J. O'Toole, City Atty., and Reynald J. Bianchi, Deputy City Atty., both of San Francisco, for respondent.

WARD, Justice.

This is an appeal from a judgment entered after sustaining a demurrer to an amended complaint without leave to amend. The defendant demurred generally on the ground that the complaint did not set forth facts sufficient to constitute a cause of action, and specifically on twenty-nine grounds of uncertainty, unintelligibility and ambiguity. On this appeal attention will be directed solely to the general demurrer.

A piece of property on Stanyan Street north of Rivoli Street, on which there is a two-story residence, belongs to the estate of Jessie A. Silva, deceased. The purpose of this action is to find judicially that a controversy exists with respect thereto; that defendant by virtue of its right of eminent domain "has a prior and superior claim thereto, subject only to the condition that defendant make proper compensation to the owner"; that "The proper compensation for the taking of said real property by defendant is the actual market value of said property as it was at the time of the filing of the complaint herein." The complaint further alleges that "said Board of Supervisors did then and there resolve, order, declare and enact that said city block number 1283 be taken away from private ownership and put to said public use as a playground for the school children of said Grattan public school; that the twenty-five separate lots therein, and comprising said block, be secured from their respective owners by purchase, and condemnation proceedings when necessary; that all dwelling houses and buildings thereon be removed, and the said block number 1283, in its entirety, be converted into a playground for the pupils of the said Grattan Public School. And on said 22nd day of May, 1935, the said Board of Supervisors duly added to the city budget for the fiscal year, 1935-1936, the sum of twenty-five thousand dollars allocated for and to be applied to the purchase of realty in said block." The complaint alleges in effect that "condemnation proceedings when necessary" may be brought on behalf of the Recreation Department of the City and County of San Francisco and land may be declared available for school, athletic or recreation purposes. Kern County High School v. McDonald, 180 Cal. 7, 179 P. 180.

The complaint alleges that the inheritance tax appraiser in the estate of Jessie A. Silva, deceased, appraised the property at $8,000; that it is worth $10,000, but that some one connected with the city government has offered only $5,500 for the property. Plaintiff alleges that "Real estate values in this City and County of San Francisco, and especially residential values, are, relatively speaking, very high at the present time; and for this reason, and for other reasons, it is the desire of plaintiff and his fellow heirs to the estate of said Jessie A. Silva to sell and dispose of said real property of said estate at once and to receive therefor its fair market value."

Plaintiff presents two "propositions" as remedies and argues that either supports his contention that the complaint states a cause of action. The first theory is that condemnation proceedings have been authorized and that therefore the plaintiff may maintain a suit—designated as an "inverse condemnation action"—upon the authority of Lamb v. California Water & Tel. Co., 21 Cal.2d 33, 129 P.2d 371. The second "proposition" is that plaintiff is entitled to sue for declaratory relief irrespective of the first "proposition." It should be noted that Lamb v. California Water & Tel. Co., supra, is an action for declaratory relief based upon a contract, though in addition to a declaration of rights under the contract plaintiff sought that certain water rights be declared an easement and a perpetual burden upon defendant. Plaintiff in that action also sought an injunction.

[1] In the present action plaintiff's property has not been appropriated. In the Lamb case the contrary was true. Plaintiff and defendant in that case operated under a contract and it was claimed injury

occurred by reason of a violation of its terms by defendant. It is said, 21 Cal.2d at page 42, 129 P.2d at page 376: "The question therefore decisive of this appeal, is whether a public utility which had already dedicated and appropriated the waters of a lower riparian owner to a public use may subsequently enter into a contract with the lower riparian owner, granting to him in exchange for his waiver of damages for the diversion of his waters, a perpetual right expressly made appurtenant to his land to receive so much of the appropriated water as is necessary for his land at a fixed monetary rate which is not subject to regulation by public authority." In the Lamb case it was held that plaintiff was not entitled to any form of relief. In Collier v. Merced Irr. Dist., 213 Cal. 554, 565, 2 P.2d 790, 794, a case in which conflicting claims were raised between a riparian proprietor and an irrigation district, it is said: "This cause is in effect the reverse of a condemnation proceeding—a proceeding to fix damages after the taking and not before the taking of the property as enjoined by the Constitution. * * * There was, therefore, no objection to respondent here, who has the right to invoke the power of eminent domain, tendering the issue by answer or cross-complaint of its own claims to the property and after these were settled to allow the action to be tried as if in an eminent domain proceeding. The answer of respondent contained every element of a cross-complaint in such an action."

[2, 3] In the present case there has been no taking of the land—no entry or physical interference with plaintiff's property. Compensation is not payable until there is a "taking," or progress is made in the contemplated improvement. Compensation in different jurisdictions may be fixed as of the time of taking, the time of the institution of proceedings to condemn the property, or at the time of the judgment of award. 29 C.J.S., Eminent Domain, § 185, p. 1068. Ordinarily in California in assessing damages or compensation, the market value is taken as of the date of the issuance of the summons unless a delay of a year occurs, not caused by the defendant. Code Civ.Proc., sec. 1249. If so, the date of trial is the date of the accrual of damages. The prospective price which might be procured is not controlling, rather the purpose to which the land is intended and to which it may be adapted should be considered. People v. Olsen, 109 Cal.App. 523, 533, 293 P. 645. In closely disputed matters the rights of the individual are subordinate to those of the governmental agency. 29 C.J.S., Eminent Domain, § 2, p. 780.

[4] Assuming the proper rule to be that compensation in such cases shall accrue at the date of the issuance of summons there is no statutory rule called to this court's attention which provides that the government's complaint herein must be filed within a given period. The petition or complaint should be filed within the time prescribed in the statute or ordinance. If in county proceedings no requirement is imposed by ordinance, then the complaint may be filed in accordance with a resolution if such resolution contains all the essentials of an ordinance. The complaint herein alleges that the board of supervisors resolved that the property should be obtained by purchase "and condemnation proceedings when necessary." This language quoted from the resolution disposes of "proposition number 1." The resolution of the board of supervisors does not purport to authorize a property owner to designate when condemnation proceedings are "necessary."

[5] Plaintiff admits that in respect to proposition number one "the City might conceivably set up in its answer to the complaint, and prove at the trial, a sufficient defense to the action in respect to actual condemnation, and be dismissed as to that, nevertheless as to the prayer for declaratory relief there could be no defense if the facts of the complaint were established." It is contended that no harm may be inflicted by a declaratory relief judgment. Plaintiff further states that "If for any reason whatever the City should decide not to take the land everything is off, and the City pays nothing. The complaint merely asks for the appraisal of the land." The court may take judicial knowledge that real estate values do not remain constant. The value fixed during the present period may be disproportionate to what should be paid when the recreation department of

the city decides to use the property as part of a "playground." Plaintiff seeks a final determination that the property is worth $10,000 and that *if* and *when* defendant chooses to take the property this will be the amount it must pay.

[6-8] Any person interested in cases of actual controversy relating to legal rights and duties of the respective parties may seek a judicial declaration thereof in either an affirmative or negative form (Code Civ. Proc., sec. 1060), but the court may refuse to act where its declaration is not necessary at the time and under all of the circumstances. Code Civ.Proc., sec. 1061. The present complaint alleges in substance that the value of the property may be determined through condemnation proceedings when defendant deems it "necessary." The only declaratory judgment that could be rendered under the allegations of the complaint would be of an advisory nature—namely, that when defendant deems it necessary to institute condemnation proceedings the price be fixed at the then market value.

Monahan v. Dept. of Water and Power, 48 Cal.App.2d 746, 120 P.2d 730, was an action for declaratory relief. The trial court sustained a general demurrer to the complaint without leave to amend. On appeal it was held that if the complaint or petition is refused, the parties are not entitled to a review unless it affirmatively appears that the trial court abused it discretion. The court there said, 48 Cal.App. 2d at page 751, 120 P.2d at page 732: "In that connection we may well observe that not only must the controversy be a justiciable controversy, as distinguished from 'a difference or dispute of a hypothetical or abstract character; from one that is academic or moot', but it must be 'definite and concrete, touching the legal relations of parties having adverse legal interests.' Ætna Life Ins. Co. v. Haworth, 300 U.S. 227, 57 S.Ct. 461, 464, 81 L.Ed. 617, 108 A. L.R. 1000. In short, the controversy must be of a character which admits of specific and conclusive relief by judgment within the field of judicial determination, as distinguished from an advisory opinion upon a particular or hypothetical state of facts. The judgment must decree, and not suggest, what the parties may or may not do." See, also, Conroy v. Civil Service Commission, 75 Cal.App.2d 450, 171 P.2d 500.

In the present case it does not appear that a controversy exists which requires a declaratory judgment, and that defendant does not deem it "necessary" to acquire the property through condemnation proceedings. Further amendment of the complaint would serve no practical purpose in "stabilizing an uncertain or disputed jural relation." Maguire v. Hibernia S. & L. Soc., 23 Cal.2d 719, 729, 146 P.2d 673, 678, 151 A.L.R. 1062; New York Foreign Trade Zone Operators, Inc. v. State Liquor Authority, 285 N.Y. 272, 34 N.E.2d 316; Columbia Pictures Corp. v. De Toth, 26 Cal. 2d 753, 161 P.2d 217, 162 A.L.R. 747.

The judgment in favor of defendant is affirmed.

PETERS, P. J., and BRAY, J., concur.

---

87 Cal.App.2d 867

PEOPLE v. GONZALES.

Cr. 661.

District Court of Appeal, Fourth District, California.

Oct. 8, 1948.

1. Homicide 🔑250

In murder prosecution, evidence was sufficient to sustain finding that defendant shot deceased. Pen.Code, § 187.

2. Homicide 🔑332(2)

Where there was sufficient substantial, though conflicting, evidence to connect defendant with shooting of deceased, weight to be given such evidence was for jury to determine in murder prosecution, and jury's conclusion could not be disturbed on appeal. Pen.Code, § 1126.

3. Homicide 🔑166(1)

Presence or absence of motive is circumstance going to question of guilt or innocence of accused in murder prosecution, and proof thereof is admissible.

4. Homicide ⊂⊃166(1)

Considerable latitude is allowed in reception of evidence on question of motive in a murder prosecution.

5. Criminal law ⊂⊃371(12)
Homicide ⊂⊃166(1)

Evidence having a direct tendency, in view of surrounding circumstances, to prove motive on part of accused to commit homicide, and thus to solve a doubt either as to identity of slayer, degree of offense, insanity of accused, or justification or excusability of act, is admissible, however discreditably it may reflect on accused, and even where it may show him guilty of other crimes.

6. Criminal law ⊂⊃1171(2)

In murder prosecution, district attorney's statement to jury, in his opening statement, that he expected to prove as a motive for the killing, that deceased's girl friend had been raped by defendant and others, and the girl friend told the deceased about being raped, was not prejudicial misconduct, since evidence to that effect was admissible to establish motive.

7. Homicide ⊂⊃203(1, 3)

Statements of deceased to be admissible as dying declarations, must have been made at a time when deceased had abandoned all hope of life so that he believed that death inevitably must follow, and such sense of impending death may be shown in any satisfactory mode, by express language of the deceased, or be inspired from his evident danger, or opinions of medical or other attendants stated to him, or from his conduct, or other circumstances.

8. Homicide ⊂⊃218

In determining admissibility of statements as dying declarations, court in murder prosecution had right to consider deceased's physical condition, nature of his wounds, his knowledge of his serious condition, his conduct, and his statements.

9. Homicide ⊂⊃218, 331

It is trial judge's province to determine sufficiency of foundation proof which will entitle dying statements to be admitted, and, unless there is an apparent abuse of discretion, ruling will not be disturbed on appeal.

10. Criminal law ⊂⊃1144(14)

Where defendant, on appeal, failed to bring up instructions, both given and refused, District Court of Appeal could not presume that trial court failed or refused to give certain instructions.

11. Homicide ⊂⊃203(3)

In murder prosecution, wherein there was evidence that deceased, at time of declarations, was in extreme pain from abdominal gunshot wound of such a serious nature that surgery was discontinued, that he was non-co-operative and continued fighting doctors after they had informed that if he did not co-operate they did not have much chance to save his life, and that within a short time the deceased asked for his parents, admission of deceased's declarations as dying declarations was not abuse of discretion.

12. Criminal law ⊂⊃404(4), 741(1)

In murder prosecution, wherein deceased's dying declaration that he had been shot by "the guy in the yellow sweater" had been introduced, yellow bathing suit allegedly worn by defendant was properly admitted, and weight to be given such evidence was for jury to determine.

13. Criminal law ⊂⊃696(1)

In murder prosecution, court properly refused to strike testimony of girl that she had met deceased about one week before he was fatally shot, that she saw him every day thereafter, and that several days before shooting defendant and others had raped her, and that she had informed deceased of fact that defendant had raped her, since testimony was admissible to show motive.

14. Homicide ⊂⊃144

No rule can be laid down as to character or amount of proof necessary to show deliberation and premeditation in a murder prosecution, and elements of murder in the first degree may not be inferred from the killing alone, but are matters of fact which cannot be implied as a matter of law. Pen. Code, §§ 187, 189.

15. Homicide ⚿18(1), 22(1)

To constitute "murder in first degree", homicide must have been perpetrated by means of poison, or lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or must have been committed in perpetration of certain enumerated felonies. Pen.Code, §§ 187, 189.

See Words and Phrases, Permanent Edition, for all other definitions of "Murder in First Degree".

16. Homicide ⚿269

In a murder prosecution, it is jury's exclusive province to determine from evidence whether killing was willful, deliberate, and premeditated act of defendant. Pen.Code, §§ 187, 189.

17. Homicide ⚿22(2)

Words "deliberate and premeditated", within meaning of statute making a "deliberate and premeditated" killing first-degree murder, indicate generally a careful consideration and examination of reasons for and against a choice or measure, some plan thought out before commission of the act, and a decision to act according to a plan. Pen.Code, § 189.

See Words and Phrases, Permanent Edition, for all other definitions of "Deliberate and Premeditated".

18. Homicide ⚿253(3), 254

Evidence that defendant and deceased were not on unfriendly terms until shortly before deceased was shot, that someone suggested that they go into alley to settle their differences in a fair fight, that one or two blows were struck, that defendant took a black object which looked like a gun from his person, and that a shot was heard, was insufficient to show "murder in first degree" for failure to show that killing was "deliberate and premeditated" and established merely "murder in second degree". Pen. Code, §§ 187, 189.

See Words and Phrases, Permanent Edition, for all other definitions of "Murder in Second Degree".

19. Homicide ⚿23(1), 146

When an unlawful killing and nothing further is shown, presumption of law is that homicide was malicious and an act of "murder", but in such a case verdict should be "murder in second degree" and not "murder in first degree". Pen.Code, §§ 187, 189.

See Words and Phrases, Permanent Edition, for all other definitions of "Murder".

20. Homicide ⚿347

Where evidence was insufficient to sustain first degree murder conviction, but was sufficient to establish murder in the second degree, District Court of Appeal modified judgment by reducing it to second degree murder and affirmed the judgment as modified. Pen.Code, §§ 187, 189.

◆

Appeal from Superior Court, Riverside County; Russell S. Waite, Judge.

Charles J. Gonzales was convicted of first-degree murder, and he appeals.

Judgment modified by reducing it to second-degree murder and, as modified, affirmed, and cause remanded with directions.

Robert D. Allen, of Riverside, for appellant.

Fred N. Howser, Atty. Gen., and Henry A. Dietz, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

Defendant was charged with the offense of murdering one Paul Matthews. A jury trial resulted in a verdict of guilty of murder in the first degree with recommendation of life imprisonment.

On September 21, 1947, defendant, while in the United States Army Air Force, was acting as a life guard at March Field. In his duties he wore a bathing suit and he had several of them set aside for this purpose. One was "yellow-colored" which he wore most of the time. Defendant there met Matthews, who was a civilian employee in Riverside. With him were Ralph Fisher and Floyd Hill, who were servicemen. They ate dinner at the mess hall. Matthews was using a pass belonging to some serviceman. After "chow" the boys went to their barracks to dress in civilian clothes. Defendant wore a yellow sweater and a pair of slacks. They all went to the city and arrived at the Q. P. Ice Cream Store.

There, at about 6:30 p. m., before dark, defendant and Matthews were talking for about five minutes. According to Hill's testimony, something was said by one of them (he believed it was Gonzales) about "going into the alley" and "settle their differences" and something about "a fair fight"; that these four men walked out around the corner and into the alley; that at first Matthews and Fisher were in front and later defendant and Matthews were in front and Fisher and Hill were in the rear; that Hill leaned against the building in the alley, about six feet away from Gonzales and Matthews, who assumed a fist-fighting position; that a couple of blows were struck and Matthews said something about "not pulling a knife"; that defendant "reached for something * * * toward his stomach * * * about belt high" and he saw a black object which looked like a gun and the next thing he knew he heard a shot and he started to run; that he ran up the alley and as he was doing so he looked around and saw Gonzales coming; that defendant joined him and they started walking up toward Seventh Street; that he then noticed a couple of girls; that they continued on around 7th Street to Main Street and thence to the Q. P. Ice Cream Store; that as they approached it they saw Matthews lying in front of the store and also saw Fisher there; that defendant told Hill not to say anything about this to anyone; that Fisher called an ambulance and they started walking up to Matthews and tried to help him up; that Matthews told them to leave him alone because the pain was too great (he had been shot in the abdomen); that the police and ambulance came and took Matthews to the hospital and the next night he died of a gunshot wound; that Fisher, Hill and Gonzales went into the Q. P. Ice Cream Store for a few minutes and then went skating. Hill said that he sent flowers and also attended the funeral with Gonzales; that after Matthews' death defendant told him to tell the officers that two strangers were molesting a couple of girls and that Matthews went to help the girls and he (Hill) "invited the two strangers into the alley." He then testified that he and Gonzales visited the Q. P. Ice Cream Store the next day and the police took them to the police station for questioning; that several days later Fisher and Gonzales were holding a conversation in the Q. P. Ice Cream Store and that he heard a girl's name "Rosalie" mentioned and either Fisher or Gonzales was "pounding on the table—once"; that he later met "Rosalie." On cross-examination this witness admitted making a statement to the officers that while defendant Gonzales, Fisher and Matthews were standing in front of the Q. P. Ice Cream Store two girls came up, followed by two strangers, and that an argument developed between the two strangers who were molesting the girls and that Fisher and Matthews agreed to go around in the alley and fight; that he saw them turn the corner and described their general appearance. He then said that Gonzales told him to tell that story and that he was afraid of him.

Other witnesses said they saw Matthews coming out of the alley staggering as though he were drunk; that he was pulling off his heavy black gloves and holding his stomach with his hands; that he threw the gloves in the doorway near the Q. P. Ice Cream Store and fell to the ground; that they saw someone take a card from deceased's pocket, the "chow pass"; that they saw someone with a "T" shirt on, appearing very nervous, and picking up the body and trying to carry it away but he was told to leave it there because an ambulance had been called; that another boy standing around there was wearing a sweater "not white," but an "off-colored sweater." A yellow sweater purportedly worn by defendant was received in evidence. One witness identified the defendant as the one he "believed" was wearing the sweater and that Fisher was wearing a "T" shirt; and that these men were present and in hearing distance (less than one yard) that night in front of the Q. P. Ice Cream Store where Matthews was lying on the sidewalk; that there were two girls who seemed to be with them; that about 20 other people were gathered around; that the witness asked Matthews who shot him and Matthews replied, while looking at the defendant "The guy in the yellow sweater"; that the witness looked up directly at the defendant and they looked directly at one another and the defendant said nothing in response to the statement. On cross-examination the witness said that he first asked Matthews his name and what had happened; that Matthews said: "I cracked off at a couple of girls * * *; these guys wanted to be heroes"; "the guy in the yellow sweater shot me."

A Miss Henderson testified that on the night of the shooting she and another girl were walking on 8th Street near the Q. P. Ice Cream Store and she saw Matthews and Fisher (who winked at them) and a "dark haired or complected boy" and another boy following, whom she did not recognize, going down 8th Street toward the alley; that the girls stood in front of the Q. P. Ice Cream Store for a few minutes and later heard someone groaning behind them; that they turned and saw Matthews fall down on the sidewalk; that people gathered around and "after a while" Fisher, "all of a sudden," appeared "out of the grey" and Matthews told him to take the "chow pass" out of his pocket. She then stated that she had seen defendant in the Q. P. Ice Cream Store several times and on that occasion he had a yellow bathing suit in his hand. She identified the yellow bathing suit in evidence purportedly worn by defendant at the field. She then testified she had met defendant and Hill on several occasions prior to September 21st.

Her girl friend testified to about the same facts but stated that as to the boys marching up the street to the alley, the one in the back "was a different nationality"; that he "had dark hair."

Several girls were near the alley on 7th Street. They testified that they saw two men scuffling in the alley and heard a shot fired; that they saw one man bending over and running down toward the alley on 8th Street and two other men running out of the alley leading toward Market Street.

Rosalie Ruiz, aged 17, testified she had met Matthews about one week prior to the shooting; that she met him through Fisher and saw him every day thereafter; that they skated together and on the night of September 17th she went to the bus station with one Cramer; that it was too late to catch the last bus and Cramer saw Fisher and defendant Gonzales with three other boys go by in a car; that he called Fisher and asked him to take Rosalie home; that instead of taking her home they took her out into the hills in some cemetery. (Rosalie was in the rear seat with Fisher and Gonzales.) A question was propounded to her by the district attorney as to what happened there. Objection was made. Out of the presence of the jury counsel discussed the admissibility of the proffered evidence. It should be here noted that the district attorney in his opening statement to the jury mentioned that he expected to prove "as a motive" for the killing that Matthews was acquainted with Rosalie Ruiz; that after these boys took her to the cemetery "at least four of these boys raped Rosalie"; that later Rosalie told Matthews about it and "that there is a motive for the killing." Counsel for defendant assigned the statement as prejudicial misconduct, and claimed that such evidence did not in fact disclose any motive and that evidence of another offense was not admissible. The trial court stated to the jury: "It will be the duty of the Jury—to determine whether or not a motive is shown—the only charge with which we are concerned—is the charge of Murder, and with no other charge, whatsoever. The jury will be instructed that the statements of counsel—do not constitute evidence—that it was unable to pass upon the question of admissibility of another offense until such evidence was offered." In the absence of the jury, the district attorney offered to prove that defendant Fisher and two others forcibly raped Rosalie; that some of them were holding her while others performed the acts; that she was threatened by one Hagler that if she told the police, "she would be taken care of"; that they then took her back to town and the next day she told Matthews, her boy friend, about these boys and he suggested that she go to the police with the matter then; that she refused because she was scared and didn't want the publicity; that soon thereafter Matthews met Fisher and he invited him to the field to stay all night and the next morning he met Gonzales; that they went swimming together and later came into town, at which time the argument above mentioned ensued. The district attorney argued that he offered this evidence to show motive and intent; that "bad blood" arose between Gonzales and Matthews and that Gonzales felt that Matthews knew too much and might go to the police and therefore wanted "to get him out of the way." Objection to the offer was sustained. However, Rosalie was then permitted to state, in the presence of the jury, that she told Matthews what had happened to her the night before in the cemetery.

Police officers testified that they searched the alley but no gun was found. Fisher, who had on a "T" shirt, was taken into custody for questioning. He later went into the alley and came back wearing a flowered sport shirt.

Several doctors testified as to the serious condition of Matthews at the time he arrived at the hospital and as to his subsequent mental and physical condition after the operation, for the purpose of laying a foundation for the introduction of a dying declaration made by decedent. This testimony was taken by the court in the absence of the jury. On Matthews' admission to the hospital he was in a condition of severe shock, perspiring profusely and had a weak pulse. He had an indented wound in the left abdomen and in the left posterior abdomen wound there was tissue extruding from it. In the operating room an excision was made under spinal anaesthesia. His condition was so serious that it was deemed advisable to close the abdomen and to obtain blood and plasma to build him up for any further surgery that might be indicated. Matthews was noncooperative and continued fighting the doctors who informed him that "if he did not cooperate they did not have much chance of saving his life." He made no response but continued his course of conduct. The next morning Matthews asked for his parents. He was more or less irrational but was "still struggling—fighting and wrestling around." The doctor testified that in between times one could rouse him by speaking to him; that in reply to a question by the doctor, i. e., "Bill—who shot you?" Matthews replied: "The guy in the yellow bathing suit." The trial court asked the doctor if in his opinion Matthews was in such condition that he knew about the subject on which he was speaking and was capable of passing an intelligent thought on that subject. The doctor replied that that was an awful hard question to answer; that he did not know. A few hours later a police officer shook Matthews and asked the same question and got the same answer.

In disposing of the question presented the trial court remarked that the purpose of the preliminary examination—when the foundation is sought to be laid for a dying declaration, is to let the court ascertain whether there is anything of a substantial nature to be submitted to the jury and if the court finds that there is, the evidence is admitted, and the jury is supposed to weigh it just as they do other evidence, with the understanding that the belief of impending death existed, i. e., with the instruction to the jury that it shall determine from the evidence whether or not the statements were made under sense of impending death and if so the jury may consider them; otherwise, it shall disregard them. Defendant failed to bring up the instructions given or refused as a part of the record on appeal.

Thereafter the jury were recalled and the evidence above set forth was, over objections, restated to the jury and the people rested.

Counsel for defendant then introduced evidence to show, as indicated by his opening statement to the jury, that Fisher and Matthews had been buddies; that they went to March Field on the night of the 20th and stayed there; that they met Gonzales, whom Matthews had known for a week or two; that they played pool, went swimming and laughed and joked during that afternoon and evening; that they all came to the Q. P. Ice Cream Store, and while in front of it they saw two girls coming toward them followed by two strange men who were molesting the girls; that when they arrived in front of the Q. P. Ice Cream Store Fisher and Matthews challenged the two strangers to go around in the alley and fight; that Matthews and

Fisher led the way and that Gonzales and Hill remained in front of the Q. P. Ice Cream Store; that shortly thereafter Fisher came around the corner and told them Matthews had been shot; that Matthews then came around the corner and fell on the sidewalk, as heretofore indicated; that Hill and Gonzales were not in the alley at any time and that Matthews met his death at the hands of one of the two strangers. He produced some witnesses supporting his statement. Some of these witnesses were impeached by contradictory statements made by them at the coroner's inquest and to the police officers shortly after the shooting. One endeavored to account for the change in her testimony as being the result of coercion on the part of the police, and said it was because "I was out of my head".

Another witness who accounted for defendant's presence in front of the Q. P. Ice Cream Store all during the shooting episode had previously told the police, according to their reporter, that he saw Matthews, Gonzales, Fisher and Hill arguing in front of the Q. P. Ice Cream Store the evening of the shooting; that Fisher said: "Let's all four of us go into the alley—settle this if you want to fight"; that Fisher and Matthews were in the lead and were followed by Gonzales and Hill; and that Matthews was putting on his gloves. A statement of these related facts was signed by the witness and offered in evidence by way of impeachment.

A police officer testified that while in the emergency hospital, shortly after the shooting, he heard Matthews say "he didn't know" who shot him; that he asked him how it happened and he said he met two boys and two girls previously that day and that he tried to "pick up" one of the girls; that later he met the two men in the alley on 8th Street and one of these boys pulled the gun and shot him; that he described the two boys and said the one "with a yellow tie" shot him.

Defendant Gonzales, aged 19, of Spanish, Portuguese and French descent, admitted that he wore the yellow bathing suit in evidence prior to and subsequent to the day of the shooting but claimed he did not wear it on that day. He then testified about his activities and those of the two claimed strangers. They were about in accordance with his counsel's opening statement to the jury. He was confronted with previous statements made by him to several police officers. These statements were in considerable conflict with his testimony given at the trial.

Fisher, defendant's main witness, described the meeting in front of the Q. P. Ice Cream Store and told about the two strangers. He said he went with Matthews and the two strangers into the alley; that he was taking off his sport shirt and that Matthews was putting on a pair of gloves; that one of the strangers pulled a gun and shot Matthews; that he (Fisher) ran out the alley to 8th Street and back in front of the Q. P. Ice Cream Store; that he there found defendant Gonzales and Hill; that neither one was in the alley at any time and that soon after he arrived in front of the store Matthews came around and fell in front of it, as heretofore described. He had previously told the police that Gonzales had on a "light yellow" bathing suit on September 21st, when they were all swimming at the pool. The witness, at the conclusion of his testimony, by way of impeachment, admitted he had been previously convicted of attempted robbery. Defendant then produced several witnesses which tended to impeach the testimony of Hill.

In rebuttal, police officers were recalled and testified that defendant first told them that he did not see Matthews and Hill at the pool that day; that he first saw them in front of the Q. P. Ice Cream Store; that he was sure they were not with him when he came to town; that after questioning Fisher they returned to Gonzales and confronted him with Fisher's statement and Gonzales then said he "lied" about that part of it because he didn't want to "get mixed up in any mess." One rebuttal witness testified that Fisher said, in regard to the shooting of Matthews, that "two men in a car went by and shot him" and that he, Fisher, "jumped around the corner when they shot at me." Another witness identified the sweater of the defendant as the one the "dark complected" person was wearing the night the four men were proceeding into the alley and the "T" shirt in evidence "resembled" the one the witness saw on Fisher that same time. Another witness, who was working at the Q. P. Ice Cream Store, testified that defendant and Fisher were not in the vicinity of the Q. P. Store when the shooting took place; that after the police were called by her she went out in front, saw Matthews lying on the sidewalk and she looked up and saw defendant and Hill coming down 7th Street together; "they were at a pace * * * just slowing down to a walk"; that she did not see Fisher there at all.

A police detective testified that while defendant was in jail, defendant asked him what the penalty was for first degree murder; that he explained it and defendant said: "How about second degree murder"; that he explained that and defendant asked: "What is the deal on manslaughter" and he explained it; that defendant then said: "Well, I would probably be better off to go in and plead guilty, because it looks like they are going to pin this on me, even though I am not guilty * * * I will tell you what * * * you let me think this over and I will tell you in the morning what I intend to do." After being instructed as to the law the jury returned the verdict as recorded.

[1, 2] The first argument of defendant is that the evidence produced by the prosecution is so inherently improbable as to be incredible and unworthy of belief. He practically concedes that Hill's testimony shows that defendant shot Matthews, but claims his testimony is entirely discredited and therefore there is no evidence pointing towards defendant's guilt. The evidence conclusively shows that Matthews' death was the result of a gunshot wound. Although conflicting, there is sufficient substantial evidence connecting the defendant with the shooting. The weight to be given this evidence was for the jury to determine. Sec. 1126, Penal Code. Its conclusion, therefore, in this respect, may not be disturbed on appeal. People v. Latona, 2 Cal.2d 714, 725, 43 P.2d 260; People v. Perkins, 8 Cal.2d 502, 511, 66 P.2d 631.

[3] The second point is that the district attorney was guilty of prejudicial misconduct in his statement to the jury as to what he expected to prove as a motive for the commission of the murder. The presence or absence of motive is a circumstance going to the question of the guilt or innocence of the accused, and proof thereof is always admissible and often valuable and is sometimes of assistance in removing doubt and completing proof which might otherwise be unsatisfactory, and sometimes is relevant in solving a doubt as to the degree of the offense and may be material where the evidence as to the identity of the criminal is circumstantial.

[4-6] Considerable latitude is allowed in the reception of evidence on the question of motive. It is settled that evidence having a direct tendency, in view of the surrounding circumstances, to prove motive on the part of a person to commit the homicide, and thus to solve a doubt either as to the identity of the slayer, the degree of the offense, the insanity of the accused, or the justification or excusability of his act, is admissible, however discreditably it may reflect upon the defendant, and even where it may show him guilty of other crimes. See 13 Cal.Jur. 685, sec. 74, and cases cited, including People v. Greig, 14 Cal.2d 548, 561, 95 P.2d 936; People v. Larrios, 220 Cal. 236, 251, 30 P.2d 404; People v. Aranda, 12 Cal.2d 307, 83 P.2d 928; People v. Hall, 27 Cal.App.2d 440, 81 P.2d 248; People v. Perkins, 8 Cal.2d 502, 66 P.2d 631; People v. Planagan, 65 Cal.App.2d 371, 403, 150 P.2d 927; and People v. Cook, 148 Cal. 334, 83 P. 43, where it was held that proof of incestuous relationship between the defendant and his daughter was admissible on a prosecution for the murder of a rival, when it furnished ground for a logical inference of a desire to put the rival out of the way. See, also, 8 Cal.Jur. 68, sec. 172. The proffered evidence as to motive was admissible and, if established, was a circumstance that might well have been considered by the jury. People v. Gosden, 6 Cal.2d 14, 25, 56 P.2d 211; People v. Argentos, 156 Cal. 720; People v. Miller, 121 Cal. 343, 53 P. 816; People v. Peete, 28 Cal.2d 306, 315, 169 P.2d 924. Therefore there was no prejudicial misconduct on the part of the district attorney when he stated to the jury that he expected to prove these facts in establishing

motive for the commission of the crime. Defendant cannot claim prejudice by reason of an erroneous ruling of the court which is in his favor.

The third contention of appellant is that the court erred in admitting into evidence the claimed dying declarations of decedent made to a police officer and a doctor as to the identity of the person who shot him, i. e., "A fellow in a yellow bathing suit."

[7, 8] To be admissible in evidence as dying declarations, the statements of the decedent must have been made at a time when he had abandoned all hope of life so that he believed that death inevitably must follow. This sense of impending death may be shown in any satisfactory mode, by the express language of the declarant, or be inspired from his evident danger, or the opinions of medical or other attendants stated to him, or from his conduct, or other circumstances in the case, all of which are resorted to in order to ascertain the state of the declarant's mind. People v. Hoffman, 195 Cal. 295, 307, 232 P. 974, in determining the admissibility of the statements, the court had the right to consider decedent's physical condition, the nature of his wounds, his knowledge of his serious condition, his conduct, and his statements. People v. Hashaway, 67 Cal.App.2d 554, 569, 155 P.2d 101, 823.

[9] In People v. Pollock, 31 Cal.App.2d 747, 754, 89 P.2d 128, 131, the court said:

"It is the province of the trial judge to determine the sufficiency of the foundation proof which will entitle dying statements to be admitted in evidence. Unless there is an apparent abuse of discretion in that regard, the ruling of the court will to be disturbed on appeal. 1 Wharton's Crim.Ev. 527, sec. 275b; People v. Ybarra, 17 Cal. 166." This language was approved in People v. Wilson, 54 Cal.App.2d 434, 441, 129 P.2d 149."

The court in People v. Rulia Singh, 182 Cal. 457, 188 P. 987, in discussing the relative functions of the court and the jury touching the admission and determination of dying declarations, held that the court alone should pass on the admissibility of this character of evidence, and that the jury should exclusively determine its probative value. It was there said, 182 Cal. at page 476, 188 P. at page 995:

"Whatever the law may be in other jurisdictions, it is well settled in this state that it is the function of the trial court primarily to pass upon the admissibility of the alleged dying declarations and of the jury to determine whether they were in fact made under a sense of impending death, and, if so, then to determine the credibility and weight to which they are entitled."

At the time of the declarations, decedent was in extreme pain from an abdominal gunshot wound of such a serious nature that surgery was discontinued. He was noncooperative and continued fighting the doctors after they had informed him that "if he did not cooperate they did not have much chance of saving his life." Within a short time decedent asked for his parents. He was more or less irrational and at times could be roused by questions. There was testimony to the effect that the deceased, while lying on the sidewalk and in the presence of the defendant, made the statement in response to the question as to who shot him that it was "the guy in the yellow sweater." There was ample evidence, other than the declarations, to identify the defendant as the person who fired the shot.

[10, 11] The trial court indicated that it would properly instruct the jury on the subject of reception of claimed dying declarations and that the jury was to weigh the evidence concerning declarations of the deceased as any other evidence and determine whether or not the statements, if made, were made under a sense of impending death, and if so, to consider them, otherwise such statements were to be disregarded. Since defendant, on appeal, failed to bring up the instructions, both given and refused, we cannot, under these circumstances, presume that the trial court failed or refused to instruct the jury as indicated. We cannot say that there was an abuse of discretion in admitting the declarations in evidence for the consideration of the jury or that prejudicial error resulted.

[12, 13] Appellant next contends that the court erred in admitting into evidence a yellow bathing suit claimed to have been worn by the defendant, and in refusing to

strike the testimony of Rosalie Ruiz. The weight to be given to such evidence was a question for the jury to determine. We see no error in the rulings of the court.

[14] Finally, it is contended that the evidence is insufficient to show that the appellant was guilty of murder in the first degree. This contention is based upon the theory that there was no evidence of premeditation and deliberation. In People v. Eggers, 30 Cal.2d 676, 686, 185 P.2d 1, it was held that no rule can be laid down as to the character or amount of proof necessary to show deliberation and premeditation, and that these elements of murder in the first degree may not be inferred from the killing alone, but are matters of fact, which cannot be implied as matters of law.

[15, 16] Murder is defined as "the unlawful killing of a human being, with malice aforethought." Penal Code, sec. 187. To constitute murder in the first degree the homicide must have been perpetrated "by means of poison, or lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing," or committed in the perpetration of certain enumerated felonies. Penal Code, sec. 189. It is the exclusive province of the jury to determine from the evidence whether the killing was the willful, deliberate and premeditated act of the defendant. The sole question in this regard is whether the evidence is legally sufficient to support the verdict.

[17] The words "deliberate and premeditated" have a well-defined meaning. People v. Bender, 27 Cal.2d 164, 183, 163 P.2d 8, 20. They indicate generally a careful consideration and examination of the reasons for and against a choice or measure; some plan thought out before the commission of the act, and a decision to act according to a plan.

[18] From the evidence it appears that the decedent and defendant were not on unfriendly terms until a short time before the shot was fired. Someone suggested that they go into the alley to "settle their differences" and something about a fair fight. The subject of their differences, if any, was not in evidence. The deceased wore gloves, and assumed a fist-fighting position. One or two blows were struck. The witness Hill testified that deceased said something about "not pulling a knife"; that defendant "reached for something * * * toward his stomach * * * about belt high" and he saw a black object which looked like a gun, and the next thing he knew he heard a shot and started to run. In the absence of the evidence indicating a motive for the shooting, there was no substantial evidence that the defendant formed or entertained any previous ill will against the decedent or that the killing was deliberate and premeditated, as those terms are defined in People v. Bender, supra.

[19] In People v. Isby, 30 Cal.2d 879, 890, 186 P.2d 405, 412, the court, quoting from People v. Wells, 10 Cal.2d 610, 616, 76 P.2d 493, said: "When an unlawful killing and 'nothing further is shown, the presumption of law is that it was malicious and an act of murder; but in such a case the verdict should be murder of the second degree, and not murder of the first degree.'" See also, People v. Howard, 211 Cal. 322, 329, 295 P. 333, 71 A.L.R. 1385.

[20] The judgment is modified by reducing it to murder of the second degree and as so modified is affirmed. The cause is remanded to the trial court with directions to pronounce judgment on the defendant sentencing him for the term prescribed by law for murder of the second degree. People v. Bender, supra, 27 Cal.2d at page 187, 163 P.2d 8; People v. Howard, supra, 211 Cal. at page 330, 295 P. 333.

The order denying a new trial is affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

88 Cal.App.2d 45

FRENCH ART CLEANERS v. STATE BOARD OF DRY CLEANERS.

Civ. 13913.

District Court of Appeal, First District, Division 2, California.

Oct. 16, 1948.

1. Appeal and error 🔑458(3)

The District Court of Appeal has jurisdiction to stay by supersedeas the operation of a prohibitory injunction pending appeal.

2. Appeal and error 🔑478

State Board of Dry Cleaners seeking a writ of supersedeas to stay pending appeal, the operation of a temporary injunction against enforcement of schedule of minimum prices established by the Board had the burden of showing that supersedeas should issue. Business and Professions Code, §§ 9563–9566.

3. Appeal and error 🔑478

The State Board of Dry Cleaners failed to sustain burden of showing that supersedeas should issue to stay pending appeal the operation of a temporary injunction against enforcement of schedule of minimum prices established by the Board, thereby forcing plaintiff operator of a dry cleaning plant to discontinue its established business practices under criminal penalties which might amount to a miximum of $200 per day. Business and Professions Code, §§ 9563–9566, 9590, 9591.

4. Appeal and error 🔑478

On application for supersedeas to stay pending appeal the operation of temporary injunction against enforcement of schedule of minimum prices established by State Board of Dry Cleaners, District Court of Appeal was concerned with the merits of appeal only to the extent of determining that plaintiff's position was not frivolous. Business and Professions Code, §§ 9563–9566.

◆

Action by French Art Cleaners, a corporation, against State Board of Dry Cleaners to enjoin enforcement of schedule of minimum prices established by the Board. From an order granting a temporary injunction, the State Board of Dry Cleaners appeals and applies for a writ of supersedeas to stay operation of temporary injunction pending determination of appeal.

Petition for writ of supersedeas denied and alternative writ discharged.

Fred N. Howser, Atty. Gen. and J. Albert Hutchinson, Deputy Atty. Gen., for petitioner.

Geo. M. Naus and Nathan Kessler, both of San Francisco, for respondent.

DOOLING, Justice.

This is an application for a writ of supersedeas to stay the operation of a temporary injunction pending the determination of the defendant's appeal.

It appears from the record that acting pursuant to sections 9563–9566 of the Business and Professions Code, Stats.1945, pp. 2847, 2848, the defendant and appellant State Board of Dry Cleaners established a minimum price scale for the services to be charged by cleaning establishments operating in Alameda County, effective on and after January 14, 1948. The plaintiff, which operates a dry cleaning plant in Alameda County, on February 9, 1948 filed its complaint seeking to enjoin the enforcement of this schedule of prices and the order granting a temporary injunction was made and entered on May 18.

[1] That this court has the power to stay the operation of a prohibitory injunction is settled by Food & Grocery Bureau v. Garfield, 18 Cal.2d 174, 177, 114 P.2d 579. That case presented the converse of this. There an injunction had been issued by the trial court restraining the defendant from issuing trading stamps to its customers on the ground that the enjoined practices violated the Unfair Practices Act. The court issued the writ of supersedeas. At pages 177, 178 of 18 Cal.2d, at page 581 of 114 P.2d the court said:

"The sole question then is whether the showing made by petitioner is such as will justify this court in exercising its inherent power in his behalf. We think that it is. This conclusion is not based upon a balancing of conveniences or hardships, which is not the proper test (Hulbert v. California etc. Cement Co., 161 Cal. 239, 118 P. 928, 38 L.R.A.,N.S., 436; Ohaver v. Fenech, supra [206 Cal. 118, 273 P. 555]; Dry Cleaners & Dyers Inst. v. Reiss, supra [5 Cal.2d 306, 54 P.2d 470]), but upon a consideration of the respective rights of the litigants, which contemplates the possibility of an affirmance of the decree as well as of a reversal. Clayton v. Schultz, supra [12 Cal.2d 703, 87 P.2d 355].

"The merchandising practice employed by petitioner is one of long standing. No doubt its abrupt abolishment would cause disruption in the orderly conduct of his business and a loss of patronage and customer good will, possibly so irreparable as to deprive him of the fruits of a meritorious appeal. This situation is such as to warrant issuance of the writ of supersedeas. The stay of proceedings will remove petitioner's risk of loss, and it may be granted without injury to or destruction of any rights which may be established in behalf of plaintiff trade association if the decree is affirmed."

[2, 3] In that case the trial court had enjoined the defendant from continuing to follow a long established business practice. The burden was on the merchant to demonstrate his right to supersedeas so that he might continue this established practice pending the appeal. In the passage quoted the court held that this burden had been met. In the case before us the effect of the injunction is to permit the respondent to continue its established business practices and the burden is on the appellant to show that supersedeas should issue, the effect of which would be to force respondent to discontinue its established business practices under criminal penalties which may amount to a maximum of $200 per day. Secs. 9590, 9591, Bus. & Prof. Code. Under the reasoning of the cited case we cannot hold that this burden has been met.

[4] The parties devote much space to an argument of the appeal on its merits. That plaintiff's position is not frivolous is attested by such cases as People v. Osborne, 17 Cal.App.2d Supp. 771, 59 P.2d 1083; In re Kazas, 22 Cal.App.2d 161, 70 P.2d 962; In re Landowitz, 22 Cal.App.2d 733, 71 P.2d 334; and In re Herrick, 25 Cal.App.2d 751, 77 P.2d 262. Further than this we should not inquire into the merits on this proceeding. The Supreme Court said in Food & Grocery Bureau v. Garfield, supra, 18 Cal.2d at page 178, 114 P.2d at page 581:

"The correctness of the trial court's ruling on the subject, and the question of what the ultimate decision should be, are not matters of concern in this proceeding."

The petition for writ of supersedeas is denied and the alternative writ discharged.

NOURSE, P. J., and GOODELL, J., concur.

87 Cal.App.2d 835

DAVY et al. v. OGIER et al.

District Court of Appeal, First District,
Division 1, California.
Oct. 6, 1948.

1. Specific performance 🔑117

In action for specific performance of contract to sell realty, plaintiff must allege and prove that the agreed price is fair, reasonable and adequate. Civ.Code, § 3391, subds. 1, 2.

2. Specific performance 🔑121(3)

Evidence did not sustain finding that purchase price of realty was not fair, reasonable, and adequate, so as to preclude purchasers from specific performance of contract to sell realty. Civ.Code, § 3391, subds. 1, 2.

3. Vendor and purchaser 🔑168

Where time was of the essence of contract for sale of realty, purchasers had duty to see that seller was paid the purchase price and escrow closed within 30 days pursuant to contract, unless prevented by some action of vendor.

4. Specific performance 🔑97(2)

Where purchaser instructed title company not to close escrow or pay purchase price of realty to vendor until instructed, and company was never instructed to pay, receipt by company of amount of purchase price from purchaser was not a compliance with contract for sale of realty requiring payment of purchase price to vendor within 30 days from making of contract, so as to entitle purchasers to specific performance. Civ.Code, §§ 3391, subd. 3, 3392.

5. Specific performance 🔑99
Vendor and purchaser 🔑130(2)

Where purchaser and his agent knew of existence of an unrecorded lease of realty, purchaser had contracted to purchase, and agreement to sell requiring vendor to convey a merchantable title referred to tenant's option to purchase realty, purchaser could not refuse to accept title subject to lease, and purchaser's refusal to pay purchase price within 30 days required by contract on ground that lease was a cloud upon title precluded purchaser from specific performance of contract. Civ. Code, §§ 3391, subd. 3, 3392.

6. Vendor and purchaser 🔑232(9)

Actual possession of premises by a tenant under an unrecorded lease is sufficient to put a purchaser upon inquiry as to the nature and extent of tenant's claim.

7. Vendor and purchaser 🔑143

Where, before time within which purchaser was required to pay purchase price for realty under contract requiring vendor to convey merchantable title, purchaser knew of existence of unrecorded lease and indicated to vendor by actions that purchaser was willing to make his own arrangement with tenant, and at no time requested vendor to do anything about lease other than sign a notice to vacate, purchaser waived any objection to title because of lease. Civ.Code, §§ 3391, subd. 3, 3392.

8. Vendor and purchaser 🔑144(1)

Ordinarily the vendor of realty must clear any defects in title before he can put purchaser in default under contract to purchase realty.

9. Specific performance 🔑99

Where purchaser did not pay purchase price of realty within time required by contract, and failure to pay pursuant to contract was not excused by any acts of vendor, purchaser could not waive defect in title arising from existence of a lease as a cloud upon title, and by such waiver become entitled to specific performance of contract by vendor.

◆

Appeal from Superior Court, Alameda County; Jas. G. Quinn, Judge.

Action by D. L. Davy and Grace E. Davy against Estella E. Ogier and others for specific performance of a contract to sell realty, wherein defendants cross-complained. From a judgment in favor of Estella E. Ogier, plaintiffs appeal.

Affirmed.

Morse & Richards and Stanley C. Smallwood, all of Oakland, for appellants.

Granville T. Burke, of Oakland, for respondent.

BRAY, Justice.

Appeal by plaintiffs and cross-defendants from a judgment in favor of defendant and cross-plaintiff Estella E. Ogier, in an action brought to compel specific performance of an agreement to sell real property. One Huddleson, a tenant of the property under an unrecorded lease, was made a party defendant. Huddleson defaulted.

As to most of the facts there is no dispute. Defendant Ogier (hereafter referred to simply as defendant) owned a certain lot in Albany upon which was a store building. The upper floor was used as a residence. The lower floor, although built for store purposes, was leased under an unrecorded lease to Huddleson, who occupied it for residence purposes. W. J. Bowman acted as plaintiffs' agent throughout the entire transaction involved here. Bowman was a licensed real estate broker and also president of the Albany Federal Savings and Loan Association (hereafter, for brevity, referred to as the "loan company"). On March 20, 1945, Bowman called defendant on the telephone and then on the 23rd saw her at her home. The record is confused as to just what was said on each occasion, but the substance of the conversations was that Bowman inquired if the property was for sale, and if so, at what price. Defendant testified: "I told him I had an offer of $8500 for it and he said he thought that was a little high. I said I didn't know, it was just what somebody else had told me, some other realtor." He asked her if she would take less and she said she would consider $6500. He later called her and stated that his client would pay $6000 cash. When she said she would be interested in that price, he came to her home with a deposit receipt, in the usual form. This receipt was signed by Bowman as real estate agent, and set forth that there was received from plaintiffs $250 as a deposit on account of the purchase price of $6000 for the property, describing it. The balance was to be paid "cash at the close of escrow, within thirty days. Seller agrees to deliver possession of the store portion of said building not later than forty (40) days from date hereof, subject to the right of the present tenant to exercise his option to purchase the above property. It is also agreed: First—That in the event said purchaser shall fail to pay the balance of said purchase price or complete said purchase as herein provided, the amount of said deposit shall, at the option of seller, be retained as liquidated and agreed damages. Second—That in the event the title to said property shall not prove merchantable and said seller shall not perfect, or be able to perfect, the same within a reasonable time from this date, the purchaser shall have the option of demanding and receiving back said deposit and shall be released from all obligation hereunder." Evidence of title was to be in the form of a title insurance policy of a certain title company. Time was made the essence of the contract. Defendant accepted the deposit and signed the following statement: "I agree to sell the above described property on the terms and conditions herein stated."

The most serious conflict in the evidence occurs with reference to the conversation concerning Huddleson's tenancy. Bowman claims that defendant told him there was a tenant in possession of the store portion under a lease, by the terms of which he had a first option to buy if she decided to sell, but, if he did not exercise his option, and she sold the premises, the lease would terminate on thirty days' notice to the tenant to vacate. Defendant admits telling Bowman of the tenant's option to buy, but denies stating that there was any termination clause in the lease. (As a matter of fact, there was no such clause in the lease, which then had over two years to run.) Plaintiff D. L. Davy knew of the existence of the lease, because in 1944 he had tried to lease the store from defendant for a five year period, and defendant then told him that the store was occupied and that she felt she should give the tenant first chance. On telling the tenant, Huddleson, of the situation, he agreed to lease it for three years. Defendant then notified Davy that the tenant had taken a lease for three years.

On March 27, the title company received an order from the loan company to search the title. April 2, the loan company sent the title company a letter enclosing a deed of trust in the sum of $4000 from plaintiffs to it, and instructed the title company to record it when they could issue policy of title insurance in the sum of $6000, "running in favor of Davy and wife to ourselves, showing title vested in the name of transferors and our deed of trust as a first record lien." After further instructions concerning other matters not pertinent here the letter stated: "Kindly phone the writer when you are ready to close and we will forward our check immediately." The letter was signed W. J. Bowman, President. This is the letter or commitment which plaintiffs contend complies with the requirement in the deposit receipt "cash at the close of escrow, within thirty days."

On April 17 plaintiffs sent the title company a letter enclosing a check for $1750, a copy of the deposit receipt, and stating: "The balance of the purchase price, namely $4,000.00, will be remitted to you by the Albany Federal Savings and Loan Association upon your demand. You are authorized to close the escrow in accordance with the terms of the deposit receipt enclosed herewith when you are prepared to issue your policy of title insurance in the sum of $6,000, showing clear title vested in the names of D. L. Davy and Grace E. Davy, husband and wife, as joint tenants, and the deed of trust running in favor of Albany Federal Savings and Loan Association in the sum of $4,000.00 as a first and the only lien of record."

Defendant deposited with the title company a deed from herself to plaintiffs instructing it to record the deed upon collecting for her the sum of $5750, balance of purchase price; taxes, insurance and rents to be pro-rated. The record does not disclose the date of the deposit of the deed, but it apparently was about the middle of April. The title company would not have known of the unrecorded lease, were it not for the fact that defendant left it with them, apparently at the time she deposited the deed. The title company notified plaintiff Davy that to clear the record of the unrecorded lease it would be necessary for him to obtain a quitclaim deed from the tenant. Apparently plaintiffs or Bowman at first instructed the title company to show the title in plaintiffs subject to an unrecorded lease. The record is not clear upon this matter. However, on April 16, Davy instructed the title company to "hold until o. k. from Mr. Bowman" or until they heard from Davy "regarding the lease." This order was never revoked nor was any money ever deposited with the title company by or for plaintiffs.

About March 23, Bowman and Davy told the tenant that Davy had purchased the property, and asked how soon Davy might have possession. He stated that he was looking for a place and would vacate as soon as he could find one. On March 30, Bowman prepared a letter or notice to the tenant to the effect that if he did not exercise his option to buy he must vacate in thirty days. At Bowman's request defendant signed this letter and Bowman delivered it to the tenant. The tenant did not vacate and is still on the premises. Neither party did anything further concerning the lease or closing the escrow. Plaintiffs later brought this action to compel specific performance.

The court found, among other matters, that the purchase price of $6000 was not fair, reasonable and adequate and that defendant was ready, able and willing at all times during the time provided in the deposit receipt to convey good title to the property and complied with her part of the agreement, but that plaintiffs failed to comply with their part of the agreement, specifically, that they failed to pay the balance of the purchase price as required—"cash at the close of escrow, within thirty days"—and that as time was the essence of the contract, such failure terminated their rights. These findings are attacked by plaintiffs as not supported by the evidence.

No Evidence That the Price Is Unfair.

[1,2] There is no evidence to support the finding that the purchase price was not fair, reasonable, and adequate. Plaintiffs, on oral argument, concede this, and hence it is unnecessary to discuss the matter in detail. Were there any substantial evidence to support this finding, the case would end, as it is elementary that in an action for specific performance plaintiff must allege and prove that the agreed price is fair, reasonable and adequate. Sec. 3391, Civil Code, subds. 1 and 2. Plaintiffs produced expert testimony to meet this issue. Defendant produced no evidence of value whatever. If the court disbelieved plaintiffs' witnesses, the most the court could have found was that the plaintiffs failed to prove the fairness of the transaction. There was no evidence to the contrary of that given by plaintiffs' witnesses and hence no basis for the finding that the price was unfair. This makes it necessary for us to consider whether the other findings are supported by the evidence.

Plaintiffs Failed to Perform.

[3,4] Plaintiffs' claim to performance is based upon the contention that the so-called letter of commitment sent the title company by the loan company on April 2 was equivalent to payment in cash. They make a number of contentions in this respect, among others, that this letter is the equivalent of a check and that the au-

thorities hold that payment by a check which is not objected to, meets the requirement that the payment be made in cash.[1] While we doubt that the letter in question can legally be held to constitute the equivalent of a payment in cash, we do not deem it necessary to determine the legal effect of this letter, for the reason that giving it all the effect claimed by plaintiffs, plaintiffs still have failed to prove performance of their contract. Without deciding whether the tender was the equivalent of cash, we will assume, solely for the purposes of this appeal, that the plaintiffs accompanied the letter of April 2 with $4000 in cash. On April 16 plaintiff Davy instructed the title company not to close the escrow or pay out any money to defendant until the company received an o. k. from Bowman, or from him. The next day plaintiffs deposited the $1750 balance of the purchase price with the title company, so that on the above assumption it then had the entire purchase price in its hands. It also had the deed from defendant to plaintiffs to be turned over to plaintiffs when the title company could pay the $5750 to defendant. But the title company could not pay any sum whatever to defendant, because of Davy's instructions not to pay until further instructions from him or Bowman, which instructions never came. Time being of the essence, it was the duty of plaintiffs to see that defendant was paid the purchase price and the escrow closed within thirty days, unless some action of defendant prevented the close of the escrow. This brings us to the effect of the unrecorded lease, it being plaintiffs' position that until this lease was eliminated, the escrow could not be terminated and merchantable title granted by defendant.

[5] However, under the particular circumstances of this case, plaintiffs, by their actions, waived this cloud on the title. Plaintiffs at all times knew of the existence of the lease. Plaintiff Davy knew of it when it was entered into, some months before the deposit receipt agreement was executed. Bowman was told of it by defendant, and the receipt refers to it, making the sale subject to the right of the tenant to exercise his option to buy. While Bowman claims its terms were misrepresented to him by defendant, defendant denies that, and in view of the court's findings we must assume as correct the defendant's statement that she did not misrepresent its terms.

Thus, while the language written into the deposit receipt by plaintiffs' agent Bowman refers only to the tenant's option to buy, the effect of the knowledge of Davy and Bowman of the lease, and the reference to a "present tenant" make the agreement one in which the plaintiffs agreed to buy subject to the existing rights of the tenant. These rights were set forth in his lease, of which lease plaintiffs had knowledge. Therefore, plaintiffs had no right to refuse to accept the title subject to that lease, and their instruction to the title company not to pay defendant within the thirty days was a violation of their agreement. Thus, defendant, at all times during the thirty days, was ready, able and willing to convey to plaintiff, on receipt of the purchase price, all the title she had agreed to convey.

[6, 7] Moreover, by their acts, plaintiffs waived any objection to the title by reason of the existence of the lease. On March 23 Davy and Bowman talked to the tenant and apparently were satisfied with his statement that he would vacate when he could find a place to which to move. The title company told Davy that to clear the title of the lease it would be necessary *for him* to obtain a quitclaim deed from the tenant. Defendant deposited a copy of the lease with the title company. Had plaintiffs not known of the lease and its terms prior to that time (and the evidence shows they did, or at the very least, were put on notice thereof[2]), they then learned of its provisions and that it was not terminable. At no time did Davy or Bowman

---

[1] See Albert v. Pearson, 68 Cal.App. 657, 229 P. 998. Plaintiffs also contend that the title company was their agent, and the failure of the title company to object to this form of alleged payment binds defendant. That parties dealing with a title company constitute it their agent is held in the Albert case and in Greenzweight v. Title Guarantee & Trust Co., 1 Cal.2d 577, 36 P.2d 186, and others.

[2] Actual possession of premises by a

notify defendant that they were not satisfied with the title or that it was incumbent on her to do anything about the lease, other than sign the notice to vacate which Bowman prepared. That notice was signed March 30. The thirty days limited by the deposit receipt did not expire until April 23. Certainly it was the duty of the buyer to take a position within that thirty days as to the lease, that either he would accept the title subject to it, or he would not accept the title as merchantable, and therefore either terminate the agreement, or under its terms, require the seller to perfect the title within a reasonable time. Plaintiffs must have known on March 23 when they talked to the tenant that the lease was not terminable. However, while they notified the title company not to close the escrow, they took no position so far as defendant was concerned, about the lease other than to indicate by their actions that they were satisfied with the lease situation.

[8] While ordinarily it is the duty of the seller of real property to clear any defects in the title before he can put the buyer into default, the situation here was different. The buyers knew of the lease; it is indirectly mentioned in the agreement; the buyers indicated to the seller by their actions that they were satisfied to make their own arrangements with the tenant, and at no time requested the seller to do anything about the lease other than sign a notice to vacate, which she did. The evidence amply supports the finding that the plaintiffs failed to perform their part of the agreement, and that defendant performed hers.

Subdivision 3 of section 3391 of the Civil Code provides that specific performance will not be enforced where the party seeking it has not substantially fulfilled his promise. Section 3392 provides: "Specific performance cannot be enforced in favor of a party who has not fully and fairly performed all the conditions precedent on his part to the obligation of the other party * * *." Cockrill v. Boas, 213 Cal. 490, 2 P.2d 774, holds that specific performance will not lie in favor of a vendee who fails to show that he deposited or tendered the balance of the purchase price within the time required by the contract.

It is interesting to note that while now the plaintiffs claim that the lease was a cloud on the title, they alleged in their complaint that after the 30th day of March, 1945 (the date of giving the notice to vacate) Huddleson "had and now has no interest" in the property. This allegation was admitted by failure to deny in defendant's answer. Thus, while now claiming that Huddleson's lease excused their non-performance, the plaintiffs alleged that since approximately 23 days before their time to perform expired, Huddleson had no further interest in the property.

[9] Inasmuch as plaintiffs failed to comply with the contract in the time agreed, specific performance cannot be compelled. Plaintiffs contend that as the court, pursuant to the allegations and prayer in their complaint, found that Huddleson now has no interest in the property, plaintiffs can now "waive the defect in title" (although they alleged that there was no such defect), and by such waiver be entitled to enforce specific performance of the contract, provided the court made an allowance to plaintiffs for the possession of the premises by the tenant since May, 1945. They rely on Miller v. Dyer, 20 Cal.2d 526, 127 P.2d 901, 141 A.L.R. 1428; Smiddy v. Grafton, 163 Cal. 16, 124 P. 433, Ann.Cas.1913E, 921; Sobelman v. Maier, 203 Cal. 1, 262 P. 1087, and other cases which hold that the vendee may enforce the contract with respect to whatever interest the vendor possesses, and may also receive compensation for the deficiency in the vendor's performance. But the principle of those cases is based upon performance by the vendee in accordance with the terms of the contract. Unless the vendee has so complied, or his failure to comply is excused because of the acts of the vendor, the principle does not apply.

---

tenant under an unrecorded lease is sufficient to put a buyer upon inquiry as to the nature and extent of the occupant's claim. See cases collected in Scheerer v. Cuddy, 85 Cal. 270, at page 272, 24 P. 713.

As pointed out heretofore, plaintiffs did not so comply, nor was their failure so to do excused because of the acts of the defendant.

The judgment is affirmed.

PETERS, P. J., and WARD, J., concur.

88 Cal.App.2d 4

FINKELSTEIN v. FINKELSTEIN.

Civ. 16287.

District Court of Appeal, Second District, Division 1, California.
Oct. 14, 1948.

1. Divorce 🔑**23**

In determining whether husband was entitled to divorce on ground that wife was incurably insane, it was immaterial whether husband had knowledge of wife's removal from state hospital within three year period before action was brought, or had consented to removal. Civ.Code, § 108; Welfare and Institutions Code, §§ 5000 et seq., 5699.

2. Divorce 🔑**23**

Word "home" as used in section of Welfare and Institutions Code defining an "institution" as including every hospital, sanitarium, "home", or other place receiving or caring for any insane person, does not include a private home, and therefore husband whose allegedly insane wife was removed from state hospital to her mother's home for care within three years of date of husband's divorce action, was not entitled to divorce on ground that wife was incurably insane and had been confined to an "institution" continuously for more than three years preceding filing of divorce action. Civ.Code, § 108; Welfare and Institutions Code, §§ 5000 et seq., 5699.

See Words and Phrases, Permanent Edition, for all other definitions of "Home" and "Institution".

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action for divorce by Sam L. Finkelstein against Anna Finkelstein, on ground that defendant was incurably insane and had been confined in an institution continuously for more than three years before filing of action. From an adverse judgment, plaintiff appeals.

Judgment affirmed.

Robert H. Davis, of Los Angeles, for appellant.

Harold W. Kennedy and Robert L. Trapp, all of Los Angeles, for respondent.

DORAN, Justice.

This is an appeal from the judgment.

The facts are not disputed. Plaintiff's action for divorce alleges that "Said defendant is incurably insane, and has been confined to an institution under the provisions of Chapter I, Part I, Division 6, of the Welfare and Institutions Code of the State of California, since April 20, 1943, and continuously for more than three years preceding the filing of this action."

Section 108 of the Civil Code provides in part as follows:

"A divorce may be granted on the grounds of incurable insanity only upon proof that the insane spouse has been confined to an institution under the provisions of Chapter 1, Part 1, Division 6 of the Welfare and Institutions Code * * * for a period of at least three continuous years immediately preceding the filing of the action".

The court found for defendant; appellant argues that "the trial court erred in decreeing that the defendant had not been confined in an institution, * * * for a period of at least three continuous years immediately preceding the filing of this action."

As recited in appellant's brief, it appears from the record that defendant was committed to the Camarillo State Hospital on "April 20, 1943, and has been under the custody, care, jurisdiction, supervision and control of the above named institution continuously since that date; that thereafter, on the 21st day of July, 1943, the defendant was paroled to her husband, the plaintiff; and that thereafter the defendant was recommitted to Camarillo State Hospital on December 23, 1943.

"That since December 23, 1943, the plaintiff gave no one direct or indirect authority to remove said defendant from the State Hospital at Camarillo; but that thereafter, on May 4, 1944, the record will also disclose that defendant was paroled to her mother, Mrs. Yetta Cohen, to be cared for at Mrs. Cohen's home, and was returned to Camarillo State Hospital on May 22, 1944; that thereafter, on October 8, 1945, without the permission, consent or authority of the plaintiff, the defendant was paroled to the custody of the authorities of Santa Monica Rest Home, 2828 Pico Boulevard, Santa Monica, California. That at that time she was unimproved mentally, and supervision equivalent to that she was receiving in the hospital was promised. That thereafter on December 10, 1945, arrangements were made for the transfer of defendant to the custody of her mother, the hospital being assured that adequate care and supervision would be provided in the mother's home. That the parole was changed December 11, 1945, to defendant's mother; and that on April 2, 1946, the defendant was returned to the Camarillo State Hospital. That this release and parole were without the knowledge or authority of the plaintiff." Appellant argues that, "defendant has been continuously under the custody, care, jurisdiction, supervision and control of the proper authorities" as the law herein cited provides.

Respondent contends that the confinement referred to in the law "must be in an institution of a public nature, or at the very least a private agency licensed by the state to receive and care for the insane" and that "a private home such as that of defendant's mother" is not such an "institution within the meaning of Civil Code, section 108."

[1] It may be noted at the outset that whether plaintiff had any knowledge of defendant's removal from the Camarillo State Hospital or had consented thereto is beside the issue.

There is but one question involved, namely, was defendant "confined to an institution * * * for a period of at least three continuous years" as the law quoted above provides. If the "private home" of defendant's mother is not "an institution" within the meaning and application of the law, then respondent must prevail.

As noted above, section 108 of the Civil Code provides that a divorce, in the circumstances here presented, may be granted "only" upon proof that of confinement to an institution under the provisions as above noted of the Welfare and Institutions Code. Section 5699 of that code is as follows:

"As used in this part, 'establishment' and 'institution' include every hospital, sanitarium, home, or other place receiving or caring for any insane, alleged insane, mentally ill, or other incompetent person referred to in this division."

[2] Obviously the above definition limits the meaning of the word "home" as used in section 108 of the Civil Code; it cannot be considered and applied in its general sense and according to its usual acceptation. The word "home", as the definition clearly indicates, does not include a private home but contemplates something entirely different but in connection with which the word "home" is frequently used, for example, childrens home, soldiers home; and many other examples that are at once suggested. Appellant's contention, therefore, cannot be upheld. The evidence supports the findings.

For the foregoing reasons the judgment is affirmed.

YORK, P. J., and WHITE, J., concur.

87 Cal.App.2d 907

JOHNSON v. BANTA.

Civ. 13666.

District Court of Appeal, First District,
Division 2, California.
Oct. 13, 1948.

1. Venue ⚷7

Where plaintiff's San Francisco lawyers mailed plaintiff's unconditional offer to deceased in Chicago with instructions to sign and return to lawyers, and deceased signed and mailed offer in New York to plaintiff in Oakland, and acceptance was not delayed by mailing from New York instead of Chicago, and deceased's use of mails was reasonable and usual, contract was made in New York and not in Oakland for purposes of venue of action for breach of contract. Civ.Code, § 1582.

2. Venue ⚷7

A contract providing that price to be paid for merchandise should be certain figures f. o. b. Oakland did not fix place of delivery of merchandise in Oakland, and hence did not make Oakland the place of performance for purposes of venue of action for breach of contract, where term "f. o. b." was used in direct connection with price and did not directly relate to delivery.

3. Venue ⚷46

Defendant sued for breach of contract which was neither made, nor was to be performed, in Alameda county, was entitled to change of venue from Alameda county to county of defendant's residence.

◆

Appeal from Superior Court, Alameda County; A. J. Woolsey, Judge.

Action for breach of contract by Lloyd Johnson, doing business as Lura-Glo Laboratories, against Dorothy S. Banta, as administratrix of the estate of Guy J. Banta, substituted in the place and stead of Guy J. Banta, deceased. From an order denying a motion for change of place of trial, the defendant appeals.

Order reversed.

Overton, Selig & Wilson and Paul Overton, all of Los Angeles, and Brobeck, Phleger & Harrison and Moses Lasky, all of San Francisco, for appellant.

Johnson, Harmon, Stirrat & Henderson, of San Francisco, for respondent.

GOODELL, Justice.

This appeal was taken from an order denying a motion for change of place of trial.

After the appeal had been perfected the defendant Guy J. Banta died and an order was made in the trial court and here substituting the administratrix of his estate in his stead.

The action is for alleged breach of contract. The motion was made on the ground that the defendant's residence was in the County of Los Angeles. Respondent resisted the motion on the grounds that the contract was made and was to be performed in Alameda County. These opposing positions define the issue now presented.

The contention that the contract was entered into in Alameda County arises from the following situation: Respondent and decedent carried on oral negotiations in Los Angeles looking to the making of a written agreement. A draft of the proposed agreement was then sent by decedent's lawyers to respondent, who had his lawyers make certain changes and rewrite it. Decedent meanwhile had left for the east. Respondent signed two copies of the new draft and his lawyers, whose offices are in San Francisco, mailed them to decedent at Chicago, with a letter in which they said "Kindly sign both copies, keeping one for yourself, and return one to us for Mr. Johnson." Decedent went from Chicago to New York City and while there signed the agreement and mailed one of the copies in New York City addressed to respondent in Oakland, by whom it was received. Respondent claims (1) that as the document was mailed from New York and not from Chicago and (2) as it was sent to respondent in Oakland and not to his attorneys in San Francisco, as directed in their letter, no contract came into existence until it was received in Oakland. Appellant contends that the contract was made when the signed copy was deposited in the mail in New York City.

In Ivey v. Kern County Land Co., 115 Cal. 196, 46 P. 926, 927, one of the leading cases in this state on mutual assent, the plaintiff signed a proposed agreement (treated in the opinion as an offer or proposal) in Bakersfield, which was forwarded by defendant's Bakersfield agent to defendant's San Francisco office for approval and signature. It was signed in San Francisco and returned to the agent in Bakersfield, who delivered the signed copy to plaintiff there. In holding that the contract was made when the agent delivered the document in Bakersfield the court said, "until its actual delivery to the plaintiff it was in the power and under the control of the defendant, and the acceptance and execution of the proposed contract was not complete until such delivery; and the place of delivery, being the place where the last act is performed which is necessary to render the contract obligatory, is the place where the contract is made." We cite this case because it stresses and illustrates the *last act* rule or test. On the same subject see, also, Michelin Tire Co. of California v. Coleman & Bentel Co., 179 Cal. 598, 604, 178 P. 507, and 1 Williston on Contracts, Rev.Ed., sec. 97. The Ivey case restates the familiar rule respecting contracts made by mail as follows: "In the first of the cases above cited it was held that, as soon as the acceptance had gone beyond the control of the party accepting, the contract thus formed became mutually obligatory upon the parties. A deposit of such acceptance in the postoffice, addressed to the other party, places it beyond his control; * * *."

[1] Thus when decedent mailed the document he placed the matter beyond his control, performed the *last act* in the negotiations, and became irrevocably bound.

The remaining question is whether the fact that decedent addressed the document directly to respondent at Oakland instead of to respondent's attorneys in San Francisco, postponed the making of the contract until the receipt of the document by respondent in Oakland. Section 1582, Civil Code, provides "If a proposal prescribes any conditions concerning the communication of its acceptance, the proposer is not bound unless they are conformed to; but in other cases any reasonable and usual mode may be adopted." This discussion is simplified by respondent's concession that "There is no question here of any conditions of acceptance * * *. The direction as to mailing was not a condition of acceptance; it was merely an implied limitation on any authority of the defendant to use the mails as an agent of the plaintiff in delivering the contract."

The proposed agreement was sent to decedent in Chicago through the mail. Under settled rules the use of the same medium for the return communication would be of course "reasonable and usual" and no possible prejudice could have been suffered because it was mailed *directly* to respondent. The fact that decedent took the documents to New York and mailed the signed copy from there instead of from Chicago is of no legal consequence since no point is made as to delay in acceptance. Moreover, the offeror knew that decedent was traveling and it does not seem reasonable under such circumstances that any particular place for acceptance could have been within the contemplation of the parties. No authority is cited by respondent in support of this point.

The offer was not burdened with any conditions limiting its acceptance. The decedent having "put his acceptance in the course of transmission to the proposer" (sec. 1583, Civ.Code) by a mode of communication which was "reasonable and usual," consent was "fully communicated between the parties" then and there, in New York.

Respondent also contends that the contract was to be performed in Alameda County because it provides that "The price to be paid by Second Party to First Party for said merchandise shall be [stating figures] f. o. b. Oakland, California." The argument is that this provision fixes the place of *delivery* of the merchandise in Oakland, hence Oakland was the place of performance.

In Meyer v. Sullivan, 40 Cal.App. 723, 730, 181 P. 847, 850, this court said: "The general rule seems to be that 'if the agreement is to sell goods "f. o. b." at a designated place, such place will ordinarily be regarded as the place of delivery; but the effect of the "f. o. b." depends on the connection in which it is used and if used in connection wtih the words fixing the price only it will not be construed as fixing the place of delivery.' (Citations.)" In that case the phrase "f. o. b. Kosmos steamer at Seattle" was in the contract and the court admitted parol evidence of custom and usage to aid in determining whether it meant literally "free *on board*" the steamer or on the dock near the steamer. On appeal this court pointed out that the trial court had determined that "f. o. b." had been used in the contract "in connection with the price of the grain only, and not as fixing the exact place at which it should be delivered. In arriving at this conclusion," said the court, "the trial court was assisted by the position of the clause in the contracts, used, as it was, in connection with the words fixing the price of the wheat sold."

In Boston Iron & Metal Co. v. Rosenthal, 68 Cal.App.2d 564, 568, 156 P.2d 963, 965, the contract provided: "Price: Thirty Dollars ($30.00) per gross ton, delivered Japan." It was contended that its meaning was that landed weights in Japan were controlling. This court in holding otherwise said, "The trial court was undoubtedly satisfied, as we are, that the words in that collocation were used to refer to and qualify price, and not to indicate the point of delivery or where title was to pass."

In Pond Creek, etc., Co. v. Clark, 7 Cir., 270 F. 482, 486 (followed in Boston Iron & Metal Co. v. Rosenthal), the court said: "It is quite generally accepted as the law that where in a contract the price of goods is fixed, and in connection with the price is employed the term 'f. o. b.' at a given point, it means that this refers to and qualifies only the price, and does not indicate that the seller is actually to deliver the goods at the indicated point, and it is construed to have no reference to delivery, but that wheresoever the goods may be shipped the seller will either pay freight to the indicated point, or, if the goods are not shipped there, will deduct or permit the purchaser to deduct from the fixed price an amount equivalent to the freight on such a shipment to the point indicated."

In 1 Williston on Sales, 2d Ed., sec. 280h, pp. 622, 623, the author lifts the foregoing quotation bodily out of the Pond case. In the Pond case it was held that the words "basis Chicago" were used in the contract to refer to and qualify the price, and did not mean or call for delivery at Chicago. That case was followed in Goodyear, etc., Co. v. Northern Assurance Co., 2 Cir., 92 F.2d 70, 72, where the court points out that "F.O.B. cars New York City" was not found under the caption "Place of Delivery" but "Instead, the f. o. b. provision was placed under the heading 'Terms,' where it would seem to have relation to price and to indicate that the cost of loading on cars was to be borne by the seller * * *." See, also, for similar reasoning, Orthwein's Sons v. Wichita, etc., Co., 32 Tex.Civ.App. 600, 75 S.W. 364, 365, a case involving the phrase "delivered Galveston."

Craig Brokerage Co. v. Joseph A. Goddard Co., 92 Ind.App., 234, 243, 175 N.E. 19, 23, follows both Meyer v. Sullivan, supra, and Pond Creek, etc., Co. v. Clark, supra. Lyons Milling Co. v. Cusimano, 161 La. 198, 108 So. 414, 415, also follows the Pond case.

Respondent relies on Gallo v. Boyle Mfg. Co., 35 Cal.App.2d 168, 94 P.2d 1010. There the court said, 35 Cal.App.2d page 170, 94 P.2d page 1011: "The purchase order in evidence contains the following language: 'Please deliver to us via Santa Fe, f. o. b. Modesto, the following items * * *.' As delivery of an article sold is an essential part of the contract, and as the contract called for delivery in Stanislaus county, it would seem that the foregoing is ample evidence upon which the trial court could make a finding that the contract was to be performed in that county."

[2] In the instant case "f. o. b." is used in direct connection with price. In the Gallo case it was directly related to delivery.

The rule laid down in Meyer v. Sullivan, supra, and in the Pond case, supra, is controlling.

[3] The record fails to show that the contract was either made or to be performed in Alameda County. Accordingly the defendant was entitled to a change of venue to the county of his residence.

The order is reversed.

NOURSE, P. J., and DOOLING, J., concur.

87 Cal.App.2d 885

YURKAS v. O'NEILL.

Civ. 7542.

Sac. 5943.

District Court of Appeal, Third District, California.

Oct. 11, 1948.

Rehearing Denied Nov. 3, 1948.

Appeal and error ⚿371

Where appellant failed to make arrangements with the clerk for payment of cost of preparing transcript within ten days after notification from the clerk as required by rules of court the appeal would be dismissed. Rules on Appeal, rules 5(c), 42(a).

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Action by Rosalie Yurkas against C. E. O'Neill, for damages resulting from alleged negligence. From a judgment for defendant, plaintiff appeals.

On appellee's motion to dismiss appeal.

Motion granted.

Rosalie Yurkas, pro se.

Peter Mannino, of Sacramento, for respondent.

THOMPSON, Justice.

This is a motion, under Rule 42(a) of Rules on Appeal, to dismiss the appeal for failure of the appellant to either pay the Clerk's estimated cost of preparing the transcript, or to make arrangements with the Clerk for the payment thereof, as required by Rules 4(c) and 5(c) of said Rules on Appeal. The plaintiff was represented on said motion in this court in proper person. The defendant was represented by his attorney, Peter Mannino.

Plaintiff brought the action against the defendant in Sacramento County Superior Court, for damages resulting from alleged negligence. The cause was tried April 13, 1948. Judgment of nonsuit was rendered against the plaintiff. April 26th notice of appeal was duly served and filed. On the same day that the notice of appeal was filed, the County Clerk gave plaintiff written notice of his estimated cost of preparing the transcript as required by said Rule 4, with instructions to deposit said estimated sum with the Clerk, or to make arrangements with him for the payment thereof. The notice of motion to dismiss this appeal, which was served and filed in this court on May 11, 1948, had attached to it the Clerk's certificate containing the statements required by Rule 42(a) of Rules on Appeal, and certifying that he had notified plaintiff in writing on April 26th of his estimate of the cost of transcript and request for payment thereof and that "the time for the deposit of said estimated sum * * * has expired and no arrangements have been made by said Rosalie Yurkas, the plaintiff herein, for the payment of said estimated cost * * *." That certificate is dated May 10, 1948, and was served on the plaintiff the following day.

Rule 5(c) provides, with respect to appellant's notice to the Clerk for preparation of the transcript on appeal to be given "Within ten days after filing the notice of appeal," [Rule 5(a)] that: "The notice given by appellant under the foregoing provisions of this rule shall not be effective for any purpose unless, within 10 days after notification from the clerk of his estimate of the cost of preparing the transcript * * *, the appellant shall make arrangements with the clerk for the payment thereof."

The record on this motion is devoid of any showing that the transcript on appeal has ever been prepared or filed, although more than four months have expired since the notice of appeal was filed, or that the appellant has ever endeavored to arrange with the Clerk for the cost thereof. Barry v. Bowdle, 69 Cal.App.2d 721, 160 P.2d 91.

It is true that appellant offered in evidence at the time of presenting this motion to dismiss the appeal her written statement, sworn to before a notary public on May 27, 1948, in which she says, "Plaintiff mailed $25.00 in money order to the County Clerk, C. C. LaRue, which he surely received." But appellant also offered in evidence what purports to be a portion of a letter signed and sent to her by the Clerk, in which he replied: "You stated this morning that you sent this office $25.00. We have no record in this office of receiving this sum or any other amount from you relative to this matter."

The sworn certificate of the Clerk definitely states that no arrangements were made with him to pay the estimated cost of the transcript. No receipt for the money order, or evidence of when it was mailed to the Clerk, or that it was enclosed in an envelope with the postage prepaid and addressed to the Clerk's residence or place of business were offered at the hearing. If the money order was mailed to the Clerk later than ten days after his notice to appellant on April 26th of his estimate of the cost of the transcript it would have been ineffectual "for any purpose", under the provisions of Rule 5(c). If the money order was in fact mailed within time, but was incorrectly addressed or the postage was not prepaid, and therefor not received, it would still be inadequate. Assuming, without so deciding, that said rule is not mandatory, since it is the disposition of courts to hear appeals on their merits, and that an appellant might be relieved from inadvertent mistakes under proper circumstances, there has been no adequate proof of such mistake, or effort to correct it within a reasonable time, or at all.

We are bound by the record as it is presented to us.

In Cunningham v. Taylor, Cal.App., 1948, 197 P.2d 565, this court held under circumstances very similar to this case, except that the appellant in that case failed to appear in this court in opposition to the motion to dismiss the appeal, that: "From the foregoing it is apparent that this appeal should be dismissed, not only for failure of appellant to arrange with the clerk for payment of the cost of the record, but also because such appeal may be deemed abandoned. (Citing authorities.)"

We are impelled to hold that the appeal should be dismissed for failure to arrange for the payment of the Clerk's estimated cost of preparing the record on appeal.

The appeal is, accordingly, dismissed.

ADAMS, P. J., and PEEK, J., concur.

---

88 Cal.App.2d 30

PEOPLE v. FIELDS.

Cr. 4222.

District Court of Appeal, Second District, Division 1, California.

Oct. 15, 1948.

Hearing Denied Nov. 9, 1948.

1. Criminal law ⚿878(3)

Where defendant, charged with grand theft of an automobile, taking same automobile without consent of owner, and grand theft of the tires of the same automobile, was only convicted of theft of automobile, the not guilty judgments on the other two counts did not affect the validity of the conviction, notwithstanding all counts were based on same incident.

2. Larceny ⚿65

Evidence was sufficient to support conviction of grand theft of automobile.

3. Criminal law ⚿988

Where, at time of revocation of order placing defendant on probation, sentence was pronounced without arraignment for judgment and in the absence of defendant's counsel, defendant was denied constitutional right to appear and defend with counsel. Const. art. 1, § 13.

4. Criminal law ⚿988

Arraignment for judgment and pronouncing of judgment are within constitutional provision providing that in "criminal prosecutions" the party accused shall have the right to appear and defend in person and with counsel. Const. art. 1, § 13.

See Words and Phrases, Permanent Edition, for all other definitions of "Criminal Prosecutions".

5. Criminal law ⚿641(1)

Probation proceedings do not come within constitutional provision that in "criminal prosecutions" the party accused shall have the right to appear and defend in person and with counsel. Const. art. 1, § 13.

Appeal from Superior Court, Los Angeles County; Edward R. Brand, Judge.

Herbert Fields was convicted of grand theft of an automobile and he appeals.

Judgment reversed and cause remanded with instructions.

William Ellis Lady, of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., and Dan Kaufman, Deputy Atty. Gen., for respondent.

DORAN, Justice.

This is an appeal from the judgment.

Defendant was charged by information in three counts with (1) grand theft of an automobile; (2) taking the same automobile without the consent of the owner in violation of section 503 of the Vehicle Code, and (3) with grand theft of the automobile tires on the same car.

Defendant was adjudged guilty of Count I, to wit, the theft of the car, and not guilty of the other counts. Permission was granted to file an application for probation. At the hearing on the application on April 26, 1945, the defendant was arraigned for judgment and asked, "Is there any legal cause why sentence should not now be pronounced?", to which defendant's counsel replied, "No". No judgment was pronounced; the matter was disposed of as follows: "Proceedings are suspended and the defendant is placed on probation for a period of five years, on condition that the first eight months be spent in the custody of the Sheriff, with good time allowed, if earned, and the road camp recommended, and that he follow such other requirements as the Probation Department shall set up for him. The other two counts are dismissed." On August 9, 1945, the order was modified and the defendant released from custody to remain on probation for five years. On December 23, 1947, the above order was revoked, at which time the defendant, who was present in court without counsel, was sentenced. There was no arraignment for judgment; the trial judge merely stated, "The defendant is now sentenced to the State Prison for the term prescribed by law, and is now committed into the custody of the Sheriff for transportation to the Warden and execution of the judgment. Chino is recommended. This sentence will run concurrently with the one in the County Jail he is now serving."

It is contended on appeal that, "since the Court found defendant not guilty of a violation of Section 503 of the Vehicle Code, it could not find defendant guilty of grand theft as charged in Count I"; the same argument is applied to the not guilty judgment as to Count III. It is also urged that inasmuch as "The evidence was held to be insufficient to support a violation of section 503 of the Vehicle Code" and the offense alleged in Count III, therefore "the evidence was insufficient to support the charge of grand theft alleged in Count I".

Appellant's argument in substance is based on the fact, which is not disputed, that the three alleged offenses are related to the same incident, that is that all three offenses involve the same automobile. The car was stolen by defendant and later parked in the rear of a building where it was "jacked up" and the wheels and tires removed. Count III related to the alleged theft of wheels and tires.

[1, 2] Appellant's argument is purely specious. The test as to the sufficiency of the evidence to support the judgment does not apply as appellant argues. Where, as here, three counts arising out of the same transaction are alleged and the defendant adjudged guilty as to one and not guilty as to the other two, a defendant cannot be heard to complain because of the not guilty judgments. The sole question involved is whether the evidence is sufficient to support the judgment of guilty as to the one count; whether it is sufficient or would have been sufficient to support a judgment of guilty of either or both of the other counts is beside the issue. The not guilty judgment of the two counts in no way affects the validity of the guilty judgment as to the other. The question is too well settled to require citation of authority. A review of the record herein reveals the evidence sufficient to support the judgment.

Appellant in conclusion also urges that, "There is another point that we might have set forth above, and so as to bring it to the attention of the Court we make mention thereof in the conclusion hereof, and that is the question of the defendant not being represented by counsel at the time of the hearing on the proceeding instituted by the

District Attorney to revoke the probation granted defendant."

Respondent in reply cites People v. Blankenship, 16 Cal.App.2d 606, 61 P.2d 352; other cases that are not in point for the reasons hereinafter noted are also cited. In the Blankenship case the order revoking the suspension of the judgment was made and entered in the absence of the defendant and defendant's counsel. It was there held in substance that probation relates to clemency and that a defendant in a criminal action is not entitled to clemency as a matter of "right"; nor is probation a matter of "right". The order revoking probation therefore, in the circumstances therein presented, was upheld. But the facts in the Blankenship case and the facts as revealed by the record in the within action are entirely different in a vital particular. In the Blankenship case the judgment had been duly pronounced, then ordered suspended and the defendant placed on probation. In the within action the judgment was not pronounced until after the alleged violation of probation had occurred. Although, as heretofore noted, the within defendant had been arraigned for judgment, no judgment was at that time pronounced. When the defendant was cited for the alleged violation, sentence was pronounced as quoted above, at which time defendant was not represented by counsel.

[3-5] The Constitution, Article I, Section 13, provides that, "In criminal prosecutions * * * the party accused shall have the right * * * to appear and defend, in person and with counsel". Inasmuch as the arraignment for judgment and pronouncing of judgment are clearly a phase of "criminal prosecutions", the defendant herein was denied that constitutional right. Probation proceedings are no part of "prosecutions"; actually they represent the opposite. Probation is not punishment in any sense; on the contrary probation avoids punishment. And as held the Blankenship case in effect, when the judgment has been duly pronounced before the order granting probation is entered, such order may be revoked without notice and the defendant ordered committed pursuant to the judgment. The defendant in such circumstances need not be present and the defendant's absence would not affect the validity of the commitment. In the within action judgment was pronounced without arraignment for judgment and in the absence of defendant's counsel which was error.

For the foregoing reasons the judgment is reversed and the cause remanded, but for the purpose of rearraigning the defendant for judgment and the pronouncing of judgment only.

YORK, P. J., and WHITE, J., concur.

---

87 Cal.App.2d 882

BRADSHAW v. GLENN-COLUSA IRR. DIST.

Civ. 7526.

District Court of Appeal, Third District,
Division 3, California.
Oct. 11, 1948.

1. Estoppel 🔑62(4)

An irrigation district is not estopped to invoke statutory requirement that verified claim be filed against it for damages resulting from defective condition of its property because of its receipt of written and oral communications timely notifying it of danger. Water Code, §§ *22727–22729*.

2. Constitutional law 🔑70(1)

Courts may allow no exceptions to plain provisions of claim statute, such as Irrigation District Liability Law, under guise of construction thereof. Water Code, §§ *22727–22729*.

3. Waters and water courses 🔑263

The requirement of Irrigation District Liability Law that verified claim against district for damages resulting from defective condition of property thereof be filed may not be waived. Water Code, §§ *22727–22729*.

4. Waters and water courses ⚿263

Compliance with provisions of Irrigation District Liability Law for filing of verified claim against district for damages resulting from defective condition of property thereof is mandatory. Water Code, §§ 22727–22729.

5. Waters and water courses ⚿263

Filing of unverified claim against irrigation district for damages resulting from defective condition of property thereof, as in letter to district superintendent, setting forth writer's loss of bees and honey as result of flood caused by breaking of irrigation ditch headgate, is not substantial compliance with statutory requirement that verified claim for damages be filed to lay foundation for action therefor. Water Code, §§ 22727–22729.

Appeal from Superior Court, Glenn County; W. T. Belieu, Judge.

Action by James B. Bradshaw against the Glenn-Colusa Irrigation District to recover damages for destruction of bees and honey by the flooding of certain land when the headgate in defendant's irrigation ditch broke.

Judgment for defendant, and plaintiff appeals.

Affirmed.

Thos. E. Reynolds, of Fairfield, for appellant.

Duard F. Geis, Charles H. Frost, Jr., and Wright L. Callender, all of Willows, for respondent.

ADAMS, Presiding Justice.

The second amended complaint in this action alleged that plaintiff acquired from one Fredrickson the right to place 50 colonies of bees on Frederickson's property in the Glenn-Colusa Irrigation District; that the district, in order to supply water for irrigation of the lands therein, owned and operated a ditch in which were located a headgate and dam; that immediately prior to August 14, 1947, such ditch and headgate were so badly and negligently constructed and maintained, and the water therein so negligently and carelessly attended, that the headgate broke and the water of the ditch flowed over the lands of Fredrickson and flooded and killed plaintiff's bees and destroyed the crop of honey therein, to plaintiff's damage in the sum of $764.00 It was further alleged that on August 30, 1947, plaintiff wrote a letter to the superintendent of the district—which letter was set forth in the complaint—wherein plaintiff set forth the loss of his bees and itemized his losses. Also set forth was a letter from the district by its secretary, dated December 24, 1947, referring to plaintiff's letter of August 30, stating that same had been presented to the board of directors of the district, and that "After full investigation by the District the Board have rejected the claim."

In a second count plaintiff claimed $150.00 alleged to have been expended by him on three trips to salvage as much of his material as possible; but no verified claim for such amount was filed.

Defendant demurred generally and specially to plaintiff's said complaint, and the demurrer was sustained with leave to amend within ten days. Plaintiff declined to amend and thereafter judgment was entered for defendant.

On this appeal it is contended by plaintiff that the trial court erred in sustaining defendant's demurrer, while respondent, in reply, points out that plaintiff's complaint was hopelessly defective in that it failed to show compliance with sections 22727 to 22729 of the Water Code. Sections 22727 and 22728 provide that whenever it is claimed that any person or property has been injured or damaged as a result of any dangerous or defective condition of any property under the control of any district or its officers or employees or the negligence of any officer or employee of a district, a verified claim for damages shall be presented in writing and filed with the officers or employees involved and the secretary within 90 days after the accident or injury has occurred; that such claims shall specify the name and address of the claimant, the date and place of the accident or injury, and the nature and extent of the injury or damage; and section 22729 reads: "Compliance with Sections 22727 and 22728 is a condition precedent to the filing or maintaining of any action for the injury or damages."

It is apparent from plaintiff's complaint that his so-called claim, to wit, the letter which he wrote to the superintendent of the district, was not verified, nor is it contended that any verified claim was filed by him; but he argues that he made "substantial compliance with the Water Code sections aforesaid."

[1-4] In Powers Farms v. Consolidated Irr. Dist., 19 Cal.2d 123, 130, 131, 119 P. 2d 717, the court held that an irrigation district is not estopped to invoke the requirement for the filing of a verified claim, as required by the Irrigation District Liability Law by reason of the fact that it had timely notice of the danger to property derived from written and oral communications concerning the damage; that the courts may allow no exceptions to the plain provisions of a claim statute under the guise of interpretation or construction; and that the requirement of the Irrigation District Liability Law for the filing of a verified claim may not be waived; that compliance with the statute in this respect is mandatory. A long line of authorities to the same effect is therein cited. Also see Davis v. East Contra Costa Irr. Dist., 19 Cal.2d 140, 142, 119 P.2d 727; Hall v. City of Los Angeles, 19 Cal.2d 198, 202, 120 P.2d 13; Ghiozzi v. City of South Francisco, 72 Cal.App.2d 472, 164 P.2d 902; Kline v. San Francisco Unified School Dist., 40 Cal.App.2d 174, 177, 178, 104 P.2d 661, 105 P.2d 362.

[5] Appellant cites certain cases such as Uttley v. City of Santa Ana, 136 Cal. App.2d 23, 28 P.2d 377, approved in Sandstoe v. Atchison, T. & S. F. R. Co., 28 Cal. App.2d 215, 223, 82 P.2d 216, in support of his contention that he complied substantially with the provisions of the applicable statutes. But in none of the cases which he cites was the failure to verify the claim involved. And in Spencer v. City of Calipatria, 9 Cal.App.2d 267, 269, 49 P.2d 320, decided by the same court that decided the Uttley case, it was held that the filing of an unverified claim is not a substantial compliance with a statute requiring that a verified claim be filed, and that compliance with such a provision is mandatory and must be complied with in order to lay the foundation for an action.

The judgment is affirmed.

PEEK and THOMPSON, JJ., concur.

87 Cal.App.2d 913

SCHWENGER v. GAITHER.

Civ. 13716.

District Court of Appeal, First District,
Division 2, California.
Oct. 13, 1948.

1. Evidence 🔑474(8)

In personal injury action arising out of automobile collision, where plaintiff first saw defendant 5 feet away, plaintiff's guess as to speed of defendant was admissible as expression of plaintiff's enlightened opinion, and fact that observation was momentary went merely to weight of testimony.

2. Automobiles 🔑246(58)

In personal injury action arising out of automobile collision at intersection, where plaintiff testified that he got a glimpse of defendant's automobile when it was only 5 feet away, failure to give tendered instruction on "to look is to see" was not error.

3. Damages 🔑216(10)

In personal injury action, where plaintiff, a salesman whose duties included exhibiting samples thereby exposing his hand, suffered loss of portion of finger and other mutilation of hand, jury were entitled to infer that plaintiff would reasonably suffer mentally by way of humiliation and anguish because of deformity, and instruction on mental suffering was proper.

4. Damages 🔑132(13)

$5,000 for loss of portion of end joint of left middle finger and injury to ring finger, leaving it tender, stiffened, and half an inch shorter than normal, was not excessive.

Appeal from Superior Court, Santa Clara County; John D. Foley, Judge.

Action by Karl F. Schwenger against Emmett H. Gaither for personal injuries sustained in an automobile collision. From the judgment, defendant appeals.

Affirmed.

Campbell, Hayes & Custer, Austin D. Warburton, and Alfred B. Britton, Jr., all of San Jose, for appellant.

Gregory, Hunt, Melvin & Faulkner, of San Francisco, and Edward M. Fellows and O. Vincent Bruno, both of San Jose, for respondent.

DOOLING, Justice.

Plaintiff had a verdict for $5000 for injuries resulting from an intersection collision between his and defendant's motor vehicle. Plaintiff was traveling easterly; defendant was traveling northerly. Defendant's car collided with that of plaintiff in the southeasterly quarter of the intersection causing it to turn over. Plaintiff suffered a fractured left ring finger, injury to the middle left finger requiring amputation of the tip or end, and a laceration of the left index finger.

[1] On direct examination the plaintiff testified that he got a glimpse of defendant's car when it was about five feet from his car and that in his opinion it was traveling at a speed of forty miles per hour. On cross-examination the plaintiff was asked the single leading question: "But you don't know as to miles per hour; forty miles an hour is just a guess, is that right?" The plaintiff answered, "That is right." Thereupon a motion to strike the witness' testimony as to speed was made and denied. No attempt was made to develop the basis of the plaintiff's estimate of speed further nor to determine what meaning he understood and intended by the word "guess." More than one court has recognized that "in common parlance, 'suppose' and 'guess' are frequently used as expressions of the speaker's enlightened opinion." Councill v. Mayhew, 172 Ala. 295, 55 So. 314, 317; Croft v. Chicago, R. I. & P. Ry. Co., 134 Iowa 411, 109 N.W. 723, 726; Baumann v. City of New York, 180 App. Div. 498, 167 N.Y.S. 720, 722. The court did not err in the denial of the motion to strike under the circumstances. That the witness' observation was momentary goes to the weight of his testimony rather than to its admissibility.

[2] The failure to give a tendered instruction on "to look is to see" was not error. In Cooper v. Smith, 209 Cal. 562, at page 566, 289 P. 614, 616, the court said of a similar proposed instruction:

> "The proposed instruction is a mere commonplace, within the knowledge of all the jurors, and is argumentative, rather than a statement of law."

[3] An instruction on mental suffering was properly given. The plaintiff, a salesman part of whose duties were exhibiting samples, testified: "I have to open cases and display the merchandise. While I can do it with one hand, it's difficult and very painful when I forget to watch my other hand." The plaintiff suffered the loss of a part of the middle finger and the ring finger was shortened from the fracture by half an inch. They are both stiff and painful. The jury were entitled to infer that plaintiff would reasonably suffer mentally by way of humiliation, shame and anguish, because of the deformity of his hand.

[4] The case of Crane v. Smith, 23 Cal.2d 288, 144 P.2d 356, is practically conclusive on the question of excessive damages. In that case the court affirmed an award of $4800 for the loss of a portion of the end joint of an index finger, against the claim that the verdict was excessive. The plaintiff in this case not only lost a portion of the end joint of the middle finger, but suffered an injury to the ring finger which left it tender and stiffened and half an inch shorter than it had been before.

Judgment affirmed.

NOURSE, P. J., and GOODELL, J., concur.

88 Cal.App.2d 1

PRYTZ v. ASSOCIATED FARMS, Inc. et al.

Civ. 13643.

District Court of Appeal, First District, Division 2, California.

Oct. 14, 1948.

1. Limitation of actions ⚷83(2)

A judgment creditor wishing to enforce judgment against estate of deceased judgment debtor does not have burden to procure appointment of administrator of estate of deceased judgment debtor. Code Civ.Proc. §§ 353, 681, 685.

2. Limitation of actions ⚷83(2)

Where judgment was entered on June 3, 1940, and judgment debtor died intestate on July 4, 1942, and administratrix was appointed on November 14, 1946, running of five-year statute of limitations on judgment was tolled by statute extending enforceability of judgment for one year after issuance of letters of administration, and hence judgment creditor's motion, filed within one year after appointment of administratrix, for leave to enforce judgment against estate was properly granted. Code Civ.Proc. §§ 353, 681, 685.

◆

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

Action by George G. Prytz against Associated Farms, Inc., Manual Silva, and others. The plaintiff recovered judgment against Manuel Silva and others. Manuel Silva died, and the plaintiff filed a motion, opposed by Conrad Silva, administrator of the estate of Manuel Silva, deceased, and others, for an order granting plaintiff leave to enforce the judgment against the estate of Manuel Silva, deceased. From an order granting the motion, the administrator and others appeal.

Order affirmed.

Lafayette J. Smallpage and Harold J. Willis, both of Stockton, for appellants.

Crozier C. Culp and Marvin Sherwin, both of Oakland, for respondent.

DOOLING, Justice.

This appeal involves the enforcement of the same judgment entered in favor of Prytz against Silva which was before the District Court of Appeal, Third Appellate District, in Silva v. Superior Court, 83 Cal.App.2d 521, 189 P.2d 314. A money judgment was entered on June 3, 1940, in favor of Prytz and against Silva and others. On July 4, 1942, Silva died. No proceedings to probate the decedent Silva's estate were commenced until November 1946, when on petition of certain creditors of Silva, Margaret Buckmaster was appointed administratrix of his estate. Respondent, within the time required by law, filed a creditor's claim based on the aforesaid judgment which was approved by the administratrix. Thereafter on May 26, 1947, respondent filed in the Superior Court of Alameda County, in which his judgment had been secured, a notice of motion for an order granting him leave to enforce his judgment against the estate of Silva. This motion was granted on July 1, 1947, and it is from the order granting this motion that this appeal is taken.

Section 685, Code of Civil Procedure, under which the motion was made, provides in its first paragraph:

> "In all cases the judgment may be enforced or carried into execution after the lapse of five years from the date of its entry, by leave of the court, upon motion, and after due notice to the judgment debtor accompanied by an affidavit or affidavits setting forth the reasons for failure to proceed in compliance with the provisions of section 681 of this code. The failure to set forth such reasons as shall, in the discretion of the court, be sufficient, shall be ground for the denial of the motion."

It appeared from the affidavit in support of the motion that Silva had died on July 4, 1942, and that no personal representative of his estate had been appointed until the appointment of Margaret Buckmaster as administratrix on November 14, 1946. These facts sufficiently support the order appealed from as may be gathered from the opinion of the court in Silva v. Superior Court, supra, 83 Cal.App.2d 521, 189 P.2d 314. The court in that case said in 83 Cal.App.2d at pages 527, 189 P. 2d at page 318:

"The judgment upon which the claim of George G. Prytz was presented to the estate and approved was not outlawed. The judgment was rendered against Manuel Silva June 3, 1940. He died intestate two years thereafter, on July 4, 1942. No administrator of his estate was appointed until November 12, 1946. Since the statute of limitations had not barred an action on the judgment prior to the death of Manuel Silva, the time to commence suit was extended by his death for one year after letters of administration were issued in his estate. Code Civ.Proc., sec. 353; Schwartz v. Edmunds, 20 Cal.App.2d 530, 67 P.2d 351; Pacific Gas & Electric Co. v. Elks Duck Club, 39 Cal.App.2d 562, 103 P.2d 1030; Casey v. Gibbons, 136 Cal. 368, 372, 68 P. 1032; In re Bullard's Estate, 116 Cal. 355, 48 P. 219; Hibernia Savings & Loan Society v. Herbert, 53 Cal. 375; 11B Cal.Jur. 359, sec. 940."

The fact, as noted by that court in the passage just quoted, that the judgment of Prytz was not outlawed and the time to commence suit thereon was extended by Silva's death "for one year after letters of administration were issued in his estate," sufficiently set forth "the reasons for failure to proceed in compliance with the provisions of section 681 of this code" as required to support such motion by Code Civ.Proc. sec. 685.

Sec. 681, Code Civ.Proc., provides for the issuance of execution upon any judgment "within five years after the entry thereof" and then provides further that if "the issuing of execution thereon is stayed * * * by operation of law, the time during which it is so stayed * * * must be excluded from the computation of the five years within which execution may issue."

[1, 2] Upon the death of Silva in 1942 it was impossible "by operation of law" to have execution issued on the judgment against him. The only legal method of enforcing the judgment against his estate thereafter was pursuant to the provisions of the Probate Code by the filing of a claim and if it was rejected by suit thereon. No burden was placed on the judgment creditor to procure the appointment of an administrator of Silva's estate. On the contrary, sec. 353, Code Civ.Proc., referred to by the court in the passage quoted from Silva v. Superior Court, supra, tolled the running of the statute of limitations on respondent's judgment by making it continue to be enforceable "within one year after the issuing of letters testamentary or of administration." The motion was made within this one year period and was therefore properly granted. As the court said in Silva v. Superior Court, supra, 83 Cal.App.2d at page 529, 189 P.2d at page 319:

"Unless the judgment creditors are entitled to the remedies provided by either Section 685 or Section 353 of the Code of Civil Procedure, the heirs of the deceased debtor could defeat valid judgments by refraining from probating his estate until after five years from the rendering thereof."

Order affirmed.

NOURSE, P. J., and GOODELL, JJ., concur.

88 Cal.App.2d 146

PEOPLE v. HEARN.

Cr. 4249.

District Court of Appeal, Second District, Division 1, California.

Oct. 22, 1948.

1. Criminal law ⚷1159(2, 4, 6)

Where evidence, circumstantial or otherwise, shows that a crime has been committed and was perpetrated by defendant, reviewing court will not retry the case nor attempt to determine the weight of the evidence or the credibility of witnesses.

2. Criminal law ⚷1159(2)

Before an appellate tribunal may reverse for insufficiency of evidence, it must clearly appear that on no hypothesis whatever was there evidence of sufficient substantiality to support the conclusion of trier of facts, even though facts might reasonably be reconciled with accused's innocence.

3. Homicide ⚷254

Evidence sustained conviction of second degree murder.

4. Homicide ⚷244(1)

In murder prosecution, evidence sustained finding that defendant, rather than deceased, was the aggressor and that defendant was therefore not entitled to protective provisions of section of Penal Code dealing with justifiable homicide and section dealing with killing by one acting under reasonable fear. Pen.Code, §§ 197, 198.

5. Homicide ⚷151(1)

Where there was substantial conflicting evidence which warranted assumption that crime committed was murder, and that taking of a human life by defendant was neither justifiable nor excusable, defendant was not entitled to benefit of code section providing that if proof on part of prosecution tends to show that crime committed only amounts to manslaughter, or that defendant was justifiable or excusable, burden of proving mitigation is not on defendant. Pen.Code, § 1105.

Appeal from Superior Court, Los Angeles County; William R. McKay, Judge.

Burney C. Hearn was convicted of second degree murder, and he appeals.

Judgment affirmed.

Walter L. Gordon, Jr., of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen. and James A. Doherty, Deputy Atty. Gen., for respondent.

WHITE, Justice.

In an information filed by the District Attorney of Los Angeles County, defendant was accused of the crime of murder. Following a plea of not guilty and waiver of a trial by jury, the cause proceeded to trial. It was stipulated that the transcript of and exhibits introduced at the preliminary examination could be read and considered by the trial judge, subject to the right of presenting additional testimony. After reading the transcript of the preliminary examination, hearing additional testimony, and receiving into evidence certain exhibits, the court rendered its decision finding the defendant guilty of murder of the second degree. From the judgment of conviction defendant prosecutes this appeal.

Epitomizing the facts, we find in the record evidence that deceased O'Brean Jackson resided with his wife in a room on the second floor at 1436 East 54th Street in the city of Los Angeles. On the evening of January 9, 1948, the victim and his wife retired about 10:30 o'clock. According to the testimony of Mrs. Jackson, appellant subsequently knocked on their door. She went to the door and appellant told her to awaken her husband as he desired to see him concerning something which earlier in the evening he had left in his automobile. Mrs. Jackson awakened her husband, appellant entered the room and asked her husband if he was drunk, to which the deceased answered, "No". The latter arose, opened the door and told appellant to "Get the hell on downstairs because he was tired and sleepy". Appellant thereupon went on downstairs and the deceased returned to bed.

Mrs. Jackson further testified that about an hour later appellant returned "and pounded on the door". The deceased arose from his bed and went to the door. As her husband opened the door, Mrs. Jackson heard two shots. Other than to quote the testimony of this witness that she subsequently heard her husband say, "Burney C., you shot me, but I got you", we refrain from quoting additional testimony given by this witness for the reason that it is manifest, as suggested by the Attorney General, that much of the testimony given by her following the foregoing events is probably the result of conclusions, and information subsequently imparted to her, because she testified that she put her head under the covers for the reason that she was scared and was thus unable to see several of the subsequent events about which she testified.

The deceased asked his wife to call an ambulance, which she did. When she was returning from that mission she observed that appellant "had done rolled downstairs". That her husband was then in possession of the .22 rifle that appellant had previously had, and was threatening to shoot the latter. It appears that prior to and up to the early part of the evening upon which the shooting occurred, deceased and appellant were very good friends and "good drinking companions".

It is conceded that appellant shot the deceased with a .22 rifle on the evening of January 9, 1948, and that as a result of the gunshot wound thus inflicted, the latter died on January 11, 1948.

The testimony as to the circumstances surrounding the shooting is in conflict, and we shall therefore, in the interest of clarity, narrate the testimony of the several witnesses rather than attempt to epitomize it in a single narrative.

Appellant's version of the circumstances surrounding the shooting are contained in a statement he made to police officers on January 20, 1948; two statements made to a police officer on the night of his arrest, and his testimony given at the trial.

In his statement of January 20, 1948, some 11 days after the fatal altercation, appellant specifically stated that the deceased did not beat him "until after the shot was fired". That upon the occasion of appellant's second visit to the deceased's room, the latter came to the door saying "that he didn't want to talk and took the ice pick". Appellant was asked, "Did he strike you at any time then?" to which appellant answered, "No". Appellant stated that he "went downstairs and he (deceased) came out the door and my gun was downstairs and he came out the door with the ice pick and I made the shot". Later, appellant was asked, "All this beating that you received that evening was after you shot Jackson, is that true?". Appellant answered, "Yes". The interrogating officer then inquired, "And that is after you left his house and started home?", to which appellant answered, "That is right. He caught me before I got home". During this interrogation, appellant stated that he visited the room of the deceased only once that night and fired but one shot.

Appellant's testimony given at the trial is at variance in important particulars with statements made by him on January 20, 1948. At the trial he testified that Jackson came to his house on the night of the shooting and that the two of them went off in Jackson's car. Hearn was driving. First they used three dollars that Hearn had to obtain the .22 rifle from the person to whom it had been pawned. Then they bought a bottle of wine, still using Hearn's money.

Hearn and Jackson were sitting in the car parked in Hearn's driveway drinking the wine, when a shortage of cigarettes led to Hearn's charging Jackson with retaining Hearn's change after the purchase of the wine. Jackson then, according to Hearn, struck Hearn and ordered him out of the car. Hearn left the car and Jackson drove off.

After Jackson had gone, Hearn discovered that he had left the gun and his purse, containing the keys to his house, in Jackson's car. He went to Jackson's house, knocked on the door, and when Jackson appeared, said he had come to "get the things out of the car". Jackson "cut him off" when he began to talk about the money question again, told him to get out and reached back under his pillow for an ice pick.

That the deceased then hit appellant in the eye and knocked him out of the door. That the latter accused the deceased of still being drunk. Appellant testified that as he was going down the stairs, he was hit on the back of the head and knocked to the bottom of the steps; that he saw the deceased come down the steps carrying a shotgun, whereupon he reached for his rifle, there was a scuffle and the gun was discharged. That but one shot was fired. Appellant testified that he was again struck after the shot had been fired and that it was his belief that the deceased had not been struck by the bullet.

On cross-examination appellant stated that he was sober on the night of the shooting but was not sure as to Jackson's sobriety. He testified that the deceased hit him with his fists the first time, and then used the shotgun barrel as he was going downstairs. That these assaults were made prior to the firing of the shot. Appellant was unable to recall the contents of his statements to the police officers, either those made following his arrest or the one made on January 20, 1948.

Police Officer Tomanovich, testified that in response to a call he went to the home of the deceased. That he followed blood stains for a distance of about four blocks to a parked truck where he found appellant lying in the truck cab. That at this time the officer asked appellant if he had shot a man on 54th Street to which the former answered, "Yes, I shot George because he beat me up".

In a later conversation, held in the police car while on the way to the receiving hospital, appellant went into more detail. Police Officer Tomanovich, concerning this conversation, testified as follows:

"Q. What did he say, if you recall, the exact words or substantially the language he used. A. We asked him where he had gotten the gun and he said he had gotten the gun back from a man he had pawned it to, a friend of his. He had pawned it to the man for $3.00. He had gotten it back that night, the gun had been loaded all the time it was pawned and the time that he had gotten it back and that he had come to see this O'Brean Jackson and then that he and O'Brean Jackson had gone out for a short while; that before he had gone upstairs to get O'Brean Jackson he had left the rifle on the front porch; then, they went out for this short while, they came back, they had an argument and he went downstairs, got the rifle and went back upstairs and shot Jackson.

"Q. Did he make any statement about O'Brean Jackson having anything in his hand at the time that he shot? A. No, sir, he did not."

The only other witness to testify for the prosecution was Police Officer Bowles who, in response to a radio call went to the scene of the shooting. He did not see appellant, but did see the victim who had bloodstains on his nightclothes on the left side of his stomach. This officer saw the .22 rifle in the room of the deceased and his wife. It had 13 loaded bullets in the magazine. No empty shells were found on the premises. According to this witness, the deceased did not appear to be intoxicated.

The sole contention made by appellant on this appeal is that the decision of the court finding him guilty of murder of the second degree is contrary to and unsupported by the evidence and is contrary to law.

[1-3] Where, as in the instant case, an analysis of the record presents a situation wherein it manifestly appears that the evidence was clearly in conflict, the applicable rule on appeal was thus stated by this court in People v. Turner, 86 Cal.App.2d 791, 195 P.2d 809, 814: "Where the evidence, circumstantial or otherwise, shows that a crime has been committed and that it was perpetrated by the defendant, the applicable rule is that on appeal the court will not retry the case, nor attempt to determine the weight of the evidence or the credibility of witnesses. Before an appellate tribunal is authorized to reverse a judgment upon the ground of 'insufficiency of evidence', it must clearly appear that upon no hypothesis whatever was there evidence of sufficient substantiality to support the conclusion arrived at by the duly

constituted arbiter of the facts. And this is true although the facts and circumstances shown in evidence might reasonably be reconciled with the innocence of the accused. People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778."

Appellant's claim that the undisputed evidence shows that the deceased had attacked him with a shotgun by striking him about the head and face, and had shortly prior thereto approached appellant with an ice pick, is not borne out by the record. The version of the fatal altercation as given by appellant in his testimony at the trial is flatly contradicted by his own prior statements made to Police Officer Tomanovich on the night of the shooting, by the story told by him when questioned on January 20, 1948, as well as by the testimony of the deceased's wife. From appellant's statements to Police Officer Tomanovich on the night of the fatality it is manifest that he carried the loaded rifle to the home of the deceased, "that before he had gone upstairs to get O'Brean Jackson he had left the rifle on the front porch, then they went out for this short while, they came back, they had an argument and he went downstairs, got the rifle and went back upstairs and shot Jackson". In his statement, appellant further admitted that he allowed the rifle to remain loaded because he "didn't know what was going to happen". Appellant further admitted that the deceased did not strike him until he had shot the latter. The evidence admits of the further inference that appellant, instead of honestly endeavoring to escape from the altercation, went downstairs, obtained the rifle, and according to his admission, "went back upstairs and shot Jackson". The time necessarily consumed by appellant in doing this warranted the inference that the deceased was by no means in immediate pursuit of appellant or pressing the quarrel.

In support of his claim of justifiable homicide, appellant testified that the deceased had an ice pick in his hand at the time of the argument, but this was not mentioned in his story to Police Officer Tomanovich shortly after the affray. It is also significant that, according to appellant's testimony, the deceased, though armed with an ice pick, struck appellant with his fist. The evidence clearly admits of the conclusion that appellant was not attacked with an ice pick, but was beaten with an old shotgun barrel, and that, only after he had shot Jackson, as is indicated by the testimony of the wife of the deceased that while standing by the door of his room the deceased had said to appellant, "Burney C., you shot me, but I got you". There is substantial testimony that appellant fired the fatal shots while standing at the top of the stairs and not after he had retreated to the bottom thereof. Mrs. Jackson testified that she heard the shots fired just as her husband reached the door, and that when she went to call an ambulance she saw appellant slumped in the corner at the head of the stairs.

[4] In the instant case, it is readily apparent that the trial judge did not believe the testimony of the appellant as given at the trial, but shows he believed the testimony of the police officers as to what appellant told them concerning the altercation on the night thereof, and some ten days later; and relied upon other testimony, facts and circumstances herein narrated, which warranted the inference that the appellant was the aggressor and not entitled to the protective provisions of sections 197 and 198 of the Penal Code.

[5] Appellant's attempt to invoke the provisions of section 1105 of the Penal Code is equally unavailing. The commission of the homicide by appellant is conceded and there was substantial evidence, in conflict it is true, but which if believed by the court warranted the assumption that the crime committed was murder, and that appellant was neither justifiable nor excusable in taking a human life.

The judgment is affirmed.

YORK, P. J., and DORAN, J., concur.

INDUSTRIAL INDEMNITY CO. v. INDUSTRIAL ACC. COMMISSION et al.

Civ. 16508.

District Court of Appeal, Second District, Division 2, California.

Oct. 21, 1948.

Hearing Granted Dec. 20, 1948.*

1. Reformation of Instruments ⚿43

A contract may be reformed only when there is evidence that through fraud, mutual mistake of parties, or mistake of one party which other at the time knew or suspected, a written contract does not truly express intention of parties. Civ.Code, § 3399.

2. Workmen's compensation ⚿1070

Evidence did not authorize Industrial Commission to reform compensation insurance policy to extend coverage to employer's son-in-law after son-in-law's death, notwithstanding that employer intended to have son-in-law covered by the policy, in absence of any evidence of fraud, mutual mistake of parties, or mistake of one party which the other at the time knew or suspected. Civ.Code, § 3399.

3. Workmen's compensation ⚿1067

Fact that insurer received a premium on workmen's compensation policy computed on basis of employer's pay roll statement, which included employer's son-in-law, did not establish insurer's liability for death of son-in-law in course of his employment despite provision in policy that policy did not insure employer's son-in-law unless coverage was especially extended to such relative, where premium paid was less than would be required if computed in accordance with terms of policy for a son-in-law of the insured.

4. Workmen's compensation ⚿1067

Knowledge of insurance broker that insured intended to cover all his employees, including his son-in-law, when securing workmen's compensation insurance policy was not imputable to insurer, so as to render it liable for death of insured's son-in-law in course of his employment, where it appeared that broker was an independent insurance broker, and as such insured's agent in procuring the policy.

Petition by Industrial Indemnity Company, insurer, against Industrial Accident Commission of the State of California, Hazel Pauline Spidle and others, for order directing annulment of commission's award granting certain death benefits to surviving widow and minor children of Vernon G. Spidle, deceased employee.

Award annulled.

Herlihy & Herlihy, by E. H. Herlihy, all of Los Angeles, for petitioner.

T. Groezinger and John A. Rowe, Jr., both of San Francisco, for Industrial Acc. Commission.

McCOMB, Justice.

This petition is for an order directing the annulment of an award of the Industrial Accident Commission granting certain death benefits to the surviving widow and minor children of Vernon G. Spidle, who died as a result of injuries arising out of and occurring during the course of his employment on December 10, 1946.

The record discloses these facts:

On December 10, 1946, Vernon Spidle was employed as an oiler and truck driver by R. C. Cornish. Mr. Spidle was the son-in-law of Mr. Cornish, and on the date mentioned Mr. Spidle sustained injuries arising out of and occurring in the course of his employment which resulted in his death the same day. Previously to the time of the accident petitioner had issued a policy of insurance covering the employees of Mr. Cornish, which contained this provision:

"It is agreed that, anything in this policy to the contrary notwithstanding, this policy does not insure: As respects injuries (or death resulting therefrom) sustained by any of the following relatives of the employer and/or his or her spouse, i.e. * * * son-in-law * * *, unless such relative is specifically named in item (III) of the Declarations or specifically insured by Endorsement attached to this policy."

It is conceded that Mr. Spidle was not specifically named in item (III) of the declarations or specifically insured by endorsement attached to the policy.

The Industrial Accident Commission made a finding endeavoring to reform the policy which read as follows: "By changing the effective date of the Extended coverage Endorsement of said policy from January 17, 1947 to August 1, 1946, and by adding to said Extended Coverage Endorsement the name of Vernon G. Spidle."

---

* Subsequent opinion 211 P.2d 857.

Questions Presented for Determination.

[1, 2] First: *Was there any evidence to sustain the Industrial Accident Commission's finding providing for a reformation of the insurance policy issued by petitioner?*

This question must be answered in the negative. A contract may be reformed only when there is evidence that through (a) fraud, (b) mutual mistake of the parties, or (c) a mistake of one party which the other at the time knew or suspected, a written contract does not truly express the intention of the parties. Sec. 3399, Civil Code; National Auto. Ins. Co. v. Indus. Acc. Comm., 27 Cal.App.2d 225, 227, 80 P.2d 1024.

In the instant case the record is devoid of any evidence of (a) fraud, (b) mutual mistake of the parties, or (c) a mistake of one party which the other at the time knew or suspected. Hence, under the rule above stated there is no evidence to support the findings necessary to authorize the Industrial Accident Commission to reform the contract of insurance which petitioner had issued.

It is immaterial that the insured intended to have the decedent covered by the policy of insurance in the absence of any evidence of petitioner's intention to insure the decedent. There being an absence of any intention of the parties. The Industrial Accident Commission thus clearly exceeded its powers in attempting to reform mation of the contract to express the true intention of the parties. The industrial accident commission thus clearly had exceeded its powers in attempting to reform the policy of insurance to extend coverage to decedent as of August 1, 1946.

[3] Second: *Did the fact that petitioner received a premium computed on the basis of the employer's pay roll statement, which included the decedent employee, establish liability upon the part of petitioner?*

This question must likewise be answered in the negative for the reason that as a matter of fact petitioner was not paid the premium to which it would have been entitled if the decedent had been covered by the insurance policy. Under the terms of the policy and under the rules of the California Inspection Rating Bureau, a son-in-law of an employer who is living with the employer and who is covered by a workmen's compensation insurance policy is presumed to have received a minimum consideration of $1500.00 per year or $30.00 per week for premium purposes. The premium rate is based on the greatest hazard to which the employee is at any time exposed in his employment, payable on the basis of all his remuneration (considered not less than $30.00 per week), even though he may not be exposed to the hazard in all of his employment.

The wages reported by the employer for his son-in-law in the present case were less than the minimum amount specified, and the premium payed was less than would be required if computed in accordance with the terms of the policy for a son-in-law of the insured. Therefore respondents are in error when they contend that petitioner received the same premium that it would have received had decedent in fact been covered by the policy of insurance.

[4] Third: *Was knowledge of the insurance broker that insured intended to cover all his employees, including his son-in-law, imputable to petitioner?*

This question must be answered in the negative. The record discloses that Mr. Haugen, the broker who handled insured's insurance, was not an agent of petitioner either general or special, but was an independent insurance broker and as such the agent of the insured. (Solomon v. Federal Ins. Co., 176 Cal. 133, 138, 167 P. 859; New Amsterdam Cas. Co. v. Indus. Acc. Comm., 137 Cal.App. 719, 722, 31 P.2d 245.)

In view of the facts of the present case, and of the foregoing rule, knowledge communicated by the insured to Mr. Haugen was not imputable to petitioner and was therefore not binding upon petitioner.

Since the record fails to disclose any evidence to sustain the findings upon which the Industrial Accident Commission ordered a reformation of the contract, and the additional fact that the policy issued by petitioner did not cover the decedent, the commission exceeded its authority in making the order reforming the contract and predicating thereon an award to decedent's dependents.

The award is annulled.

MOORE, P. J., and WILSON, J., concur.

---

88 Cal.App.2d 124

BREITMAN et al. v. GATTMAN et al.

Civ. 13678.

District Court of Appeal, First District, Division 2, California.

Oct. 21, 1948.

Specific performance 🔑93

Specific performance of contract for sale of hotel property was granted, notwithstanding that purchasers failed to pay $1,000 deposit on January 10, 1946, as required by contract which stated that time was of the essence, where purchasers' tender of deposit on January 11 instead of January 10 was technical default and was not willful but was due to vendor, and purchasers had under contract several weeks after January 10 to satisfy themselves with respect to title and consummate the sale. Civ.Code, §§ 1490, 3275.

◆

Appeal from Superior Court, San Francisco County; Thos. M. Foley, Judge.

Action for specific performance of contract for sale of piece of hotel property by Mildred Breitman and another against Elsa Gattman and others. From a judgment decreeing specific performance, the defendants appeal.

Affirmed.

Jack Flinn and John A. Foley, both of San Francisco, for appellants.

J. Bruce Fratis, of San Francisco, for respondents.

GOODELL, Justice.

This appeal was taken from a judgment decreeing specific performance of a contract for the sale of a piece of hotel property on Van Ness Avenue in San Francisco.

On December 29, 1945, Louis T. Samuels Co., acting as agent for the seller, negotiated a contract for the sale of the property by appellant Elsa Gattman to respondents for $42,500. The contract acknowledged receipt of a deposit of $1000. and provided: "Deposit to be increased to $2,000.00 on the tenth * * * day of January 1946." This increased deposit was not made on that day, but on the next day respondents gave the agent their check for $1,000. and that afternoon he took it to Mrs. Gattman, who refused it because it was not in time. She then declined to go forward with the sale.

On January 30, 1946, she sold the property to the appellants Neal and Marie McNeil at a price in advance of the respondents' contract. The McNeils had knowledge of the respondents' contract.

The court relieved the respondents from their default under the rule of section 3275, Civil Code which reads: "Whenever, by the terms of an obligation, a party thereto incurs a forfeiture, or a loss in the nature of a forfeiture, by reason of his failure to comply with its provisions, he may be relieved therefrom, upon making full compensation to the other party, except in case of a grossly negligent, willful, or fraudulent breach of duty."

Appellants state their principal contention as follows: "Plaintiffs' rights under agreement of sale were forfeited by their failure to make the deposit at the time called for." They base this on the provision in the contract that "Time is of the essence of this agreement" and invoke section 1490, Civil Code which provides that "Where an obligation fixes a time for its performance, an offer of performance must be made at that time, within reasonable hours, and not before nor afterwards."

Whether the action of the court in relieving respondents from their default was correct or not, is the only question which has to be decided, and that question calls for an inquiry into the circumstances attending the default.

The contract provides that the sale is subject to two leases. The lease for the upper floors was hard to locate, and the seller's agent went over it with respondents in the late afternoon of the 10th. That examination disclosed that the monthly rental was less than the rental shown on the statement theretofore furnished by the seller's agent. This discrepancy caused some deliberation between the two respondents, but late that afternoon they decided to go ahead notwithstanding the lower rental return and then informed the seller's agent to that effect and that they were prepared to pay the entire remaining $41,500. into the title company at once and they requested him to obtain the deed. The testimony on behalf of respondents shows that their preoccupation in the examination of the lease and the attention centered on this discrepancy diverted both the agent and the respondents from the requirement that the additional deposit was due that day. This testimony is not disputed, although Mrs. Gattman claimed that she was blameless for the delay in getting hold of the lease. Indeed appellants do not contend that the respondents' breach of duty was grossly negligent or wilful or fraudulent. They stand on the stark fact of failure to pay on the 10th. The court found that the payment on the 11th instead of the 10th of January "was a technical default and that said breach of contract was neither grossly negligent wilful or fraudulent, but, on the contrary, was due to the failure of defendant Elsa Gattman to produce for the inspection of plaintiffs one of the two outstanding leases on the premises until January 10, 1946."

Appellants do not attack the sufficiency of the evidence to support any part of this finding. The last phrase thereof, attributing the default to Mrs. Gattman's delay in producing the lease for examination by respondents, brings the case within the holding in Henck v. Lake Hemet Water Co., 9 Cal.2d 136, 69 P.2d 849.

Appellants rely on Glock v. Howard etc. Co., 123 Cal. 1, 55 P. 713, 43 L.R.A. 199, 69 Am.St.Rep. 17, since the contract in suit makes time essential, but with respect to that question the court in the Lake Hemet case says 9 Cal.2d at page 143, 69 P.2d at page 852: "It was recognized in Glock v. Howard * * * that equity will relieve a party from the effect of a breach of a covenant to pay upon a day certain upon the showing of fraud, mistake, surprise, or other ground of purely equitable cognizance excusing the breach, where damages on account of the breach can be accurately measured and compensation made by the allowance of interest [citation]." And 9 Cal.2d at page 144, 69 P.2d at page 853, the court says: "Furthermore, even assuming that time should be deemed an essential element in the contract, nevertheless it may be said that under the pertinent authorities hereinabove cited, the interposition of equity to grant relief under the facts was justified by the showing that for two years the water company, immediately preceding the due date, notified the plaintiff of the amount due for the ensuing year, and that the plaintiff's failure to make payment on January 2, 1934, was excusable because it was in part if not largely induced or provoked by the defendant's own conduct. Collins v. Eksoozian, supra [61 Cal.App. 184, 214 P. 670]." There seems to be no difference between the water company's failure there to send out the customary notice of the due date, and Mrs. Gattman's delay here in producing the lease.

In the Lake Hemet case, 9 Cal.2d at page 144, 69 P.2d at page 853, this also is said: "The theory upon which the courts hold that in such cases time is of the essence, is that damage resulting to the seller by reason of delay in performance on the part of the purchaser cannot be estimated nor compensated [citations]."

In the same connection, in Vorwerk v. Nolte, 87 Cal. 236, 240, 25 P. 412, (cited in Glock v. Howard etc. Co., 123 Cal. at page 9, 55 P. 713, 43 L.R.A. 199, 69 Am.St.Rep. 17), it is said: "It is a matter of common understanding that when these words—'time is of the essence of this contract'—are used, it is with reference to future payments; that *their purpose is to protect the vendor against delays in payment of the purchase price, and the tying up of his estate beyond the fixed period, without the payment of the agreed compensation therefor;* * * *." (Emphasis added.)

The contract in suit contains the following provision: "45 days from the date of approval are allowed the purchaser to examine the title to said property and to report in writing any valid objections thereto, to the agent for the seller. If no such objections to title be reported the balance of said purchase price shall be paid by said purchaser on or before the expiration of said time * * *" The additional deposit of $1000. due on January 10 was of course part of the purchase price which had to be paid (to make up the total of $42,500.) before the vendees could call on the vendor for a deed, but the vendees had, under the contract, several weeks after January 10 within which to satisfy themselves with respect to the title and consummate the sale, hence the delay of but one day could not possibly have held up the transaction or tied up the vendor's estate "beyond the fixed period, without the payment of the agreed compensation therefor". Vorwerk v. Nolte, supra.

In addition to the Lake Hemet case there are other authorities which discuss Glock v. Howard etc. Co., supra, in connection with forfeitures or the time clause. Among them are Ebbert v. Mercantile Trust Co., 213 Cal. 496, 500, 2 P.2d 776; McDonald v. Kingsbury, 16 Cal.App. 244, 248, 116 P. 380 (where time was of the essence); Leak v. Colburn, 55 Cal.App. 784, 788, 204 P. 249 and Culligan v. Leider, 65 Cal.App.2d 51, 59, 149 P.2d 894.

In the Lake Hemet case the default had continued for nine days. In Fickbohm v. Knaust, 103 Cal.App. 443, 284 P. 692, (where time was of the essence) the court granted relief from defaults in the payment of *two* monthly installments. In Leslie v. Federal Finance Co., 14 Cal.2d 73, 92 P.2d 906, 911, the default continued for eight days. In reversing the judgment the court said: "There is no evidence that the respondent suffered any substantial prejudice as a result of the delay or that full compensation could not have been made for the delay. Under these circumstances it was the duty of the court to grant appellant the relief she sought." The court followed Hopkins v. Woodward, 216 Cal. 619, 15 P.2d 499, and the Ebbert and Lake Hemet cases.

The trial court found "that the increase in deposit * * * was paid by plaintiffs to defendant Elsa Gattman on January 11, 1946." The contract provides for payments on the purchase price to be made to a title company "or to the office of Louis T. Samuels Co." the seller's agent. The check of M. Breitman dated January 11, 1946, payable to Elsa Gattman for $1000. for "add. deposit on Clinton Hotel" was delivered by respondents to Mr. Samuels on the 11th and was taken by him to Mrs. Gattman that afternoon. There was no dispute as to that, but it is also true that she refused to accept it. The check is in evidence. The respondents, then, did all they could on the 11th, toward meeting their obligation of the day before.

We are satisfied that the court was correct in relieving the respondents from their default. Such holding renders it unnecessary to discuss the findings dealing with the authority of the agent to accept the belated check and touching the question of waiver. In other words, if the default was properly excused and if the $1000. was either paid or tendered on January 11th, the other questions and the findings thereon become immaterial. (2 Cal.Jur. pp. 1028, 9).

The action of the court in granting relief from what it found to be a "technical default" is supported by a large number of cases. In addition to those already cited which discuss Glock v. Howard etc. Co. and the time clause there are several late cases illustrating the readiness of courts to grant relief from forfeitures, for instance O'Morrow v. Borad, 27 Cal.2d 794, 800, 167 P.2d 483, 487, 163 A.L.R. 894, where the court restates the rule that "Forfeitures * * * are not favored; hence a contract, and conditions in a contract, will if possible be construed to avoid forfeiture * * * And where * * * the condition is express and cannot be avoided by construction, the court may, in a proper case, excuse compliance with it or give equitable relief against its enforcement * * *" Citing the Lake Hemet, Hopkins and Ebbert cases, supra, and Ballard v. MacCullum, 15 Cal.2d 439, 444, 101 P.2d 692.

There is nothing in Christin v. Story, 119 Cal.App. 326, 6 P.2d 301, cited by appellants, which militates against the views expressed herein. There earlier defaults were waived by acceptance of overdue payments, after which there was a revival by the giving of notice requiring strict performance, and then a final notice. The defendant made no case under section 3275, Civ. Code for he did "nothing to entitle him to relief under that section." Here, however, the $1,000. was tendered within 24 hours after the respondents' technical default.

The judgment is affirmed.

NOURSE, P. J., and DOOLING, J., concur.

---

88 Cal.App.2d 23

VIETH et al. v. KLETT et al.

Civ. 16368.

District Court of Appeal, Second District, Division 1, California.

Oct. 15, 1948.

1. Appeal and error ⚷907(3)

Upon direct appeal upon judgment roll alone, introduction of evidence supporting findings as made, without objection of losing party, and treatment of facts by all parties as issues properly before trial court, must be presumed.

2. Homestead ⚷5

A homestead once created will be protected to the fullest extent and creditor's power to attack homestead by forced sale will be strictly limited to the instances specified in the law. Civ.Code, § 1243, 1245.

3. Homestead ⚷167
Trusts ⚷96

Where widower and head of family recorded declaration of homestead upon his separate property in which he and his family resided, and widower thereafter remarried and continued to live upon property with second wife and family, and widower and second wife executed grant deed without consideration to grantee who as part of same transaction and without consideration executed to widower and second wife a joint tenancy deed to property, grant deed conveyed title in constructive trust and did not operate as abandonment of homestead. Civ.Code, §§ 1056, 1058, 1238, 1243, 1245.

4. Homestead ⚷15, 167

A homestead which widower declared in his separate property after death of first wife and prior to his marriage to second wife continued for benefit of the second community, and joint tenancy in widower and second wife could be created without abandoning such homestead. Civ.Code, § 1238.

5. Homestead ⚷84

Joint tenancies may be subject to homestead rights. Civ.Code, § 1238.

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Action to enjoin sale of reality by Edward J. Vieth and another against Orilla Klett and another. From a judgment enjoining the sale, Orilla Klett appeals.

Affirmed.

Victor Bewley, of Los Angeles, for appellant.

Edward K. Brody and Irving I. Bass, both of Los Angeles, for respondents.

WHITE, Justice.

This is an appeal by defendant Orilla Klett alone from a judgment enjoining the sale of real estate. No reporter's transcript has been filed and this appeal is prosecuted upon the judgment roll alone.

Defendant Klett, a judgment creditor of plaintiff Edward J. Vieth, delivered a writ of execution to defendant Sheriff Biscailuz with instructions to sell all the right, title and interest of plaintiff Edward J. Vieth in certain real estate.

Defendant Sheriff Biscailuz advertised the sale for June 30, 1947. On June 27th, plaintiffs filed their complaint to restrain defendants from proceeding with the sale of the aforesaid property under the execution and order of sale, and for cancellation of the instructions given to defendant sheriff for the above mentioned sale.

Issue being joined, the cause proceeded to trial before the court sitting without a jury resulting in a judgment enjoining the foregoing sale and cancelling the instructions given to defendant sheriff for such sale.

[1] The rule in this state is that upon a direct appeal from the judgment upon the judgment roll alone, an appellate tribunal must presume that evidence was introduced which would support the findings as made, without any objection upon the part of the losing party, and that the facts were treated by all parties as issues properly before the court at the trial. Where the entire record is before the reviewing court a different situation might be presented. First Trust & Savings Bank of Pasadena v. Warden, 18 Cal.App.2d 131, 133, 134, 63 P. 2d 329.

In the instant case, the facts established by the judgment roll are that on May 8, 1945, respondent Edward J. Vieth, a widower, recorded a declaration of homestead upon his separate real property, upon which he resided with his three minor children.

On July 22, 1945, respondent Edward J. Vieth married respondent Hazel P. Vieth, and thereafter continued to reside upon said property with his wife and the aforesaid minor children.

On September 4, 1945, respondents herein, husband and wife, without consideration, executed a grant deed of said property to one Beverly L. Nickolson, an employee of Thomas Mortgage Company. Following the execution of said grant deed, and on the same day, and as part of the same transaction, Beverly L. Nickolson, also without consideration, executed and delivered to respondents a joint tenancy deed to said property. On November 23, 1945, the two deeds were recorded together and bear consecutive document numbers.

The court found "that said conveyances were executed and delivered by the respective parties for the sole purpose of vesting title in these plaintiffs as joint tenants". The findings further disclose that appellant Orilla Klett in an action for wrongful death arising out of an automobile accident, obtained a judgment against respondent Edward J. Vieth for $5,872.75. The findings then recite the issuance of execution on May 13, 1947, commanding defendant sheriff to sell all right, title and interest of respondent Edward J. Vieth in and to the property herein mentioned, to satisfy the foregoing judgment, and the subsequent advertisement by the sheriff of his intention to proceed with such sale. That the property was not worth more than the sum of $7,500 and was encumbered by a deed of trust upon which there remained an unpaid balance of approximately $3,700.

In the complaint filed herein it was alleged that respondent Edward J. Vieth had never abandoned said homestead at any time, and the court found, "that on the fourth day of September, 1945, and prior thereto, plaintiff Edward J. Vieth and his family, then consisting of himself and his three children, Richard, Ronald and Robert, commenced to occupy the said premises and resided thereon, occupying the same as a homestead, and have at no time since that date had any other residence and have not occupied any other premises since that date."

It is admitted that appellant Klett failed to comply with the provisions of section 1245 of the Civil Code involving proceedings on execution against homesteads.

Appellant urges that the judgment granting an injunction is not supported by the findings for the asserted reason that no homestead existed upon the property in question, and that compliance with section 1245 of the Civil Code was, therefore, not required. That respondents husband and wife by their grant deed, completely divested themselves of all proprietary interest in the land to which the homestead of May 8, 1945, was attached. That the foregoing grant deed operated as an abandonment of the homestead.

Section 1243 of the Civil Code provides that, "A homestead can be abandoned only by a declaration of abandonment, or a grant thereof, executed and acknowledged:

"1. By the husband and wife, if the claimant is married;

"2. By the claimant, if unmarried."

The rule concerning the abandonment or destruction of a homestead by grant was thus stated by this court in First Trust & Savings Bank of Pasadena v. Warden, supra, 18 Cal.App.2d page 134, 63 P.2d at page 331: "* * * it has long been the rule in this state that the homestead is destroyed whenever the title to all or a portion of the homestead property is transferred to a third party. Kellersberger v. Kopp, 6 Cal. 563. This rule has been followed even though the property or a portion thereof was immediately reconveyed to one of the spouses as a part of the same transaction (Carroll v. Ellis, 63 Cal. 440), and the same rule has been adhered to even though the conveyance contains a reservation of right of possession and profits during the life of the spouses. Bank of Suisun v. Stark, 106 Cal. 202, 39 P. 531."

Section 1056 of the Civil Code provides that, "A grant cannot be delivered to the grantee conditionally. Delivery to him, or to his agent as such, is necessarily absolute, and the instrument takes effect thereupon, discharged of any condition on which the delivery was made."

And section 1058 of the Civil Code provides that, "Redelivering a grant deed of real property to the grantor, or canceling it, does not operate to retransfer the title."

In the case at bar appellant admits that the court found that the conveyance to Beverly L. Nickolson was for the sole purpose of vesting title in respondents as joint tenants through the medium of a deed executed by the former to the latter as part of the same transaction, but relying on the cases of Carroll v. Ellis, 63 Cal. 440, 442, and First Trust & Savings Bank of Pasadena v. Warden, supra, 18 Cal.App.2d at page 134, 63 P.2d 329, contends that there was a period of time, though short, during which the title was vested in Beverly L. Nickolson, and that a grant effects an abandonment of the homestead where the grantor divests himself of all property interests to which the homestead was attached regardless of the fact that the property was immediately reconveyed as part of the same transaction.

Respondents, however, insist that the grant deed executed by them and delivered to Beverly L. Nickolson was a conveyance of the legal title in constructive trust for the use and benefit of respondents, and upon the condition that Beverly L. Nickolson would reconvey the property to the respondents as joint tenants.

This presents the question, was the grant deed referred to a grant and did it operate to transfer the title to the property from the grantors to the grantee?

[2] The rule prevailing in California is that once the homestead has been created, the objects of the law require that as a matter of social policy, to the end that the humane purposes which the legislature intended by its enactment shall be effected, the homestead shall be protected to the fullest extent, and the power of a creditor to attack the homestead by forced sale must be strictly limited to the instances specified in the law.

Bearing this rule in mind, we are persuaded that the finding by the trial court herein that no consideration passed from Beverly L. Nickolson to respondents for the execution and delivery of the grant deed to the former; that the deed from Beverly L. Nickolson to respondents as joint tenants was without consideration, and, "that the said conveyances were executed and delivered by the respective parties for the sole purpose of vesting title in the names of these plaintiffs as joint tenants", must be construed as a finding that by their grant deed respondents conveyed the legal title to Beverly L. Nickolson in constructive trust and without intent to convey to her any beneficial interest therein, and without intent to abandon the homestead previously declared thereon. Palen v. Palen, 28 Cal.App.2d 602, 83 P.2d 36.

In the case of First Trust & Savings Bank of Pasadena v. Warden, supra, relied upon by appellant, the deed of conveyance therein consisted of an absolute grant of all interest held by the grantors. There was nothing contained in the deed, nor in the findings of the court, which might indicate that the transaction was without consideration, and was effected, as in the instant case, solely for the purpose of reconveyance of the property to such grantors as joint tenants.

In the case of Carroll v. Ellis, supra, also relied upon by appellant and cited in the case of First Trust & Savings Bank of Pasadena v. Warden, supra, the same situation prevailed.

[3] We are satisfied that under the facts and circumstances present in the instant case, the deed from respondents to Beverly L. Nickolson did not convey such an interest as to create an abandonment of the homestead under the law.

[4] Appellant next contends that a homestead prior to marriage does not exist for the benefit of the wife under a subsequent marriage. Because of the facts of the instant case this contention is untenable. On May 8, 1945, while respondent Edward J. Vieth was a widower and the head of a family, he recorded a declaration of homestead selected from his own property. This he was entitled to do under section 1238 of the Civil Code. The property in question being the separate property of Edward J. Vieth at the time he legally declared a homestead thereon it remained his separate property upon and after his remarriage, and until by appropriate instruments he and his second wife took the same as joint tenants. During all of that time the property remained impressed with the homestead which continued for the benefit of the second community. To hold otherwise would do violence to the foregoing expressed public policy of this state which seeks, through the homestead law, "to provide a place for the family and its surviving members, where they may reside and enjoy the comforts of a home, freed from any anxiety that it may be taken from them against their will, either by reason of their own necessity or improvidence, or from the importunity of their creditors." Estate of Fath, 132 Cal. 609, 613, 64 P. 995, 997.

The case of Estate of Clavo, 6 Cal.App. 774, 93 P. 295, is not applicable to the factual situation in the case at bar. In the cited case the homestead was executed jointly by the husband and wife, and the court held that upon the death of the wife, the title to the property became vested absolutely in the surviving husband and that the homestead could not continue for the benefit of the second community upon his remarriage. However, in the instant case, the homestead was selected by the respondent Edward J. Vieth after the death of his first wife, out of his property, pursuant to section 1238 of the Civil Code, and therefore continued for the benefit of the second community.

In view of the hereinbefore declared social policy of the state with reference to homesteads and the beneficent purposes sought to be realized by such legislation, we are impressed that, adopting a liberal construction of the law and facts here present, an abandonment of the homestead created after the death of the first wife was not required in order to create a joint tenancy in the husband and his second wife. The homestead herein not having been abandoned, the creation of the joint tenancy under the facts here present, must be held as not having altered in any way the estate or character of the homestead.

[5] It is now established law in this state that in pursuance of the policy underlying all homestead legislation, joint tenancies may be subject to homestead rights. Estate of Kachigian, 20 Cal.2d 787, 791, 128 P.2d 865.

The judgment appealed from is affirmed.

YORK, P. J., and DORAN, J., concur.

88 Cal.App.2d 153

McFARLAND v. SUPERIOR COURT IN AND FOR MERCED COUNTY et al.

Civ. 7567.

District Court of Appeal, Third District, California.

Oct. 22, 1948.

Hearing Denied Dec. 20, 1948.

1. Automobiles ⚷351

In indictment charging manslaughter committed without malice by unlawfully operating truck with gross negligence and by committing an act without due circumspection which might produce death, reference to gross negligence was immaterial and did not warrant setting aside indictment. Pen.Code, § 192.

2. Indictment and information ⚷10

Evidence that skid marks and scars on pavement indicated that defendant was driving truck around curve far over on wrong side of road and that driver and two other occupants of meeting automobile were killed in resulting collision warranted indictment of defendant for manslaughter, nothwithstanding his contradictory testimony as to operation of truck. Pen.Code, § 192.

3. Prohibition ⚷28

On application for writ of prohibition to prevent trial on indictment charging manslaughter, court could not interfere with discretion of grand jury in determining whether evidence warranted indictment or weigh the evidence adduced to determine its sufficiency. Pen.Code, § 192.

4. Indictment and information ⚷137(3)

Indictment could not be set aside merely because some incompetent evidence was received by grand jury, where substantial competent evidence before grand jury authorized return of indictment. Pen. Code, §§ 903, 995.

5. Prohibition ⚷27

On application for writ of prohibition to prevent trial under indictment on ground that incompetent evidence was received by grand jury, court must presume that grand jurors obeyed their oaths. Pen.Code, § 903.

6. Indictment and information ⚷137(4)

An indictment will be set aside as invalid if there was no competent evidence before grand jury of commission of crime by defendant or a total absence of evidence to support a necessary element of the crime charged.

7. Prohibition ⚷11

Upon writ of prohibition, an indictment may not be held to be invalid for mere irregularities in impaneling grand jury or in the proceedings leading to indictment.

8. Prohibition ⚷11

Prohibition will not lie for the correction of errors or irregularities committed by an inferior tribunal acting within its jurisdiction.

9. Grand jury ⚷1

The grand jury is an inquisitorial body and a constituent part or agency of the court, created for the protection of society and enforcement of law and it is entitled to the respect and support of the court. Pen.Code, § 927.

10. Grand jury ⚷34

The district attorney or his deputies may properly appear before grand jury upon its request or otherwise to give advice or interrogate witnesses and the Attorney General may procure counsel to present evidence in a matter under investigation before grand jury. Pen.Code, § 925.

11. Grand jury ⚷37

The credibility of testimony given by accused person in his own behalf before grand jury was a question solely for grand jury. Pen.Code, § 920.

12. Prohibition ⚷27

Record of grand jury proceedings established that truck driver subpoenaed by grand jury and subsequently indicted for manslaughter was fully admonished by deputy Attorney General that he was not required to testify before grand jury and that his testimony might be used against him and did not show that he was persuaded by any improper statements to become a witness in his own behalf so as to justify setting aside indictment on writ of prohibition. Pen.Code, §§ 192, 920, 925.

13. Criminal law ⚿1166(2)

Statement by deputy Attorney General to defendant subpoenaed by grand jury and subsequently indicted for manslaughter that his evidence might be used in his favor in event of a trial was not prejudicial so as to render indictment invalid, where such evidence was all favorable to defendant. Pen.Code, §§ 192, 920, 925.

Original proceeding by James O. McFarland against the Superior Court of the State of California in and for the County of Merced and another for a writ of prohibition to prevent respondents from trying petitioner for alleged crime of manslaughter.

Writ of prohibition denied.

Andrew J. Eyman, of San Francisco, for appellant.

Fred N. Howser, Atty. Gen. and Doris H. Maier, Deputy Atty. Gen., for respondents.

THOMPSON, Justice.

By means of a writ of prohibition the petitioner seeks to prevent the Superior Court of Merced County from trying him for the alleged crime of manslaughter for which he was indicted. The cause grew out of an automobile casualty in which three persons were killed. The defendant named in the indictment was charged, under Section 192 of the Penal Code, in three counts, with causing the deaths of said persons by gross negligence in operating his truck and trailer without due caution and circumspection. The indictment was chiefly based on the evidence of a highway patrolman that the skid marks and scars on the paved surface of the highway indicated that the defendant's truck was more than four feet over the white line on the wrong side of the road when the collision occurred.

The petition for writ of prohibition alleges that the indictment is invalid on account of irregularities of the grand jury, a total lack of evidence of negligence of the defendant and persuasion by the prosecuting officer which induced the defendant to become a witness before the grand jury on his own behalf. The transcript of evidence is before this court. A motion before the trial court to set aside the indictment under Section 995 of the Penal Code, for the foregoing reasons, was denied. It is alleged the petitioner is without a speedy or adequate remedy at law.

The accident occurred about noon on July 22, 1947, on the public highway between Merced and Los Banos, about eight miles east of Los Banos, where the roadway curves in the form of a letter "S". It was a clear day, without rain or fog. There was then no other traffic in sight. The defendant was employed in driving his truck and trailer for the Purity Stores. He had completed the delivery of goods for that day, and was returning to his home. He had eaten his luncheon and was driving westerly at a speed of about forty miles per hour. He was alone in the truck. As he approached the turn of the road to his left, he observed a Buick sedan "coming into the curve on the other end" at a rate of speed which he estimated at 70 or 75 miles per hour. The defendant claimed he was traveling on his proper right hand side of the white line. He said, "When he got right close to me, well, he was coming over, you know, towards me, and before I knew it, why he was over on my side * * * and then he hit the front wheel. * * * You could see where it knocked the whole front axle out from under the truck." A spring was broken. The driver of the truck lost control, and the machine skidded and traveled 170 feet or more westerly and landed "down in the ditch on the north side." He denied that his truck was ever on the wrong side of the road.

The Buick machine landed in the ditch on the south side of the highway about 200 feet easterly and beyond the point of collision. It was badly damaged. Mr. Frank C. Ventura, the driver of the Buick car, and his four-year old daughter, Irene, were instantly killed. Marlene Fagundes, a niece of Mr. Ventura, was fatally injured as a result of the accident, and she was taken to a hospital and died soon afterward. Mary Ventura, the wife of Frank, was injured, but apparently not seriously. She was the only living survivor of the accident except the driver of the truck. She testified that she was engaged in unwrapping a package of gum at the time of the collision and did not see the approaching truck. She testified to no important facts except the death of her husband and the two children as a result of the accident.

After the accident occurred, the defendant, who was uninjured, at the suggestion of a stranger who arrived at the scene, telephoned for a traffic officer. The officer, Neil C. Nicholsen, who had served in that capacity for eighteen years, promptly arrived and made a careful investigation of the affair. He located the approximate point of impact from "marks" and "gouges" in the pavement, and a portion of a broken spring, beginning at a point "four feet and six inches" beyond the white line on the south side of the highway. The scars in the surface of the highway and a "solid tire mark" extended "from the first gouge mark including the tire mark to where it crossed the center line was 170 feet, 7 inches, that is on the south side of the center line." He found the truck and trailer in its damaged condition, with a broken front axle and spring, some distance westerly on the north side of the highway, in the ditch. The Buick machine was found badly damaged, in the ditch on the south side of the road some distance from the point of impact. Mr. Ventura, the driver of the Buick car and his daughter Irene were dead. Marlene Fagundes, his niece, was seriously injured. Mr. Brooks, the County Coroner, was promptly summoned, and soon arrived. The niece was taken to the hospital and died soon thereafter. The traffic officer took the statement of the defendant, who merely told him: "I was going west and the other car was going east and he pulled over toward me and I started to pull over and he hit me on the front and left side." There was no evidence of the presence of any other living persons at the time of the accident, except the defendant and Mrs. Ventura. There is no evidence of any other traffic on the highway at the time of the accident. Based on the location of the marks and scars and the broken portion of the spring which the traffic officer found more than four feet beyond the white line on the wrong side of the highway, he swore to a complaint in the justice's court, charging the defendant with manslaughter. A preliminary hearing was held, and the charge was dismissed. We have no record of what evidence was adduced at that hearing. The grand jury later investigated the affair, and the defendant was indicted, as we have previously stated. The indictment was based chiefly on the testimony of the traffic officer, indicating that the truck and trailer were far over the white line on the wrong side of the road when the accident occurred.

The grand jury issued a subpoena for the defendant on the assumption that he might wish to testify in his own behalf. The only witnesses, other than the defendant, who testified before the grand jury were the traffic officer, the coroner and Mrs. Ventura.

After the indictment was filed, and defendant's motion to set it aside had been denied, this petition for a writ of prohibition was filed in this court.

The only issues to be determined on this proceeding are whether the writ lies under the circumstances of this case, whether the evidence adduced before the grand jury "taken together, if unexplained or uncontradicted, would, *in their judgment,* warrant a conviction by a trial jury", Penal Code, Sec. 921, and whether the admission of hearsay and incompetent evidence, or the conduct of the Deputy Attorney General, who was presenting the case, or the conduct of the members of the grand jury rendered the indictment void.

[1-5] We are of the opinion the indictment is not void for any of the reasons assigned, or at all. The defendant was charged under Section 192 of the Penal Code with the crime of manslaughter committed "without malice" by unlawfully driving his vehicle with "gross negligence" and by committing an act without due caution and circumspection which "might produce death, in an unlawful manner." We think the use of the term "gross negligence" is immaterial. There was no demurrer to the indictment. There was some evidence that the cause of the acci-

dent was that the defendant was driving his truck at that time around the curve in the highway far over on the wrong side of the road, and that it did result in the deaths of the three persons named in the different counts of the indictment. Without explanation or contradiction of those facts by the defendant, which Section 921 contemplates may be disregarded, and which the grand jury had a right to disbelieve, the jurors had the discretion to determine, "in their judgment" whether the evidence would "warrant a conviction by a trial jury." In that event the section last mentioned declares that the jury "ought to find an indictment," as it did. We may not interfere with that discretion of the grand jury, or weigh the evidence adduced to determine its sufficiency. Other incompetent evidence which was adduced in the nature of opinions of the traffic officer and the coroner that they did not believe the defendant's statement that he was not on the wrong side of the highway, and that they believed he was guilty of unlawful homicide, constitute mere irregularities in the proceedings before the grand jury, which did not affect its jurisdiction and which should therefore be disregarded on this proceeding. To be sure, the defendant had no opportunity to object to those improper questions asked by the Deputy Attorney General. We definitely disapprove of those inquiries. But they furnish no evidence of a lack of jurisdiction to return the indictment. We may concede that those answers might have influenced some grand jurors in returning the indictment. We must, however, presume that the grand jurors obeyed their oaths to present no person through malice, hatred, ill will or prejudice, and to present only "the truth, the whole truth, and nothing but the truth", according to their "skill and understanding". Penal Code, Sec. 903.

An indictment may not be set aside merely because some incompetent evidence was received by the grand jury, provided there is substantial competent evidence upon which the grand jury is authorized in its judgment to return the indictment. Section 995 of the Penal Code does not authorize the setting aside of an indictment for insufficiency of evidence, or because incompetent evidence is received or considered. Stern v. Superior Court, 78 Cal.App.2d 9, 18, 177 P.2d 308; People v. Hatch, 13 Cal.App. 521, 528, 109 P. 1097, 1100; 14 Cal.Jur. p. 76, sec. 59. In the Hatch case the district attorney advised the grand jury that there was adequate evidence to warrant the finding of an indictment. The court said: "* * * The law contemplates that only competent evidence be received by the grand jury, yet if it should receive incompetent evidence and found an indictment thereon, there is no method of reviewing its action in so doing. An indictment is but an accusatory paper, and it was never intended that on a motion to dismiss, irregularities in the proceedings before the grand jury should be reviewed, except as expressly provided in the statute."

[6] The only modification of the foregoing rule recognized by our California courts is that when there is *absolutely no competent evidence* before the grand jury of the commission of the crime by the accused person, upon a writ of prohibition the indictment will be held to be invalid. Greenberg v. Superior Court, 19 Cal.2d 319, 322, 121 P.2d 713; People v. Schuber, 71 Cal.App.2d 773, 163 P.2d 498. And when there is *a total absence of evidence* to support a necessary element of the crime charged, upon a similar proceeding, the indictment will be held to be invalid for that reason. Dong Haw v. Superior Court, 81 Cal.App.2d 153, 183 P.2d 724.

In the Greenberg case the Supreme Court said [19 Cal.2d 319, 121 P.2d 715]: "The transcript of the testimony upon which the indictment was based *contains no evidence even remotely supporting the charges made against petitioner.*" (Italics added.)

In the Schuber case a previous writ of habeas corpus was granted for the absence of evidence showing that a public offense had been committed. The defendant was rearrested and again held to answer after another preliminary hearing. On motion of the defendant the information was dismissed. On appeal from that order, this court said [71 Cal.App.2d 773, 163 P.2d 499]: "The transcript on this appeal contains no new competent evidence of the commission of a public offense, or that the defendant is guilty thereof." The prisoner was therefore discharged. In the Dong Haw case a writ of prohibition was granted as to the petitioner on the ground that the transcript of evidence before the grand jury disclosed absolutely no evidence that he had offered or authorized payment of money for the purpose of attempting to bribe a public officer to permit unlawful gambling in the City of Sacramento. The Greenberg case did hold that "A grand jury that indicts a person when *no evidence has been presented* to connect him with the commission of the crime charged, exceeds the authority conferred upon it by the Constitution and laws of the State of California", and therefore justifies the issuance of a writ of prohibition to prevent a trial on the merits. The court said in that case that the accused person, under such circumstances, had no speedy or adequate remedy at law because "He could not be required to stand trial and to appeal from a possible adverse judgment without being subjected to unreasonable expense, inconvenience, and delay." (Citing authorities.) The preceding cases are not applicable to the facts of this proceeding, in which some evidence was adduced before the grand jury of the commission of the offense charged and that the defendant was guilty thereof.

[7, 8] Upon prohibition, an indictment may not be held to be invalid for mere irregularities in impaneling the grand jury or in the proceedings which lead to an indictment. 50 C.J., p. 680, sec. 45; 42 C.J.S., Indictments and Informations, § 24c (2), page 868. In the text of 50 Corpus Juris, supra, which is supported by numerous authorities, it is said: "Under the general rule that prohibition will not lie for the correction of errors or irregularities committed by an inferior tribunal acting within its jurisdiction, the writ has frequently been refused when sought for such purpose in criminal or quasi-criminal proceedings."

[9] The grand jury is an inquisitorial body of very ancient origin and a constituent part or agency of the court, created for the protection of society and the enforcement of law. It is entitled to the respect and support of the courts. 38 C.J.S., Grand Juries, § 1, pages 982–984. Section 927 of the Penal Code provides that: "A grand juror cannot be questioned for anything he may say or any vote he may give in the grand jury relative to a matter legally pending before the jury, except for a perjury of which he may have been guilty, in making an accusation or giving testimony to his fellow-jurors."

[10] The district attorney or his deputies may properly appear before the grand jury, upon request of the grand jury, or otherwise, to give advice or to interrogate witnesses. Likewise, the Attorney General is empowered to procure counsel to present evidence in a matter under investigation before the grand jury. Penal Code, section 925.

[11] Fairly construed, we think the evidence before the grand jury does not warrant the petitioner's construction that the defendant was improperly persuaded against his will to become a witness at that hearing. "The grand jury is not *bound* to hear evidence for the defendant; but * * * when they have reason to believe that other evidence within their reach will explain away the charge, they should order such evidence to be produced * * *." Penal Code, sec. 920. In this case the grand jury had already subpœnaed the defendant. It may be reasonably inferred they thought the defendant might satisfactorily explain why the skid marks indicated that his truck was more than four feet over on the wrong side of the white line of the highway when the accident occurred, by, for instance, showing that, on account of mechanical defects of his machine, of which he was previously unaware, or otherwise, he had lost control of it. For that purpose, or to determine the credibility of the testimony of the defendant as compared with the contradictory evidence of the traffic officer regarding the location of the truck at the time of the accident, his evidence might fairly account for the admonition to the witness by the Deputy Attorney General, before he testified to any material facts involved in the cause of the accident, that "I think it only fair to warn you that

what you might say here might be used against you. On the other hand it might be used in your favor, depending on what it is, in the event that you are subsequently prosecuted as a result of an indictment by this Grand Jury." Again the Deputy Attorney General said to the witness, "If you care to make a statement to the Grand Jury on your version of how it happened you can do so. I admonish you again that you don't have to make any statement because it might be used against you or on the other hand it might be used in your favor in the event of a subsequent trial." That officer further warned the witness that "If you do make a statement * * * it is only fair to tell you that anything that you say of course will be possibly the subject of cross questions by myself or the jury. In other words, we want you to understand thoroughly what you are telling us" is subject to cross-examination. The officer then said, "Now if you care to make a statement to the Grand Jury, your statement is now invited, * * *." After the foregoing admonitions the defendant made a full statement of the circumstances surrounding the accident in which he definitely and positively asserted that his truck was not on the wrong side of the highway. On cross-examination he adhered strictly to that assertion. His evidence was all favorable to his theory that he was guilty of no negligence or violation of traffic law which led to the accident. It was the sole province of the grand jury to determine the credibility of his evidence.

It is true that before the defendant had testified to any material facts this colloquy occurred:

"Q. * * * You know what this is all about right at the present time? A. Yes, sir.

"Q. O. K. Well, now with that in mind, do you care to make any statement to this Grand Jury with respect to the vehicle accident which I have already described in which three persons were killed? A. No.

"Q. You don't care to make any statement? A. No.

"Q. Well, is that your answer? A. *I didn't understand you.* [Italics added.]

"Q. I say what is your answer, do you care to make a statement to the Grand Jury with respect to your part in that accident or don't you? A. I don't know.

"Q. Well, that is something you yourself have got to decide. A. Well, do you mean how it happened?

"Q. If you care to make a statement to the Grand Jury on your version of how it happened you can do so. I admonish you again that you don't have to make a statement because it might be used against you or on the other hand it might be used in your favor in the event of a subsequent trial."

[12, 13] We think the defendant was fully admonished that he was not required to testify before the grand jury, and that if he did so his testimony might be used against him. It seems apparent that the defendant's first answers above quoted, to the effect that he did not care to make a statement were because he did not understand exactly what the prosecuting officer was asking him. We do not construe the record as supporting petitioner's claim that he was persuaded by any misleading or improper statements to become a witness on his own behalf. He must have understood that he was not compelled to testify before the grand jury, and that if he did so, his evidence might be used against him. The statement that defendant's evidence might be used in his favor was certainly unusual, and possibly improper But, in view of the entire record, we are convinced it was not prejudicial so as to render the indictment invalid on that account. That is true in view of the fact that his evidence was all favorable to the defendant. It contains no admissions against his interest.

For the foregoing reasons the writ of prohibition is denied.

ADAMS, P. J., and PEEK, J., concur.

88 Cal.App.2d 60

ABELLERA v. TOM et al.

Civ. 3697.

District Court of Appeal, Fourth District, California.

Oct. 13, 1948.

1. Appeal and error ⚿706(1)

Burden is on appellant to present adequate record in support of appeal from order granting new trial, and in absence of such record, as where no reporter's transcript is filed because of loss of reporter's notes, appeal must be dismissed on respondents' motion.

2. Appeal and error ⚿706(1)

A wide discretion rests with trial court in respect to granting of new trial, and order therefor should not be disturbed on appeal, in absence of record disclosing facts sufficient to justify such action.

◆

Appeal from Superior Court, Imperial County; Elmer W. Heald, Judge.

Action by Angelo B. Abellera against Herman Tom and others for malicious assault. Judgment for plaintiff, and, from an order granting certain defendants a new trial, plaintiff appeals. On respondents' motion to dismiss the appeal.

Motion granted, and appeal dismissed.

L. A. Gordon and Darwin H. Wolford, both of Los Angeles, for appellant.

Horton & Knox, of El Centro, for respondents.

BARNARD, Presiding Justice.

This is an appeal from an order granting a new trial to certain defendants. The action is one for damages for malicious assault, it being alleged that the plaintiff was wrongfully assaulted in a place of amusement by two of the defendants who were then acting as agents and employees of three other defendants who owned the place of business. The action was tried before Judge Thompson, sitting without a jury. Findings and judgment were signed and filed on December 13, 1947, shortly before Judge Thompson retired from the bench. The judgment awarded the plaintiff $18,421 as against the owners of the business, $36,842 as against one of the alleged employees, and $55,264 against the other alleged employee.

Notice of intention to move for a new trial on all of the statutory grounds, except misconduct of the jury, was served and filed by the three owners of the business on December 3, 1947. Judge Thompson having retired, this motion was heard by Judge Heald on February 13, 1948, and was by him granted on February 18, 1948. A written order granting the motion was signed and filed which, after reciting that all parties had appeared and that it appeared to the court that the motion ought to be granted as to these three defendants, ordered the motion granted as to them upon all of the grounds stated in the notice, including insufficiency of the evidence. The plaintiff filed notice of appeal from this order, and also filed a notice to the clerk requesting the preparation of both a clerk's and a reporter's transcript.

A clerk's transcript was filed in this court on June 17, 1948. No reporter's transcript was ever filed and it was conceded at the hearing of this motion to dismiss that it is impossible to secure a reporter's transcript due to the fact that the reporter's notes have been lost, and that it is not possible to secure a satisfactory record by other means. Notice of a motion to dismiss the appeal for want of an adequate record was filed by the respondents on August 6, 1948. After a continuance, this motion was made and heard on October 13, 1948.

[1] The record before us contains nothing material to the question now presented, except the notice of intention to move for a new trial upon the six statutory grounds and the court's order granting a new trial as to the respondents upon all of the grounds stated in the notice, including insufficiency of the evidence. The record is devoid of anything to show what was before the trial judge or considered by him in connection with presenting and deciding the motion for new trial. The burden was upon the appellant to present an adequate

record in support of his appeal from the order granting a new trial, there was ample time for him to do so if it could be done, and in the absence of such a record no good reason appears for denying the motion to dismiss the appeal.

[2] It would be an idle act to deny this motion to dismiss and to again consider the matter upon submission of the appeal. If that were done it would be incumbent upon the appellant to show that the court erred in granting a new trial as to these parties. Many of the questions then involved, including errors of law and insufficiency of the evidence, would depend upon a satisfactory record of what took place at the trial. Admittedly, such a record cannot be obtained. Under the existing circumstances, it appears rather obvious that the present appeal can serve no useful purpose. A very wide discretion rests with the trial court with respect to the granting of a new trial, and an order therefor should not be disturbed in the absence of a record which would disclose facts sufficient to justify such action.

The motion is granted and the appeal is dismissed.

MARKS and MUSSELL, JJ., concur.

---

88 Cal.App.2d 99

PEOPLE v. FRAZIER.

Cr. 4246.

District Court of Appeal, Second District,
Division 2, California.
Oct. 20, 1948.

1. Embezzlement 🔑22
False pretenses 🔑20½
Larceny 🔑65

A defendant may be convicted of grand theft upon proof of facts establishing embezzlement, larceny or obtaining money by false pretenses. Pen.Code, § 484.

2. Embezzlement 🔑1
Larceny 🔑1

Statute substituting word "theft" for "larceny," "embezzlement" or "stealing" in statutes did not change any elements of the former crimes. Pen.Code, § 484.

3. Embezzlement 🔑14

Where defendant was employed by owner to sell trailer and had been given possession of trailer with authority to sell it and to receive payment therefor, defendant was owner's agent in holding trailer and in receiving proceeds of sale, as regards issue of whether defendant was guilty of embezzlement of part of proceeds. Pen.Code, §§ 484, 503, 506, 508; Civ.Code, § 2026.

4. Embezzlement 🔑44(1)

Evidence sustained conviction of grand theft based on embezzlement of part of proceeds realized from sale of trailer which had been turned over to defendant by owner to sell as owner's agent. Pen. Code, §§ 484, 503, 506, 508; Civ.Code, § 2026.

5. Criminal law 🔑822(6, 11)

Instructions, when considered as a whole, were not erroneous as directing jury to find defendant guilty of grand theft if he was a broker or as requiring defendant to establish his innocence beyond a reasonable doubt, especially where trial court gave standard instructions on presumption of innocence. Pen.Code, § 484.

6. Criminal law 🔑822(1)

A single instruction or portion of an instruction cannot be considered separately from the entire charge.

7. Criminal law 🔑801

Permitting counsel to argue case to jury before completing reading of all instructions, though a departure from usual procedure, was not error, in absence of showing that trial court's discretion was abused or that defendant's rights were affected. Pen.Code, §§ 1093, subds. 5, 6, 1094.

8. Criminal law 🔑755½

In prosecution for grand theft based on alleged embezzlement of part of proceeds realized from sale of trailer which had been turned over to defendant by owner to sell, trial court's statement that question for jury to decide was whether trailer was left with defendant as broker of seller, or was trailer to be sold at net price, was correct statement of issues presented by evidence, and was not an improper comment on the evidence. Pen. Code, §§ 484, 1093, subd. 6, 1439; Const. art. 1, § 13; art. 6, § 19.

◆

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

E. P. Frazier was convicted of grand theft, and he appeals.

Affirmed.

Walter C. Harbert, of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., and Elizabeth Miller, Deputy Atty. Gen., for respondent.

WILSON, Justice.

Defendant was charged with grand theft in that he feloniously took $440, the property of one Charles A. Schickel. He pleaded not guilty, was tried to a jury and was found guilty as charged. His motion for a new trial was denied and he was placed on probation for three years. He has appealed from the order denying a new trial, his specified grounds being that the evidence is insufficient to sustain the verdict and that the court committed prejudicial errors.

1. Sufficiency of the evidence. Defendant was engaged in the business of selling trailers and trailer parts. In July, 1947, Schickel called at defendant's sales lot with a view of selling his trailer. Defendant offered to sell it, his commission to be 10 per cent of the sale price. No price was agreed upon at that time, but defendant told Schickel his asking price of $2600 was too low and that he should be able to obtain $2900. Schickel asked defendant to prepare a contract for the commission but it was not drawn at that time. About a week later Schickel took his trailer to defendant's lot and parked it. When he asked defendant if the contract was ready the latter said it was not necessary because they knew each other. Orally a commission of 10 per cent was agreed upon by the parties. Schickel talked to defendant almost weekly until the latter part of September asking why the trailer had not been sold. Defendant said trailers were not selling very fast. Schickel suggested lowering the price but defendant said they would get the agreed amount when the right person came along.

On September 28, 1947, a Mr. Paelig purchased the trailer from defendant for $2725 and gave the latter a deposit of $20. On September 29 Paelig gave defendant a check on an Illinois bank, payable to defendant, for $2705, the balance of the purchase price. Defendant deposited the check in his bank on the same day and it was forwarded to Illinois for collection. The purchase price was designated as $2600, with extras, sales tax, license and transfer amounting to $125, making a total of $2725. The check was honored by the Illinois bank and the proceeds deposited in defendant's bank to his credit on October 6, 1947.

Meanwhile on September 30, the day after defendant received Paelig's check, he called on Schickel and told him he had a buyer for the trailer but the price of $2600 was too high. He told Schickel that the best price he could obtain was $2200, and after deducting expenses of $300, including $100 for license plates, a net of $1900 would remain for Schickel. The latter agreed to accept that amount and executed a used trailer consignment agreement by which he agreed to accept $1900 net and to leave the trailer with defendant for 15 days. At no time did defendant tell Schickel he had already sold the trailer or that he had received cash and a check totaling $2725.

A few days after September 30 Schickel telephoned to defendant asking whether the trailer had been sold. The latter said he had not closed the deal at that time. The next day Schickel talked to defendant who said he had received a check for the full amount which was being cleared through a bank in Illinois. Schickel asked the name of the purchaser and defendant said the customers were queer people and Schickel should not have anything to do with them because he, defendant, did not want Schickel to jeopardize the sale. Defendant did not tell Schickel how much he had obtained for the trailer nor the amount of the check. Schickel repeatedly asked defendant about the money he was to receive. It was not until October 15 that defendant gave Schickel a check for $1900 signed by defendant's wife. Schickel executed a bill of sale and certificate of title at that time. Schickel did not learn until a week or ten days after October 15 that the trailer had been sold on September 29.

Since the jury by their verdict and the court by its order denying a new trial accepted the evidence above outlined as true, the conflicting evidence of defendant and his witnesses must be disregarded.

[1,2] A defendant may be convicted of grand theft upon proof of facts establishing embezzlement, larceny or obtaining money by false pretenses. People v. Cook, 10 Cal.App.2d 54, 57, 51 P.2d 169; People v. Jones, 61 Cal.App.2d 608, 622, 623, 143 P.2d 726; People v. Myers, 206 Cal. 480, 483, 275 P. 219. No elements of the former crimes have been changed by section 484 of the Penal Code as amended in 1927. People v. Myers, supra. "Embezzlement is the fraudulent appropriation of property by a person to whom it has been entrusted." Penal Code, sec. 503. Every agent or other person entrusted with property for the use of any other person, who fraudulently appropriates it to any use or purpose not in the due and lawful execution of his trust, or who secretes it with a fraudulent intent to appropriate it to such use or purpose, is guilty of embezzlement. Penal Code, sec. 506. Every agent of any person who fraudulently appropriates to his own use, any property of another which has come into his control by virtue of his employment as such agent, is guilty of embezzlement. Penal Code, sec. 508.

[3] All elements of embezzlement said in People v. Borchers, 199 Cal. 52, 56, 247 P. 1084, to be necessary are present in this case: (a) Since defendant was employed by Schickel to sell the trailer and had been given possession of it with authority to sell it and to receive payment therefor, he was Schickel's agent in holding the trailer and in receiving the proceeds of the sale. Civil Code, sec. 2026; Soto v. Globe Grain & Milling Co., 55 Cal.App. 532, 534, 203 P. 830. (b) The proceeds were the property of Schickel. As previously noted, the agreement between defendant and Schickel was that the former was to sell the trailer and to receive 10 per cent of the sale price as his commission. The trailer was sold for $2600 (plus license fees, sales tax, etc., not involved in the case); deducting defendant's commission of $260 leaves $2340 net proceeds belonging to Schickel; defendant paid Schickel only $1900, which was $440 less than the amount that should have been paid. (c) Schickel owned the trailer and delivered it to defendant for the purpose of sale, hence it was rightly in defendant's possession. As a factor defendant was authorized to receive payment from the purchaser. Civ. Code, sec. 2026. When he received payment for the trailer the funds were lawfully in his possession but belonged to Schickel. (d) Defendant asserted title to and returned $440 of Schickel's money. At the time when he had deposited in his bank a check received from the purchaser for the total sale price of the trailer he represented to Schickel that he could not obtain more than $2200 and after deducting commission and other expenses only $1900 would remain. Although he had already sold the trailer he induced Schickel to sign an agreement consigning it to him for 15 days for sale at the net price of $1900 to Schickel. He paid that sum to Schickel which the latter accepted, depending on the truth of defendant's false statement. Such act on defendant's part constituted conversion. (e) Defendant's intent to defraud Schickel is shown by the evidence heretofore related.

[4] Defendant contends that the agreement of September 30 wherein Schickel agreed to accept $1900 net for the trailer was a final and binding agreement determining the amount he was to receive. This contention is fallacious since the agreement was procured by defendant by reason of his false statement to Schickel that he, defendant, could not obtain more than

$2200 for the trailer when at that time he had sold it and had received cash and a check representing the sale price of $2600 plus $125 expenses, and had deposited the check in his bank for collection. An agreement procured by such means binds no one. Since defendant had failed at the outset of his dealings with Schickel to prepare the commission agreement as the latter had requested, it is clear that he procured the agreement of September 30 as a part of his scheme to defraud. The representation that the vehicle could not be sold for more than $2200 was not concerning a future event or occurrence but was a false representation of a present fact, positively known by defendant to be untrue. Defendant had already sold it for $2600. The evidence amply supports the verdict.

[5, 6] 2. Alleged errors in instructions to the jury. Defendant complains of a part of an instruction reading as follows: "You have heard the testimony from both sides. If you find from all the evidence, beyond a reasonable doubt, that Mr. Frazier was employed as a broker to make the sale, then your verdict must be 'Guilty' * * *." He contends that this language told the jury that it is a crime to be a broker. Complaint is also made of another portion of the same instruction which reads: "* * * If, on the other hand, you find from all of the evidence, beyond a reasonable doubt, that the trailer was left with Mr. Frazier to be sold for a net price, and all the purchase money above that net price was to belong to Mr. Frazier, then your verdict must be 'Not guilty.'" Defendant's contention that this language requires him to establish his innocence beyond a reasonable doubt is without merit. The two quotations to which defendant takes exception are isolated parts of an instruction that, as a whole, states the law correctly and outlines fully and fairly the contentions of both prosecution and defense. The entire instruction reads: "The questions in this case may be summarized as follows: Mr. Frazier is charged with grand theft in that he did wilfully, unlawfully, and feloniously take $440.00 in money, lawful money of the United States, and the personal property of Mr. Schickel. The whole case resolves around, What was the contract between Mr. Schickel and Mr. Frazier? Mr. Schickel claims that he left his trailer with Mr. Frazier as his broker or agent for sale, and that Mr. Frazier was to receive 10 per cent commission on the sale for his services. Mr. Frazier admits that the trailer was left with him for sale, but he claims that the agreement was that Mr. Schickel name a net price which he would take, and that all the purchase money above that net price belonged to Mr. Frazier. You have heard the testimony from both sides. If you find from all the evidence, beyond a reasonable doubt, that Mr. Frazier was employed as a broker to make the sale, then your verdict must be 'Guilty.'

"If, on the other hand, you find from all the evidence, beyond a reasonable doubt, that the trailer was left with Mr. Frazier to be sold for a net price, and all the purchase money above that net price was to belong to Mr. Frazier, then your verdict must be 'Not guilty.' One cannot be guilty of the theft of his own property."

The jury was not instructed to convict if they found that defendant was a broker, nor were they told that he was required to establish his innocence beyond a reasonable doubt. The entire instruction covered the law correctly and sufficiently. There was no error. The instruction must be viewed and construed as a whole. A single instruction or a portion of an instruction cannot be considered separately from the entire charge. People v. Horowitz, 70 Cal.App.2d 675, 703, 161 P.2d 833; People v. Ames, 61 Cal.App.2d 522, 534, 143 P.2d 92.

In addition to the foregoing the court gave the standard instructions on the presumption of innocence; that the burden of proof was on the people as to each and every element of the offense charged, including the element of specific intent; that if they had a reasonable doubt as to whether the people had satisfactorily proved any element of the offense charged they should acquit him. These and other instructions fully protected defendant's rights. Comparable instructions were held to be sufficient in People v. Bodey, 94 Cal. App. 420, 422, 271 P. 203, where the court instructed that (1) if, from all the evidence, the jury was satisfied to a moral certainty beyond a reasonable doubt that the defendant committed a certain act he should be found guilty; (2) if from all the evidence they were satisfied to a moral certainty beyond a reasonable doubt that he did not commit the act he should be found not guilty; (3) if from all the evidence they entertained a reasonable doubt whether or not the defendant did commit the act he should be found not guilty. Considering all the instructions as a whole, there was no error and defendant's rights had full protection.

[7] 3. Alleged error in directing the order of the trial. Defendant assigns error in that the court permitted counsel to argue the case to the jury before completing the reading of all the instructions. The court read a portion of the instructions, counsel for both sides presented their arguments, after which the remainder of the instructions were read. Subdivisions 5 and 6 of section 1093 of the Penal Code provide that counsel may argue the case and the judge may then charge the jury. This section is not mandatory. Section 1094 provides that "* * * for good reasons, and in the sound discretion of the court, the order prescribed in the last section may be departed from." While the procedure adopted is unusual and is not to be commended for regular, every-day practice, we do not find that the discretion of the court was abused or that defendant's rights were affected by the court's action. Departure from usual procedure is not error unless discretion has been abused. People v. Valencia, 32 Cal.App. 631, 632, 163 P. 865.

[8] 4. Alleged error of the court in commenting on the evidence. We have examined the remarks made by the court to the jury and do not find that they are outside the limits permitted by the Constitution and the statute. Const., Art. I, sec. 13; Art. VI, sec. 19; Penal Code, sec. 1093, subd. 6; sec. 1439. The statement by the court that "the question for you to decide in this case is whether the trailer was left with Mr. Frazier as the broker of the seller or was it to be sold at a net price" was a correct statement of the issues presented by the evidence. Other remarks made by the court in connection with the instructions concerning the law were proper and not only did not exceed the constitutional privilege of the court to comment on the evidence but were helpful to the jurors in that such remarks placed in their minds the matters that they were required to consider and decide.

The order denying a new trial is affirmed.

MOORE, P. J., and McCOMB, J., concur.

In re FILTZER'S ESTATE.

HARDER v. ALLEN.

Civ. 16379.

District Court of Appeal, Second District,
Division 1, California.
Oct. 15, 1948.

Hearing Granted Dec. 14, 1948.*

1. Bastards 🔑5

In proceeding on petition for family allowance for support of minor child of petitioner and decedent, where testimony of petitioner was undisputed that she and decedent went through a purported marriage in Mexico and received a certificate to that effect, certificate and official translation thereof were admissible on issue of legitimacy of child to corroborate petitioner's testimony. Civ.Code, § 85; Probate Code, § 680.

2. Evidence 🔑366(2)
Marriage 🔑45

The rule that a marriage certificate does not prove itself and that there must be proof of signature of person by whom it purports to have been signed and of his authority to perform the ceremony applies where certificate is offered as proof of recitals contained therein, but does not apply where certificate is offered merely to corroborate testimony of one of the parties to purported marriage ceremony to effect that ceremony took place.

* Subsequent opinion 205 P.2d 377.

3. Bastards 🔑10

Generally, to legitimize issue of a bigamous marriage, it must appear that at least one of the parties thereto entered into such relationship in good faith believing it to be a valid marriage. Civ.Code, § 85.

4. Bastards 🔑8

In proceeding on petition for a family allowance for support of minor child of petitioner and decedent, question of good faith of petitioner in entering into purported marriage with decedent, believing it to be a valid marriage, thereby legitimizing issue of such marriage, which was actually bigamous, was for trier of fact. Civ.Code, § 85.

5. Bastards 🔑105

The rule that the law favors legitimacy applies in proceeding on petition for a family allowance for a minor child, who was the issue of a bigamous marriage between petitioner and decedent. Civ. Code, § 85; Probate Code, § 680.

6. Executors and administrators 🔑216(2)

Attorney's fees are allowable for services rendered on a petition for a family allowance for a minor child as a part of the allowance on the ground that they are necessary for child's support and maintenance. Probate Code, § 680.

◆

Appeal from Superior Court, Los Angeles County; Wm. M. Byrne, Judge.

Proceeding in the matter of the estate of Francis W. Filtzer, also known as Bob Filtzer, deceased, on the petition of Mary Louise Harder for a family allowance for the support of Gregory Francis Filtzer, the minor child of petitioner and decedent, contested by R. E. Allen; administrator with will annexed of decedent's estate. From an order directing the family allowance, administrator appeals.

Affirmed.

Voorhees, Stewart & Voorhees, of Los Angeles, for appellant.

Leonard Wilson and Arnold L. Leader, both of Los Angeles, for respondent.

WHITE, Justice.

This is an appeal from an order of the Superior Court of Los Angeles County, sitting in probate, directing the administrator with the will annexed of the estate of Francis W. Filtzer to pay to petitioner and respondent, Mary Louise Harder (hereinafter referred to as petitioner), a family allowance for the support of Gregory Francis Filtzer, the minor child of petitioner and decedent, pursuant to the provisions of section 680 of the Probate Code.

Francis W. Filtzer died on or about May 9, 1947, leaving as his surviving spouse Evelyn R. Filtzer. During the year 1945 Evelyn R. Filtzer had filed an action for divorce against Francis W. Filtzer in which an interlocutory decree was granted in September, 1945, but the action was dismissed in April, 1946. In November, 1945, a suit for divorce was instituted by Hans Frederick Harder against Mary Louise Harder, petitioner herein, and an interlocutory decree was entered on January 3, 1946. On or about January 13, 1946, Mary Louise Harder and Francis W. Filtzer went through a purported marriage ceremony in Tijuana, Mexico, and thereafter lived together as husband and wife in California. As a result of this union a child was born on July 22, 1947. Relying upon section 85 of the Civil Code, which provides that "The issue of a marriage which is void or annulled or dissolved by divorce is legitimate", petitioner sought an allowance for the support of the minor child, together with attorney's fees.

After hearing, the trial court made an order, in which it found that petitioner and decedent "entered into a marriage ceremony in the State of Morales, Republic of Mexico, and that said marriage between said decedent and said petitioner, Mary Louise Harder, was, by said Mary Louise Harder, entered into in good faith, and that said marriage has never been dissolved, annulled or otherwise set aside. That following said marriage, said petitioner, Mary Louise Harder and said Francis W. Filtzer lived together in the City of Avalon, County of Los Angeles, State of California, as husband and wife. * * *." The court further found that petitioner was entitled to a "reasonable allowance out of the above entitled estate for the maintenance of said child, for the payment of doctor and hospital bills, and for the employment of attorneys to protect the interest of said child." The court directed the administrator to pay petitioner the sum of $275 for hospital and doctor bills, $500 attorney's fees, and $100 per month until further order of the court.

As grounds of appeal appellant asserts (1) that no marriage was in fact proved; (2) that if a marriage took place, it was not entered into in good faith on the part of either party and the child is therefore not legitimate under section 85 of the Civil Code; and (3) that the court was without jurisdiction to order payment of attorney's fees for petitioner in this proceeding.

The only testimony relative to the marriage was that of petitioner, who stated that she and the decedent went through a marriage ceremony before an official in Tijuana, who delivered to her what purported to be a certificate of marriage in the Mexican language; that thereafter she received through the mail a purported official translation in English of the certificate. Each of these documents was introduced into evidence over objection. She further testified with reference to the issue of good faith, that decedent told her that "we could not get married anywhere in the State of California, but that we could go to Mexico and it would be valid in any state" ; that she relied upon this statement, went through the ceremony in reliance upon the same, and after the marriage lived with Mr. Filtzer as his wife, and used his name.

[1, 2] In support of his first contention, appellant urges that there was no evidence as to the laws of the State of Morales, Mexico, and it must therefore be presumed that the laws of that state are the same as California; that no evidence was presented that the parties had obtained a license, that the person performing the ceremony was authorized by law so to do, or of his official capacity or identity; and that the court erred in receiving the purported marriage certificate and translation in evidence. The testimony of petitioner, however, is undisputed that she and decedent actually went through what purported to be a marriage ceremony and received a certificate to that effect. The offspring of a marriage "null in law" for lack of a license was held legitimate in Re Estate of Shipp, 168 Cal. 640, 144 P. 143. It was not error to receive in evidence the purported marriage certificate and translation thereof. The authorities cited by appellant, to the effect that a marriage certificate does not prove itself, that there must be proof of the signature of the person by whom it purports to have been signed and of his authority to perform the ceremony (People v. Le Doux, 155 Cal. 535, 102 P. 517; People v. Jordan, 72 Cal.App. 406, 237 P. 757), would be applicable if the certificates were being offered as proof of the recitals contained therein; but the evidence was not received for that purpose. It was received, as stated by the trial court, not to prove a valid marriage, but to support the testimony of petitioner that she went through a ceremony at that time and place, received the certificate at that time, and believed that she was legally married. In other words, the documents were received in corroboration of petitioner's claim and testimony that she acted in good faith, believing that she could be, and was, legally married.

[3, 4] It may be conceded that the prevailing weight of authority requires that in order to legitimize the issue of a bigamous marriage such as the one with which we are here concerned, under statutes identical with or similar to section 85 of the Civil Code, it must appear that at least one of the parties to such attempted marriage entered into the same in good faith, believing it to be a valid marriage. See In re Atkins, 151 Okl. 294, 3 P.2d 682, 84 A.L.R. 499, 501; 3 Cal.Law.Rev. 161; 19 So. Cal.L.Rev. 457, 458. In the present case the trial court found that the marriage was entered into in good faith by Mary Louise Harder, and that the parties to the marriage thereafter lived together as husband and wife. In attacking this finding, appellant asserts that the testimony of Mary Louise Harder as to her good faith is so inherently improbable as to be entitled to no credence, and that this

court should disregard her statement and set aside the finding of the trial court based thereon. With this contention we cannot agree. The question of good faith on the part of respondent was a question of fact to be determined by the trier of fact, and as evidenced by his findings, the trial judge was convinced by substantial evidence that respondent entered into the marriage relationship in good faith, believing that she was the lawful wife of the deceased, and relying upon his statements to her that their marriage in Mexico was a or would be a valid one. Her testimony in this respect finds support in the fact that upon their return to California the parties lived together and held themselves out as husband and wife.

[5] Furthermore, it is to be remembered that the law favors legitimacy. In Re Estate of Shipp, 168 Cal. 640, 144 P. 143, where the parties failed to secure a license, the court in referring to the same statutory language used in Civil Code section 85, said: "The appellant seeks to give to this clause a very limited interpretation; his contention being that the term 'marriages null in law,' as here used, includes only the marriages which are subject to an action for annulment on one of the grounds specified in section 82 of the Civil Code. We think the provision should not be construed so narrowly. The statute was passed with the generous and kindly purpose of relieving children, to some extent, from the harsh consequence of illegitimacy—a status for which the children affected are in no degree morally responsible. The section should be liberally construed. Blythe v. Ayres, 96 Cal. 532, 582, 31 P. 915 19 L.R.A. 40."

[6] In urging that the trial court erred in allowing attorney's fees as part of the order granting a family allowance, appellant relies upon the rule that attorney's fees are not ordinarily recoverable in the absence of exceptional circumstances, such as a special agreement or special statutory provision, or in certain equitable actions. In re Estate of Marre, 18 Cal.2d 191, 114 P.2d 591. However, in the present case, the fees were awarded, as stated by the trial judge, as part of the allowance, because they were "necessary for his (the child's) support and maintenance, just the same as room and board or anything else." The court further stated that the fees were allowed solely for the services rendered in connection with the petition for family allowance.

Appellants cite no authority holding that attorney's fees are not allowable in a case such as this. In re Estate of Marre, supra, does not support appellant's contention, for the holding there was that, although it was contended that fees were a necessary expense of the beneficiary of a trust, the amounts payable were to be determined in the sole judgment of the trustees, and the court in a companion case In re Estate of Marre, 18 Cal.2d 184, 190, 114 P.2d 586, held that the amounts to be paid for the beneficiary's support should be determined in the discretion of the trustees. In the present cause the court has found that an allowance of attorney's fees is necessary for the support and maintenance of the child, just as it also found that an allowance for medical expenses was necessary.

In the case of Arais v. Kalensnikoff, 1937, 10 Cal.2d 428, 74 P.2d 1043, 1047, 115 A.L.R. 163, suit was brought to compel a father to support his illegitimate child under section 196a of the Civil Code, which at that time read as follows: "The father as well as the mother, of an illegitimate child must give him support and education suitable to his circumstances. A civil suit to enforce such obligations may be maintained in behalf of a minor illegitimate child, by his mother or guardian, and in such action the court shall have power to order and enforce performance thereof, the same as under sections 138, 139 and 140 of the Civil Code, in a suit for divorce by a wife." The court in the cited case held: "Also as section 196a of the Civil Code requires a father to support his child, the trial court had power to order him to pay attorney's fees in the action brought to enforce that obligation." In other words, the attorney's fees in an action brought under section 196a of the Civil Code were allowed, not upon an express authorization of the statute, but as a necessary element of the support and maintenance of the child. See also, Kyne v. Kyne, 38 Cal.App.2d 122, 131, 100 P.2d 806; Paxton v. Paxton, 150 Cal. 667, 89 P. 1083. It is true the present action is not brought against a living parent to enforce the obligation of support, but the same reasoning should apply where the claim is against the estate of a parent under section 680 of the Probate Code. That section provides that the widow and minor children are entitled "to such reasonable allowance out of the estate as shall be necessary for their maintenance according to their circumstances, during the progress of the settlement of the estate, * * *."

For the reasons herein stated, the order appealed from is affirmed.

YORK, P.J., and DORAN, J., concur.

---

87 Cal.App.2d 106

CUNNINGHAM v. COCA-COLA BOTTLING CO. OF LOS ANGELES.

Civ. 16253.

District Court of Appeal, Second District, Division 1, California.

Aug. 4, 1948.

1. Negligence 🔑138(2), 139(2)

Instruction that only duty resting on defendant was to use ordinary care to see that, when it delivered a cooler for bottled beverages to plaintiff's employer and when it later serviced it, the cooler was not in such condition that in its normal use it would become dangerous to those in its vicinity, and that, unless plaintiff established in some specific manner that defendant failed to use reasonable care which was proximate cause of plaintiff's injuries, plaintiff could not recover, was correct.

2. Appeal and error 🔑1066

In action for injuries sustained by service station employee from explosion of cooled water in beverage vending machine, instructions on doctrine of res ipsa loquitur were not prejudicial to plaintiff where, under the undisputed facts, the doctrine had no application.

3. Negligence 🔑121(2)

Before the doctrine of "res ipsa loquitur" can be applied, the thing or instrumentality causing injury must be shown to be under exclusive control and management of defendant which control is not limited to actual control, but applies to right of control of the instrumentality which causes the injury.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Ipsa Loquitur".

4. Negligence 🔑121(3)

Doctrine of "res ipsa loquitur" was not applicable to beverage vending machine which exploded injuring a service station employee, where the bottling company's control or right of control of machine was limited to providing proper maintenance or repairs, the machine was the property of the oil company, and was operated by the employees thereof, and it was as probable that the accident was the result of activities of some unknown person, as it was that it was caused by any defect in the machine itself.

5. Negligence 🔑121(2)

The rule of res ipsa loquitur does not apply unless the instrumentality causing the injury is shown to have been under the exclusive control of the one sought to be charged with responsibility therefor, nor does it apply where cause of accident is unexplained and might have been due to one of several causes for some of which defendant is not responsible.

6. Negligence 🔑121(2)

The doctrine of res ipsa loquitur does not apply to a case having a divided responsibility of the thing causing the injury, where an unexplained accident may have been attributable to one of several causes for some of which defendant is not responsible and when the injury was caused by one of two causes, for one of which defendant is responsible but not for the other, and in such case plaintiff must fail if the evidence does not show that injury was result of former cause, or leaves it as probable that it was caused by one or the other.

7. Trial ⚷295(8)

Instruction respecting burden of proof of allegations of negligence by plaintiff was not prejudicial to plaintiff on ground that he departed from theory alleged at trial and that the instructions therefor placed an impossible burden upon him and misled the jury, in view of further instruction requiring the jury to consider the instructions as a whole.

8. Trial ⚷295(1)

In seeking to predicate error upon a single instruction or portions thereof singled out from the context of the entire charge, plaintiff must not only show legal error, but error affecting his substantial rights.

9. Negligence ⚷138(4)

In action for injuries sustained by service station manager when beverage vending machine exploded, charge on plaintiff's contributory negligence was not error under evidence indicating that plaintiff was negligent in leaving the machine out of doors and accessible during hours when the station was closed.

10. Appeal and error ⚷1001(1)

Determination arrived at by the jury cannot be disturbed unless the appellate court can say as a matter of law that it rests upon no substantial evidence at all.

11. Negligence ⚷136(18)

In action for injuries sustained by service station manager when beverage vending machine exploded, evidence that the explosion was caused by some defect therein for which defendant was responsible was insufficient for the jury.

◆

Appeal from Superior Court, Los Angeles County; Samuel R. Blake, Judge.

Action for damages for personal injuries sustained as result of an explosion by Randall Cunningham against the Coca-Cola Bottling Company of Los Angeles. From the judgment, plaintiff appeals.

Affirmed.

Charles A. Son, of Los Angeles (Joseph D. Taylor, of Los Angeles, of counsel), for appellant.

Schell & Delamer, of Los Angeles, for respondent.

WHITE, Justice.

Plaintiff has appealed from a judgment for defendant entered upon the verdict of a jury in an action for damages for personal injuries. The injuries were sustained as the result of an explosion which occurred when the plaintiff lifted the lid of a Coca-Cola vending machine located on the premises of a Union Oil service station where plaintiff was employed as manager. The explosion or eruption was not caused by a bursting bottle, but appeared to emanate from the cooled water in which the bottles of Coca-Cola were submerged. The vending machine was installed on the premises under a contract between Union Oil Company as vendee and Pacific Coast Coca-Cola Bottling Company as vendor, which provided that the vendor's licensee (defendant and respondent Coca-Cola Bottling Company of Los Angeles) would maintain the machine in good repair so long as it was used for the exclusive vending of Coca-Cola.

Plaintiff charged in his complaint that the machine was installed and continuously maintained, supervised and controlled by defendant; that by reason of its "imperfection, defectiveness, unsafety, inadequacy of construction, inspection and supervision, (the machine) became and was a hiddenly defective and dangerous instrumentality"; that it was carelessly and negligently installed and maintained; that when plaintiff was in the act of placing a bottle of Coca-Cola in the machine, "the liquid in said vending machine had become, through the carelessness and negligence of defendants, and without the knowledge of plaintiff, a powerful and dangerous caustic, and was blown into, upon and against his face, eyes and forehead," inflicting serious and permanent injuries. Defendant denied the charges of negligence and in an amendment to its answer set up the defense of contributory negligence of plaintiff "in the supervision, operation, control and use" of the machine.

It appears that Pacific Coast Bottling Company of Beverly Hills sold a Coca-Cola vending machine to Union Oil Company under a contract which provided that the machine would be supplied with Coca-Cola by defendant and respondent Coca-Cola Bottling Company of Los Angeles, a licensee of Pacific Coast Bottling Company. The machine was operated by electricity, and consisted essentially of a tank, containing water, in which the bottles of the beverage were immersed, and a hermetically sealed cooling unit consisting of a motor, compressor, and pipes containing the refrigerant which pipes led from the compressor into the tank. The cover of the tank could be locked. The key to the cover was kept in the gasoline station. In the cover was a smaller lid which was not locked. Upon insertion of a coin in the coin receptacle and pulling a lever, the smaller lid could be rotated so that an opening thereunder would come directly above a bottle and the purchaser could remove the same.

Plaintiff testified that on the day of the accident he lifted the cover of the machine in order to place therein a bottle of soft drink which he had purchased for his personal use; that there were then no Coca-Cola bottles or other bottles in the machine; that upon lifting the cover he heard a "click"; that he placed the bottle therein, at the same time feeling the water to ascertain if it was cold; that he then observed bubbles rising from the bottom of the tank, and turned away, but before he could turn away an explosion or eruption occurred, blinding him. There was testimony by a fellow employee and by others that plaintiff told them immediately after the accident that "something fell in the water"; while plaintiff at the trial testified that he did not see anything fall into the water. It was the theory of defendants, supported by expert testimony, that some prankster had placed a piece of sodium in the lid or cover of the machine so that it fell into the water when the cover was opened, resulting in the explosion; while plaintiff sought to show by expert testimony that the explosion resulted from improper maintenance, in that the insulation of the 110-volt wires leading to the motor was abraided by vibration; that there were bottle caps, slugs and coins in the tank; that by means of "voltaic action" or leakage of the refrigerant from the coils, or both, hydrogen was liberated in the tank and ignited by electricity from the 110-volt line or by an accumulation of electrostatic electricity. Defendant's experts testified that they found sodium hydroxide in matter which appeared to have splattered on the window of the station. If the explosion were caused by hydrogen being ignited by a spark there would be no residue of sodium hydroxide. There was expert testimony that the refrigerant used in the cooling unit is non-corrosive and non-inflammable and will not react with water to give off hydrogen. If the refrigerant leaked from the tubing with sufficient rapidity to cause bubbles in the water, it would all escape within 48 hours. It further appeared from the evidence that for at least a year after the explosion the machine continued to be used without repairs and operated normally.

It is contended that the following instructions were inconsistent with the instructions on res ipsa loquitur and that the giving of them constituted prejudicial error:

"The only duty resting on the defendant in this case was to use ordinary care to see that when it delivered the cooler to plaintiff's employer and later when it serviced the cooler, the said cooler was not in such condition that in its normal use it would become dangerous to those in its vicinity. Consequently, unless the plaintiff has established by a preponderance of the evidence that the defendant failed in some *specific* manner to use such reasonable care and that such failure was a proximate cause of plaintiff's injuries, the plaintiff cannot recover." (Italics added.)

"The defendant is not responsible for any condition caused while the cooler was in the possession of another and of which it had no notice of, or in the exercise of ordinary care would not have known and would not have discovered by reasonable inspection in the exercise of ordinary care."

Appellant contends that in the giving of the first-quoted instruction the court departed from the rule of res ipsa loquitur, in that under such rule the plaintiff is not required to prove a specific act of negligence; and that by the second quoted instruction the court confined the duty of defendant to use care when the cooler was delivered and when it was serviced, without regard to the need for service or inspection at other times.

[1-4] The first challenged instruction was correct, and plaintiff was not prejudicially affected thereby, because, under the undisputed facts present in this case the doctrine of res ipsa loquitur had no application, and instructions thereon should not have been given. Had a verdict for plaintiff been rendered, a judgment entered thereon could not be sustained, by reason of the error committed in giving the jury instructions on the doctrine of res ipsa loquitur. Before the doctrine can be applied, the thing or instrumentality must be shown to be under the exclusive control and management of the defendant. White v. Spreckels, 10 Cal.App. 287, 101 P. 920; Judson v. Giant Powder Co., 107 Cal. 549, 40 P. 1020, 29 L.R.A. 718, 48 Am.St.Rep. 146. Such control is not limited to actual control, but applies to the right of control of the instrumentality which causes the injury. Metz v. Southern Pacific Co., 51 Cal.App.2d 260, 124 P.2d 670. In the present case, defendant's control or right of control of the instrumentality was limited to providing proper maintenance or repairs. The instrumentality was the property of the Union Oil Company, and was kept on premises of the Union Oil Company. Employees of the Union Oil Company kept the machine filled with water, connected and disconnected it from the electric line at their convenience, refilled it with soft drinks from time to time. The key to unlock the cover of the machine was kept at the station. When the station was closed at night the unsold bottles were removed, but the machine was left unlocked on the premises; it was not moved into the station building, but was left outside, accessible to any person who might come upon the station premises.

In Hubbert v. Aztec Brewing Company, 26 Cal.App.2d 664, 688, 80 P.2d 185, 197, 1016, hearing denied by Supreme Court, it was said, quoting from Biddlecomb v. Haydon, 4 Cal.App.2d 361, 40 P.2d 873, hearing denied by Supreme Court:

[5] "The rule of res ipsa loquitur does not apply unless the instrumentality causing the injury is shown to have been under the exclusive control or management of the one sought to be charged with responsibility therefor. Neither does it apply where the cause of the accident is unexplained and might have been due to one of several causes for some of which the defendant is not responsible. Brown v. Board of Trustees of Leland Stanford Junior University, 41 Cal.App. 100, 182 P. 316; Olson v. Whitthorne & Swan, 203 Cal. 206, 263 P. 518, 58 A.L.R. 129. In Scellars v. Universal Service Everywhere, 68 Cal.App. 252, 228 P. 879, the court quotes with approval from the case of Lucid v. E. I. DuPont de Nemours Powder Co., 9 Cir., 199 F. 377, 118 C.C.A. 16, L.R.A.1917E, 182, where the court said: 'The doctrine of res ipsa loquitur involves an exception to the general rule that negligence must be affirmatively shown, and is not to be inferred, and the doctrine is to be applied only when the nature of the accident itself, not only supports the inference of the defendant's negligence, but excludes all others.' * * * ."

[6] Therefore, in the case at bar the doctrine of res ipsa loquitur can have no application where the cause of the injury is under the management and control of the plaintiff, nor can it apply to a case having a divided responsibility where an unexplained accident may have been attributable to one of several causes, for some of which the defendant is not responsible; and when it appears that the injury was caused by one of two causes for one of which defendant is responsible, but not for the other, plaintiff must fail if the evidence does not show that the injury was the result of the former cause, or leaves it as probable that it was caused by one or the other. Gerhart v. Southern California Gas Co., 56 Cal.App.2d 425, 431, 432, 132 P.2d 874, and cases cited.

The defendant had no control or right of control over the machine. It had only a duty of inspection and maintenance. The most painstaking performance of such duty could not prevent an accident resulting from the introduction of an inflammable or explosive substance into the water in the tank of the machine. The state of the evidence was such that the jury could conclude that it was at least as probable that the accident was the result of the activities of some unknown person in arranging to have a piece of sodium fall in the tank as that it was caused by any defect in the machine itself.

The second instruction under attack contained a proper exposition of the law under the issues raised by plaintiff's complaint, that the machine was negligently installed and maintained.

As indicated above, the instructions given were more favorable to plaintiff than he was justly entitled to under the law. From the instructions as given the jury could not fail to understand that from the happening of the accident they were entitled to draw an inference, under the erroneously given instructions as to the doctrine of res ipsa loquitur, that the machine was negligently installed or maintained, subject, of course, to the given admonition that they "should weigh any evidence tending to overcome that inference, bearing in mind that it is incumbent upon the defendant to rebut the inference by showing that it did, in fact, exercise ordinary care and diligence, or that the accident occurred without being proximately caused by a failure of duty on its part."

[7] Appellant next complains of an instruction reading as follows:

"Plaintiff alleges that by reason of the carelessness and negligence of the defendant, a powerful and dangerous caustic was blown into, upon and against his face, eyes and forehead. The burden of proof is on the plaintiff to prove these allegations, and if plaintiff fails to prove such allegations by a preponderance of the evidence, the plaintiff cannot recover and your verdict must be in favor of the defendant."

Although admitting that the instruction correctly stated the charge in the complaint, appellant asserts that he departed from this theory at the trial, contending that the explosion was caused by hydrogen gas; that the instruction required him to prove contentions made not by him but by the defendant, placed an impossible burden on plaintiff and confused and misled the jury. For the reasons heretofore stated it must be held that the error, if any, does not warrant a reversal.

The jury was further advised: "You are not to single out any certain sentence, or any individual point or instruction, and ignore the others, but you are to consider all the instructions as a whole, and treat each in the light of all the others. The order in which the instructions are given has no significance as to their relative importance."

[8] Bearing in mind the well settled rule that instructions must be considered as a whole, it must be held that in seeking to predicate error upon a single instruction, or portions of an instruction singled out from the context of the entire charge to the jury, plaintiff has not met the burden imposed upon him to show not only legal error, but error affecting his substantial rights.

[9] It must also be held that it was not error for the court to instruct the jury upon contributory negligence, for the reason that under the facts hereinbefore set forth with respect to the custody and control of the vending machine, the jury might properly have concluded that plaintiff as manager of the station was negligent in leaving the machine out-of-doors and accessible during the hours when the station was closed.

[10, 11] A reading of the record discloses that defendant offered clear and convincing evidence that the explosion was caused by sodium and could not have been caused by any defect, electrical or mechanical, in the machine. The rebuttal evidence offered by plaintiff, in an attempt to show that the explosion was the result of a leakage of the gas refrigerant from the tubing in the tank plus decomposition of the refrigerant in the presence of oil, grease and water to produce hydrogen gas, and accompanied by an electric current or spark resulting from abraided insulation and "voltaic action" in the water of the tank due to the presence of slugs and bottle caps therein, was considerably weakened by cross-examination, from which it was shown that plaintiff's expert witness did not examine the machine until six months after the accident (as heretofore noted, the machine operated normally for at least a year after the accident, without repairs). There was no evidence as to the presence of slugs or bottle caps in the water at the time of the explosion, nor any evidence as to the condition of the wires or tubing at that time. Although plaintiff's expert witness testified to

an abraided condition of the insulation, he made no tests to determine whether there was actually any electrical leakage. In the face of the foregoing, the most that can be said is that the testimony was in conflict and presented a factual situation for determination by the jury; and under well established rules, we are not authorized to disturb the determination arrived at by the duly constituted arbiters of the facts unless we can say, as a matter of law, that it rests upon no substantial evidence at all. Such is not the situation presented by the record in the case now engaging our attention.

The conclusions at which we have arrived render it unnecessary to determine whether, as contended by respondent, it was relieved of all duty of maintenance under its contracts because for a period the machine was not used exclusively for the vending of Coca-Cola. Plaintiff testified that other products were placed in or dispensed from the machine for a period, but later modified his testimony to state that no other products were sold, but that the employees placed other soft drink products purchased for their own use in the machine from time to time. It was contended by appellant that this practice was permitted under a clause of the contracts. No such clause appears in the contracts in evidence.

For the reasons stated, the judgment is affirmed.

YORK, P. J., and DORAN, J., concur.

---

88 Cal.App.2d 85

PEOPLE v. DAWSON.

Cr. 4220.

District Court of Appeal, Second District,
Division 2, California.
Oct. 20, 1948.

Rehearing Denied Oct. 29, 1948.

Hearing Denied Nov. 18, 1948.

1. Homicide 🔑243, 244(1)

Evidence established that custodian of building located in neighborhood subjected to frequent crimes of violence killed 14 year old boy while resisting attempt to commit burglary and to resist assault upon himself shortly after discovery that building had been subjected to burglary. Pen. Code, §§ 197, 692, subd. 1, 693, subd. 1, 837, subd. 1, 841.

2. Homicide 🔑118(2)

Where an attack is sudden and danger is imminent, a person may stand his ground and slay his attacker even though it be proved that he might have more easily gained safety by flight. Pen.Code, §§ 197, 692, subd. 1, 693, subd. 1; Civ.Code, § 50.

3. Homicide 🔑117

Where peril is swift and imminent and necessity of action immediate, law does not weigh in too nice scales the conduct of an assailant and say that defendant who killed assailant shall not be justified because he might have resorted to other means than homicide to secure his safety. Pen.Code, §§ 197, 692, subd. 1, 693, subd. 1; Civ.Code, § 50.

4. Homicide 🔑116(3, 4)

To justify a homicide, defendant must have believed himself to be in peril and as a reasonable person he must have had sufficient grounds for such belief and must have been entitled to act upon it. Pen. Code, §§ 197, 692, subd. 1, 693, subd. 1; Civ.Code, § 50.

5. Homicide 🔑116(2)

To establish a justifiable homicide, defendant must have been entitled to act upon appearances, and if conduct of decedent was such as to induce in mind of a reasonable man under all circumstances then existing, and viewed from standpoint of defendant, fear or belief that death or great bodily harm was about to be inflicted by decedent upon defendant, it does not matter whether such danger was real or apparent. Pen.Code, §§ 197, 692, subd. 1, 693, subd. 1; Civ.Code, § 50.

6. Homicide 🔑116(4)

If one who committed a homicide claimed to be justifiable acted from reasonable and honest convictions that harm was about to be inflicted upon him by decedent, he cannot be held responsible for a mistake in actual extent of danger when other reasonable men would alike have been mistaken. Pen.Code, §§ 197, 692, subd. 1, 693, subd. 1; Civ.Code, § 50.

7. Homicide ⚷116(2), 117

Where 58 year old partially disabled custodian discovered that building had been subjected to burglary, and was warned by companion that persons were presently in the building, and while crawling through hole in fence and in vulnerable position custodian ordered unknown person to stop and person rushed at him in attitude of attack, apparent and actual necessity existed justifying resort to self-defense, and use of such force as he believed was necessary to protect himself. Pen.Code, §§ 197, 692, subd. 1, 693, subd. 1; Civ.Code, § 50.

8. Homicide ⚷241

Evidence was insufficient to sustain conviction of manslaughter as against plea of justifiable homicide. Pen.Code, §§ 192, 197, 692, subd. 1, 693, subd. 1, 837, subd. 1, 841; Civ.Code, § 50.

9. Criminal law ⚷1159(2)

All intendments are in favor of jury's verdict, and ordinarily reviewing court is limited to a determination of whether there is substantial evidence supporting verdict which is not inherently improbable.

10. Criminal law ⚷304(2)

District Court of Appeal may judicially notice that atrocious crimes are committed by boys of tender years.

* * *

Appeal from Superior Court, Los Angeles County; William R. McKay, Judge.

Clarence D. Dawson was convicted of manslaughter, and he appeals from the judgment of conviction, and from orders refusing to set aside plea of not guilty, denying motion for new trial, refusing application for probation and denying motion in arrest of judgment.

Judgment and order denying new trial reversed, and appeals from other orders dismissed.

Frederic H. Vercoe and D. L. Di Vecchio, both of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., and Wm. E. James, Deputy Atty. Gen., for respondent.

WILSON, Justice.

Defendant was charged with the crime of manslaughter—the killing without malice of one Eddie Hines. By stipulation he was tried to the court without a jury. He was found guilty as charged and sentenced to state prison. He has appealed from the judgment of conviction and from the orders (1) refusing to set aside temporarily his plea of not guilty for the purpose of moving to quash the commitment, (2) denying his motion for a new trial, (3) refusing his application for probation, (4) denying his motion in arrest of judgment.

Defendant relies for reversal of the judgment and the order denying a new trial chiefly upon the specification that the evidence is insufficient to sustain the judgment of conviction and that the court abused its discretion in denying the motion for a new trial.

At the date of the occurrence that is the subject of this opinion Walter A. English, a geologist, was the owner of the building and premises designated as No. 114 South Beaudry Avenue in Los Angeles. The building was not residential property but was maintained by Mr. English for business purposes, having therein his offices and laboratory together with desks, filing cabinets, typewriter, photographic room and equipment, microscope and other property used by him in his profession. He owned the property adjoining on the south known as No. 120 South Beaudry Avenue, which was a duplex residence, the north portion of which was rented by him to defendant. Defendant has been a tenant in the property since 1942, and in addition was employed by Mr. English as custodian of the business building at No. 114 and was authorized to guard the property, to enter and care for the building, to open Mr. English's mail and to forward any checks that might arrive during the latter's absence. Defendant is engaged in mining and land development business and has resided in Los Angeles for the past 27 years.

On the property line between Nos. 114 and 120 there is a cedar hedge about 10 feet high. A chicken wire fence is interwoven in the hedge. There is a hole in the wire fence so close to the ground that one must go on hands and knees in order to crawl through it.

The evidence on behalf of the prosecution came from three boys who were the companions of decedent and from police officers who testified concerning statements made by defendant.

The evidence of decedent's three companions was adduced mainly by leading questions of the district attorney which called merely for affirmative or negative answers or practically put the answers in the witnesses' mouths. No objections were forthcoming from defendant's trial attorney—not those representing him on this appeal. The questions put to the three witnesses were similar in form and their testimony is so nearly identical that, as would be expected due to the character of the questions, it might have come from only one person instead of three. It may be epitomized in one statement without relating the evidence of each witness separately. The three witnesses and the decedent resided near the Beaudry Avenue buildings in question. Two of the boys were 14 years of age, the third was 15. They testified substantially as follows: About two or three o'clock in the afternoon the four boys decided to go to the building at No. 114 South Beaudry Avenue and play hide and seek; decedent, Eddie Hines, was to be "it;" they went to the front of the building; Eddie was left standing by a tree with his arm over his eyes as the other three boys departed; there was a hole or window in the front of the building at No. 114, about on a level with the ground, which opened into the basement; there was a screen that had been torn from in front of the window but they did not tear it down; they had not been in the building during the morning of the day of the shooting; one of the boys suggested that they "go in there and hide;" they climbed into the opening and dropped down to the floor; (one of the boys said there was a pipe in the basement that they used in order to climb down; the police surveyor saw no pipes); it was dark in the basement, the only light coming through the small window through which they entered; they hid along the side of the wall in the basement and from where they were standing they could see the window through which they entered; Eddie Hines "peeked" in and at that time they heard someone say "Hey" and then heard a shot; they did not hear Eddie say anything; two of the boys ran up the stairs and out through the back door; the other boy remained in the basement for more than an hour when he departed by the same route; they did not touch anything in the basement and did not know what was there; they did not hear the voice say anything except "Hey." Two of the boys testified that just before the shot was fired they could see Eddie Hines' legs, and that he had his back to the window. Two of them testified they went to a market with their employer in the morning of the day in question and they had not been in the company of Eddie Hines during the morning. Their employer testified he took one of the boys with him to the market on that morning but did not remember that he had taken both.

The report of the autopsy surgeon given at the coroner's inquest was received in evidence by stipulation. The report showed that decedent was a Negro 14 years of age, height five feet, weight 85 pounds; there was an opening in decedent's body, circular in shape and 3/16ths of an inch in diameter, located in the upper portion of the chest, 2¼ inches to the left of the midline and 1⅝ths inches below the shoulder line, almost overlying the clavicle; posteriorly, in the left side of the back, there was a bulging area 3 inches to the left of the midline and 4 inches below the shoulder line; the bullet was found to be lodged beneath the skin in the bulging area above described.

A police surveyor testified as follows: The vent leading into the cellar of the building at No. 114 is 2.3 feet wide and 1.4 feet high; the lower edge of the vent is 1.4 feet above the ground on the outside and is 5.8 feet from the floor of the basement; a bush covered the vent; evergreen trees and a chicken wire fence extended along the south property line of No. 114; one can see through the trees; there are two holes in the fence sufficiently large that he crawled through them; the level of the property at No. 114 and No. 120 is practically the same; there was a light in the furnace room and without the light the room was dark; he saw no pipes that would enable a person to climb down; if anyone left the floor of the furnace room and ran up the steps he would have to detour in order to go out through the back door.

The evidence of decedent's father related to his age, weight and grade in school and shed no light upon the incident that resulted in his son's death.

Police Officer Shinbane testified that as he was passing the premises in question he heard a shot and saw decedent stagger to the pavement; someone was holding the boy's head; he walked up the steps and found defendant with a 22 caliber automatic in his hand; defendant gave the gun to the witness and stated to the officer that there were some prowlers on the place, a couple of them were still in the building, and he had shot the one in the front of the building; he did not say he had been threatened or he had shot in self-defense; he said he had come back from a trip and had found someone had been burglarizing the place; the witness did not go into the basement to ascertain whether any persons were there or to observe the conditions in the building.

Officer Harry Fremont testified that he and his partner, Al Shambra, answered a call at 120 South Beaudry Avenue; he allowed defendant to change his clothes and then they proceeded to the City Hall; defendant made a statement to the officers in which he said he and Mrs. Dorn, his business associate, had returned from a trip to a mining project; he had been absent three days; he was the caretaker of the building at 114 South Beaudry Avenue, the owner of which was then in Alaska; he noticed a screen had been torn away from a vent in the building and while he was engaged in preparing a covering for the window from which the screen had been torn Mrs. Dorn called to him that three or four boys, either Mexican or Negroes, were entering the building; he left his work, procured his gun, and when he ran out through the front door he saw a boy standing by the vent; defendant yelled to the boy and the boy started coming toward him; defendant was behind a hole in a chicken wire fence between two cypress trees; the boy kept coming toward him and he fired the shot. The officer identified a photograph of the vent, showing the screen that had been torn away, the picture having been taken after someone had nailed boards over the vent; he also identified a picture representing a hole in the chicken wire fence. Upon cross-examination the officer was asked whether defendant had told him he had said "Halt or I will shoot;" the witness thought defendant had made the statement but was not positive whether he had said "Halt." The witness testified that the only discrepancy "regarding the whole facts of the case" between defendant's statement to him and his testimony at the coroner's inquest was that defendant testified at the inquest he had not been warned that the persons breaking into the premises were boys, while in his original statement to the officer he had stated that Mrs. Dorn told him they were boys. The evidence of officer Alphonso Shambra was similar to that of officer Fremont.

Defendant's testimony was as follows: He was the custodian of Mr. English's business building at 114 South Beaudry Avenue, and had possession of keys to the building; each day while he was in Los Angeles he opened Mr. English's mail, removed checks therefrom and forwarded them to Mr. English in Alaska; he and Mrs. Dorn left for a trip to their mining project on July 17, 1947; before leaving he made a careful examination of the building inside and outside and observed that the wire screen which covered the window leading into the basement was in place; they returned to Los Angeles on July 22d, arriving at the premises in question about 2 o'clock P.M.; they discovered that their equipment stored in the rear of the premises at No. 114 had been tampered with; large latches on a concrete vault in which his electric dynamo was situated had been "thrown;" they immediately inspected the premises finding that the building had been burglarized and that entrance had been made through the window leading into the basement; the wire screen which had been securely fastened on July 17 had been torn off; cabinets and drawers in Mr. English's laboratory had been opened and the contents strewn about; locks had been tampered with and the contents of the premises were in great confusion; a microscope belonging to Mr. English was missing; there was a fresh gouge mark where an attempt had been made to "jimmy" the hasp of the vault; the door from the photographic dark room had been forced and a light was burning in the room; the keys on the typewriter had been jammed in a bunch; keys with identification tags were scattered over the floor; drawers of steel filing cabinets had been opened and the room was in a state of disorder; contents of a Gladstone bag had been scattered; his steel tool box had been dragged out and opened; rough scars were on the floor; a Stan microscope which defendant had previously used was missing; matches were scattered about; the screen and cloth had been broken from the aperture leading into the basement from the outside; the screen was shiny and polished as though bodies had passed over it; defendant prepared to barricade the aperture and while he was sawing boards for that purpose Mrs. Dorn called to him that there were four fellows in the front of the building; defendant told her to observe them and ascertain whether they intended any harm and if so to call the police; shortly thereafter Mrs. Dorn said "They are now in the building;" defendant got his gun from his home at No. 120; he looked through the hedge between the two buildings and saw a person with his head and shoulders inside the aperture in the basement of No. 114; he could see a brown arm which was the only indication of color; he went down on his knees to crawl through the hole in the chicken wire fence and hedge between the premises when the person pulled his head out of the aperture and turned around facing defendant; the branches of the trees forming a hedge obscured his vision to some extent and he could not see the person clearly; defendant called in a loud voice "Halt, or I will fire;" instead of doing so the person rushed at defendant hunched over in a grappling position used in wrestling; defendant was on his knees and so enmeshed in the wire fence that he could not make a rapid retreat; he intended to hold the persons in the building until the police arrived; the person made a leaping advance toward defendant; because of defendant's vulnerable position he feared bodily harm; when the person was about five feet distant from defendant the latter fired upward not aiming particularly at the person but to frighten or stop him; the person (decedent) yelled, "I am shot," and ran toward the steps; at the time the shot was fired there were branches of cedar trees between him and Hines which partially obscured them from each other; he fired the shot both for the purpose of protecting himself and to apprehend the person who he believed was associated with the others who had entered the building to commit burglary.

As reasons, in addition to the testimony above outlined, for defendant's fear that he was about to be attacked, evidence was introduced concerning previous disturbances, robberies, burglaries, assault with a deadly weapon and other crimes in the neighborhood committed by juvenile gangs and others; a robbery had been committed in a store only a short distance from defendant's residence; two burglaries had been committed in Mr. English's building at No. 114 previously to the burglary that was committed while defendant was absent as above related; juveniles had to be driven away, with the use of guns, from a service station in the neighborhood. During the first week in July, 1947, defendant had called the police on three occasions to remove disreputable characters from the building at No. 114; in March, 1947, a dead body was found in a car in front of the same building; a juvenile battle had occurred near defendant's residence, and a store had been held up nearby; he had driven some Pachucos from an adjacent filling station, and a cutting battle had taken place directly at the rear of his house and one of the victims had taken refuge in defendant's home, covered with blood.

Defendant did not tell the police officers the microscope was missing. His explanation was that he did not want to tell everything to Detective Fremont because he did not have confidence in the latter, since on the trip to the jail Fremont had said: "I am going to make it my business to send you to San Quentin because I have a boy 13 years old." He was practically corroborated by Fremont who admitted that he said "Well, you ought to be in San Quentin. I have a 13 year old boy myself."

At the time of the shooting defendant was 58 years of age; his health was poor; he drew permanent and total disability payments from the Government and from an insurance company for chronic arthritis and suffered from hernia which required the wearing of a truss; he also suffered from heart trouble. Proof of defendant's condition came not only from him but from reports of the United States Veterans' Bureau which were received in evidence: (1) rejecting his application for United States Government Life Insurance because of disability consisting of "myocarditis, chronic, with partial heart block;" (2) awarding disability allowance; (3) awarding a pension for "heart disability" and for "disability of orchitis, chronic, which have been rated as permanently and totally disabling." In addition defendant has a large inguinal hernia and an incipient umbilical hernia which require his wearing a truss. At the time in question he was also suffering from an injury to the bone sheathing of his left arm. The foregoing evidence was not contradicted or even questioned at the trial.

Mrs. Dorn's testimony corroborated defendant's evidence as to the occurrences after their arrival at the premises from the mine and concerning the condition of the interior of Mr. English's place of business. When she saw the four persons in the yard she notified defendant and he told her to see if they actually went into the building, and if so to call the police; she heard one of the boys say "Let's break in here again," and one of the boys said "No;" she heard two of them jump into the cellar; she told defendant they were actually in the building; she attempted to call the police but had some difficulty in obtaining the proper telephone connection; while she was attempting to make the call two of the boys came up the cellar stairs and ran behind her; she asked them where they were going and they said they were going out through the back door.

Mr. Aufderheide, who resided at No. 122 South Beaudry, which is the south half of the duplex in which defendant lived, testified that between 9:00 and 9:30 o'clock on the morning of the day of the shooting he had seen four boys on the premises at No. 114, and identified decedent, Eddie Hines, and two of his afternoon companions as three of them; he could not identify the fourth; just before the shot was fired he was sitting in his living room and heard footsteps in No. 120; he ran out through the front door; just before he reached the door he heard defendant shout "Stop" and a phrase which was indistinct, and then the shot was fired. He also testified he knew of a number of arrests that had been made at No. 114 and he had called the police a number of times himself because of drunken persons sleeping on the premises. In March, 1947, he saw the dead body of a murdered man in a car in front of No. 114.

Mr. English testified that one of the considerations for taking defendant as a tenant was that the latter would look out for the property and see that it was not burglarized or do something about it if it was; the building had been burglarized twice and the people who previously occupied No. 120 paid no attention to the burglars although they admitted they had seen them. Mr. English described the condition of his premises when he returned. He stated the Stan microscope, two fountain pens and a clinical thermometer, some books, scales and other items of property were missing, also his safe deposit key, the key to the vault in the building and keys to other doors.

Several witnesses testified that defendant's reputation for peace and quiet in the neighborhood was good.

Giving full effect to the evidence it is insufficient to sustain the judgment of conviction when considered in connection with the relevant provisions of the Penal Code and the decisions of the courts applying such provisions in like cases.

Defendant's act did not constitute manslaughter within the definition of that term contained in section 192 of the Penal Code.[1] It is not contended that defendant's act comes within subdivision 1. The evidence, as we have pointed out, does not establish the commission of an unlawful act, or of a lawful act in an unlawful manner or without due caution and circumspection. Defendant's purpose in the first instance was to protect the property of which he was custodian and to prevent any unlawful act thereon; second, to apprehend and hold for the police the persons who had entered the premises and who defendant had reason to believe, had entered for the purpose of committing burglary. When defendant first observed the decedent the latter was in a position indicating that he was about to join his companions in the basement. While exercising his duty as guardian of the property and his duty as a citizen to apprehend persons who are observed in the commission of a crime (Penal Code, sec. 837), the sudden acts of decedent indicated his intent to commit a physical assault on defendant. Homicide is justified when committed by a person (a) when resisting an attempt "to commit a felony, or to do some great bodily injury upon any person;" (b) "when there is reasonable ground to apprehend a design to commit a felony or to do some great bodily injury, and imminent danger of such design being accomplished;" (c) "When necessarily committed in attempting by lawful ways and means, to apprehend any person for any felony committed, * * *." Penal Code, sec. 197.

"Lawful resistance to the commission of a public offense may be made: 1. By the party about to be injured; * * *." Penal Code, sec. 692. "Resistance sufficient to prevent the offense may be made by the party about to be injured: 1. To prevent an offense against his person, * * *." Sec. 693. "Any necessary force may be used to protect from wrongful injury the person * * *" of one's self. Civ.Code, sec. 50. "A private person may arrest another: 1. For a public offense committed or attempted in his presence." Penal Code, sec. 837. "The person making the arrest must inform the person to be arrested of the intention to arrest him, * * * except when the person to be arrested is actually engaged in the commission of or an attempt to commit an offense, * * *." Sec. 841.

[1] The evidence shows that defendant was at first resisting an attempt to commit burglary, a felony, and intending to arrest the offender, there being reasonable ground to apprehend that Eddie Hines designed to commit the crime and that there was imminent danger that such design would be accomplished. An instant later defendant was lawfully resisting another public offense, to wit, an assault upon himself. In defendant's practically helpless situation his resistance was no greater than was sufficient and necessary to prevent the assault upon him. Defendant was attempting to arrest Hines for what appeared to be an attempt and an intent to commit burglary in defendant's presence. While defendant did not inform Hines that he intended to arrest the latter he did call upon him to halt. Under the circumstances then existing and owing to the lack of time within which defendant could have informed Hines that he was to be arrested, and the cause of the arrest, the demand to halt was sufficient. In this situation regard must be given to the fact that defendant knew he would be unable to cope with his attacker or to defend himself in physical combat.

[2, 3] Where an attack is sudden and the danger is imminent a person may in-

---

[1] "§ 192. Manslaughter is the unlawful killing of a human being, without malice. It is of three kinds:

"1. Voluntary—upon a sudden quarrel or heat of passion.

"2. Involuntary—in the commission of an unlawful act, not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection; provided that this subdivision shall not apply to acts committed in the driving of a vehicle."

(Subd. 3 refers to manslaughter committed in the driving of a vehicle and is not applicable to this case.)

crease his danger by retreat. In such case he may stand his ground and slay his attacker even though it be proved that he might have more easily gained safety by flight. People v. Newcomer, 118 Cal. 263, 273, 50 P. 405; People v. Hecker, 109 Cal. 451, 463, 42 P. 307, 30 L.R.A. 403; People v. Ye Park, 62 Cal. 204, 208; Beard v. United States, 158 U.S. 550, 560, 15 S. Ct. 962, 39 L.Ed. 1086, 1090. Necessity is deemed to exist when an innocent person is placed in sudden jeopardy. "Where the peril is swift and imminent, and the necessity of action immediate * * * the law does not weigh in too nice scales the conduct of the assailed, and say he shall not be justified because he might have resorted to other means to secure his safety." People v. Hecker, supra, 109 Cal. at page 467, 42 P. at page 313, 30 L. R.A. 403.

[4-6] The evidence in this case fully satisfies these rules found in the decisions: (1) Not only must the defendant have believed himself to be in peril but, as a reasonable person, he must have had sufficient grounds for such belief. People v. Glover, 141 Cal. 233, 238, 74 P. 745; People v. Herges, 14 Cal.App. 273, 276, 111 P. 624; People v. Albori, 97 Cal.App. 537, 544, 545, 275 P. 1017. (2) Defendant was entitled to act upon appearances, and if the conduct of decedent was such as to induce in the mind of a reasonable man, under all the circumstances then existing and viewed from the standpoint of the defendant, the fear or belief that death or great bodily harm was about to be inflicted by decedent upon defendant, it does not matter whether such danger was real or apparent. People v. Thomson, 145 Cal. 717, 720, 79 P. 435; People v. Hatchett, 63 Cal. App.2d 144, 156, 158, 146 P.2d 469. (3) If defendant acted from reasonable and honest convictions he cannot be held criminally responsible for a mistake in the actual extent of the danger, when other reasonable men would alike have been mistaken. People v. Smith, 164 Cal. 451, 462, 129 P. 785.

[7] Defendant had reason to believe, and from all the evidence we must conclude that he did believe, he was in danger of bodily injury which might be serious or even result in his death. An apparent and actual necessity existed which would lead any reasonable man to be in such fear of grave results to himself that he would be justified in resorting to self-defense and to use such force as he believed was necessary to protect himself from the encounter which seemed to be imminent.

[8, 9] The prosecution's evidence of the events before and at the time of the shooting was the testimony of decedent's three companions above related which was repeated by them in response to leading questions, as we have already pointed out. The other evidence for the prosecution consisted of testimony of the police officers concerning defendant's statements made to them. Such statements did not differ from the evidence given by him and Mrs. Dorn at the trial. A careful examination of the entire record, coupled with a consideration of the arguments contained in the briefs, particularly that of the attorney general, has convinced us that the evidence is insufficient to sustain the judgment of defendant's guilt of the crime of manslaughter. It does not dispel the presumption of innocence nor does it remove the reasonable doubt of defendant's guilt which persists throughout a trial of one charged with a crime. In reaching this conclusion we have not overlooked the rule that all intendments are in favor of the verdict and that ordinarily a reviewing court is limited to a determination of whether there is substantial evidence supporting the verdict which is not inherently improbable.

Since defendant was in a kneeling position on the ground and entangled in the chicken wire fence, and since the bullet entered decedent's body 1⅝ inches below the shoulder line and was found beneath the skin 4 inches below the shoulder line it is manifest that Eddie Hines was in a stooping or crouching position at the time the bullet struck him. The downward course of the bullet fully corroborates defendant's evidence as to the respective positions of himself and the decedent when the shot was fired. This physical fact impeaches the testimony of the three boys that Hines was in a standing position when he received the wound. If he had been standing and defendant kneeling the bullet would have taken an upward instead of a downward course in his body, and if both had been standing it would not have gone downward. The testimony of the boys is contradicted by facts in another particular: They testified that they had not been in the basement at any time previously, yet two of them, according to their own statements, had no difficulty in finding their way up the stairway and out through the back door. Their response to Mrs. Dorn when she asked where they were going, that they were "going out the back door," indicated their familiarity with the premises. The police surveyor stated that anyone going from the basement to the first floor would not have a straight exit but would have to do some detouring.

The uncontradicted evidence furnishes complete justification for defendant's adoption of the course he pursued. Defendant having been employed by Mr. English as custodian for the express purpose of guarding the premises, and Mrs. Dorn having seen the boys in the yard and having heard one of them say "Let's break in here again," he had reason to believe and evidently did believe that another burglary was about to be committed. Such belief, based on the facts then within his knowledge, justified him in procuring his gun for the purpose of protecting the premises from depredations similar to those that had been committed during his absence at the mine and on other previous occasions referred to in the evidence. He had been told by Mrs. Dorn that some of the persons she had seen in the yard had gone into the building and he saw Hines with his head in the window which would lead him to no other conclusion than that the latter was about to follow the others into the basement. He testified that he intended to arrest the persons in the building and the person whose head was in the window and hold them until the police arrived. Such was the right and duty of any citizen who sees that a felony is being committed. Defendant's warning to decedent to halt was unheeded. Instead, Hines started toward defendant in an attitude that indicated the former's intent to commit an assault on defendant. The latter had a right to protect himself from attack, especially in view of his kneeling position from which he was unable to extricate himself by reason of his enmeshment in the wire fence. This would have been his right if his state of health had been normal. The uncontradicted proof concerning his health and his ailments, furnished by evidence other than his own, shows his inability to enter into physical combat or to withstand an attack. He knew of his disabilities and he knew that the neighborhood was infested with a criminal element both adult and juvenile. No time was given him to deliberate but, as was his right, he no doubt thought of all those conditions in the split second in which he was required to act. He was not required or expected to remain in a precarious position until he, in a kneeling and practically helpless situation, was assaulted by a person who was mobile and was leaping and lurching toward him in a stooping attitude of attack, especially after the latter had been specifically warned to halt.

The evidence given by defendant and Mrs. Dorn was uncontradicted and unquestioned. Their statements made to the police officers and their testimony in court regarding the burglary and the condition of Mr. English's building were apparently accepted by the officers as true. They made no examination of the premises for the purpose of ascertaining whether defendant's statements were true. Officers were on the ground a few minutes after the shooting, yet there is no evidence that they entered the building or made any investigation of the burglary.

[10] The attorney general argues that the size of decedent indicated that he was only a boy. He was five feet tall. Many adults are no taller. Defendant did not have sufficient time to consider whether his assailant was a boy or a man. Furthermore, the abundant evidence of the previous presence in the neighborhood of ruthless juvenile criminals would remove this feature of the argument from serious consideration. We may take judicial knowledge of the fact that atrocious crimes are committed by boys of tender years since the newspapers almost daily recount such crimes and many of the offenders reach the

trial courts and their cases come into the courts of review. Hence the fact that Eddie Hines was a boy need not be given any weight.

The judgment and the order denying a new trial are and each of them is reversed. The appeals from other orders are dismissed.

MOORE, P. J., and McCOMB, J., concur.

Hearing denied; EDMONDS, CARTER, and SPENCE, JJ., dissenting.

88 Cal.App.2d 78

STROM et ux. v. UNION OIL CO.

Civ. 13715.

District Court of Appeal, First District, Division 2, California.

Oct. 20, 1948.

1. Landlord and tenant 🔑108(1)

The rule that lessee's failure to pay rent in accordance with terms of lease is legal cause for dissolving lease presupposes that lessor is desirous and willing that lessee pay rent promptly, will facilitate and not hinder him in doing so, and is not endeavoring merely to entrap lessee into technical breach of lease.

2. Contracts 🔑318

Forfeitures are odious in law and are enforced only where there is clearest evidence that forfeiture was meant by parties' stipulations, and there must be no cast of management or trickery to entrap party into forfeiture.

3. Contracts 🔑318

Equity will refuse to enforce forfeiture at instance of one obtaining strictly legal right thereto by fraud, deceit, or any other oppressive practice, and will relieve innocent party from enforcement of forfeiture so secured.

4. Landlord and tenant 🔑288

An unlawful detainer action to forfeit lease because of lessee's alleged default in condition thereof appeals to equity side of court and requires full examination of all equities involved to end that exact justice shall be done, though remedy provided by law for such breach is summary in principle and process.

5. Landlord and tenant 🔑108(1)

Lessee's mailing of checks to purchasers of leased property in payment of rent, instead of tendering money in person, after having made rent payments to original lessor by mailing checks to his assignee, did not warrant forfeiture of lease by purchasers, in absence of provision therein as to place or mode of such payments or notice to lessee that such mode of payment was not acceptable to purchasers.

6. Landlord and tenant 🔑108(1)

A lessee, mailing checks to lessors in payment of rent, was under no duty to take special measures to check timely receipt of checks in order to avoid forfeiture of lease for non-payment of rent within time fixed by lessee's notice of forfeiture, but had right to assume that post office department would deliver checks in due time and that lessors would accept them. Code Civ.Proc. § 1162.

7. Landlord and tenant 🔑108(1)

Lessee's failure to deposit amount of rent due in bank until 17 days after return of their rent checks, which lessors, in bad faith, refused to accept, though received by mail within time fixed by their notice to lessee to pay rent or surrender leased premises, did not warrant forfeiture of lease, where lessors brought unlawful detainer action against lessee on day before checks were returned and hence were not prejudiced by delay in making deposit. Civ. Code, § 1500; Code Civ.Proc. § 1162.

◆

Appeal from Superior Court, Contra Costa County; Harold Jacoby, Judge.

Action in unlawful detainer by A. T. Strom and wife against the Union Oil Company of California, a corporation. Judgment for defendant, and plaintiffs appeal.

Affirmed.

R. A. Rogers, of Oakland, for appellants.

Brobeck, Phleger & Harrison, of San Francisco, and Tinning & De Lap, of Richmond, for respondent.

NOURSE, Presiding Justice.

This is an appeal by plaintiffs A. T. Strom and Ethel Strom, husband and wife, from a judgment in favor of defendant, Union Oil Company of California, herein further referred to as Union Oil Co., in an action in unlawful detainer.

When appellants acquired the service station property subject of this action, Union Oil Co. was lessee under a duly extended lease from the former owners, Mr. and Mrs. Wells, which, as extended, was to run until September 31, 1951. The lease included some equipment; an appendix specified what equipment was owned by the lessor and what by the lessee. The monthly rent of $140 payable in advance was being paid regularly by mailing checks to a bank to whom the Wells had assigned.

On July 17, 1946, Union Oil Co. was informed by the bank of the release of the assignment. Prior to that date respondent had been told of an intended sale of the property and there had been some conversations with the prospective purchaser, appellant A. T. Strom, who wanted to see the lease. After receipt of the release Mr. Andrews of Union Oil Co. telephoned Mr. Wells more than once asking for new payment directions. Mr. Wells promised soon to send directions by letter. In the meantime appellant A. T. Strom had some more conferences with Union Oil Co. in which he tried to persuade it to consent to an increase of the rent. He testified that when these conferences did not lead to any result he left, repeating twice to a Union Oil Co. official: "The only thing that I have to say, Mr. Newhoff, is that you live up to the terms of this lease to the letter," and he commented further, "All I wanted was the property back." He did not give any definite information or direction. Only by letter of Mr. and Mrs. Wells of August 21, 1946, was Union Oil Co. informed that the premises had been transferred to Mr. A. T. Strom on July 8, 1946, that the rental paid on July first had been turned over to him and that all further payments had to be made to Mr. A. T. Strom of 1229 Nevin Avenue, Richmond, California. At the same time the transfer of a hoist located on the premises from Union Oil Co. to the owner against payment of $75 by Mr. Wells was arranged. Union Oil Co. prepared a new appendix to the lease accordingly and by letter of August 29, 1946, sent it in duplicate for signature to Mr. Strom at the Nevin Avenue address. In the same letter Union Oil Company referring to the letter of Mr. and Mrs. Wells, asked to be advised whether title to the premises was taken in joint tenancy or as Mr. Strom's separate property so that payment of rentals could be made in the proper manner. Mr. Strom testified that he received the letter but did not answer it. Instead on September 6, 1946, appellants sent a letter to Union Oil Co. at its San Francisco office requiring it to pay rent for the months of August and September, 1946, or deliver up possession of the premises within three days after service of that notice, and electing forfeiture of the lease in case of noncompliance. The letter did not contain any direction as to place or mode of payment. The letter reached the office on September 7th, a Saturday, on which day the office was not open for regular business. The next Monday, September 9th, Union Oil Co. sent two checks for the two months rent by registered mail to appellants at the 1229 Nevin Avenue address, which Mr. Strom admitted was his business and mail address and the residence of his mother. On September 10th the notice to pay rent or quit was personally served at Union Oil Company's office at San Francisco and on the leased premises. The same morning the registered letter was offered by a postman at 1229 Nevin Avenue where Mr. Strom's mother refused to sign for it. The letter therefore went back to the postoffice; the same day a notice of arrival was left by the postman in the mail box at 1229 Nevin Avenue and a second notice was delivered in the same manner on September 13th. It is conceded that only with the service on September 10th the requirements of section 1162 of the Code of Civil Procedure as to service were fulfilled and that the three days period included September 13th. Appellants did not claim the registered letter at the postoffice nor did they communicate in any manner with respondent. On September 20, 1946, the letter was returned to respondent "unclaimed." Respondent tried to contact appellants personally at the Nevin Avenue address but was referred to a ranch near Concord where on September 24, 1946, the checks were personally tendered and refused. Asked why he did not accept the checks when mailed to his mailing address Mr. Strom answered, "They were received too late." On September 27, 1946, the summons in this action in unlawful detainer was served on respondent, the complaint having been filed on September 19, 1946. On October 7, 1946, an amount of $420 in cash was tendered to appellants personally on the Concord ranch for three months rent including the month of October and when appellants again refused the amount was immediately deposited in the name of appellants in the Concord branch of the Bank of America and written notice served on them.

The trial court made findings partly to the effect that respondent at all times has been and now is ready, able and willing to pay all monthly installments of rent to the persons legally entitled thereto, that its repeated tenders of payment were wrongfully refused by plaintiffs with the intent to illegally, inequitably and fraudulently claim a forfeiture of the lease and that respondent was not holding over after default in payment of any rent.

On this appeal appellants do not discuss or mention the above finding of their bad faith, but argue that respondent was in default because its rental debt was not extinguished within the three day period as respondent tendered checks instead of money, sent the checks by mail without checking delivery instead of making personal tender and did not keep the tender alive by deposit in a bank as provided by section 1500 of the Civil Code within the three day period. However, we think that the finding of bad faith, which is supported by the evidence showing the facts, as stated herein before, is of primary importance where appellants try to enforce a forfeiture.

[1] In Saxton v. Para Rubber Co., 166 La. 866, 118 So. 64, 65 in which case a lessor called for rent at lessee's store on a day on which he knew it to be closed and thereafter preferred to file a suit for ejectment instead of accepting a certified check available from the day the rent was due, the court said: "It is quite true that the payment of the rent in accordance with the terms of the lease is one of the essential obligations of the lessee, and the failure of the lessee to properly discharge this obligation is a legal cause for dissolving the lease. But this presupposes that the lessor is desirous and willing that the lessee should pay his rent promptly, and will facilitate and not hinder him in doing so; that the lessor is not endeavoring merely to entrap his lessee into a technical breach of the lease.

"The punctuality required of the lessee in the payment of his rent has been designed solely for the protection of the lessor, and cannot be allowed to be converted in his hands into a means of entrapping and oppressing the lessee."

[2] In Cleveland v. Salwen, 292 Pa. 427; 141 A. 155, 157, a case in which lessors tried to forfeit the renewal of a lease on the ground of alleged breaches by lessee in the course of the original lease, the following is stated as an important ground for upholding the judgment for lessee: " 'The issue turned on the question of lessors' good faith in attempting to escape from the covenant of renewal. That being found against them, the adverse award necessarily followed.'

"The real purpose to obtain a forfeiture is made emphatically manifest by the admission of one lessor that:

" 'We talked about selling the place at the expiration of the lease, and thought we could get a better price for it without a tenant in it.'

"Here certainly was no proof of good faith on the part of the property owners in their efforts to oust their tenants. (citation.) 'Forfeitures are odious in law, and are enforced only where there is the clearest evidence that that was what was meant by the stipulations of the parties. There must be no cast of management or trickery to entrap the party into a forfeiture. (citation)' " Compare also Schwarz v. Sorbello, 139 N.J.Eq. 542, 52 A.2d 683, 687; Farmer v. Pitts, 108 Neb. 9, 187 N.W. 95, 24

A.L.R. 719, 722; Paducah Home Oil Co. v. Paxton, 222 Ky. 778, 2 S.W.2d 650, 56 A.L.R. 797, 799; and Dunlap v. Macke, 233 Ala. 297, 171 So. 721, 725.

[3] No California case in which forfeiture of a lease was denied because of bad faith of lessor has been found, but in McCue v. Bradbury, 149 Cal. 108, 84 P. 993, our Supreme Court gave a comparable decision. In that case McCue, debtor under a deed of trust, offered to pay principal and interest one day before due at a certain bank. Bradbury, the creditor, answered, "All right, but it is not due until the 23rd", and he did not appear on the 22nd at the bank indicated. McCue then bought certificates of deposit at the same bank for the amounts required and had served on Bradbury a notice that the amount due had been deposited and would be paid over by the bank against reconveyance of the premises. Bradbury did not communicate with McCue but stealthily tried to bring about a sale of the premises under the trust deed. In an action to restrain the sale and compel Bradbury to accept the amount deposited McCue was successful and the Supreme Court affirmed stating in part, 149 Cal. at pages 112, 113, 84 P. at page 994:

"Appellants' principal contention upon appeal is that the acts of the McCues looking to the payment of the obligation to Bradbury were entirely insufficient as a legal tender of payment, and that this being so, and plaintiffs being in default under the terms of the trust, Bradbury's trustees were justified in proceeding with the sale of the property to extinguish the McCues' obligation. But in this appellants mistake the gist of the action. The action is not based upon the assumption that the tender actually made was a full and complete legal tender, but upon the contention that the acts of the defendant William B. Bradbury, in assenting to the proposed mode of payment, in failing to make objection in any form to the tender as made, and in doing all this in bad faith, to lull the plaintiffs into a fancied security, with the end in view of declaring a forfeiture and forcing a sale of their property—that these acts and this conduct are sufficient to induce a court of equity to relieve against the forfeiture, and to compel defendant Bradbury to accept, in full satisfaction of his demand, the amount due and payable upon the 24th day of October, which amount the plaintiffs then and ever since have stood ready, willing, and able to pay. It is based upon the equitable principle, often invoked and as often upheld, that equity will refuse to enforce a forfeiture at the instance of one who has obtained the strictly legal right to it by fraud, deceit, or any other form of oppressive practice; and, upon the other hand, will relieve the innocent when such a forfeiture so secured is sought to be enforced."

[4] Equitable principles apply in this state also where a forfeiture is sought in an action in unlawful detainer. In Knight v. Black, 19 Cal.App. 518, 525, 526, 126 P. 512, 515, it is said: "By this action the plaintiff is seeking to have a forfeiture declared because of the alleged default in a condition of the lease, and although the remedy provided by law for the breach of such a condition is summary in principle and process, nevertheless the very nature of the action, involving, as it does, a forfeiture, appeals to the equity side of the court, and in turn requires 'a full examination of all of the equities involved to the end that exact justice be done.' Gray v. Maier & Zobelein Brewery, 2 Cal.App. 653, 84 P. 280."

[5-7] Let us now examine these equities. With respect to appellants there is no doubt that they could have had timely payment if they had so desired, but that they were intentionally evasive and uncooperative, hoping thereby to induce some technical shortcoming on which to terminate a lease which they thought disadvantageous. How serious are in comparison respondent's shortcomings, if any, that appellants succeeded in bringing about? Appellants complain that respondent mailed checks for the rent instead of tendering money in person. The lease does not contain any place or mode of payment of rent. Payment of rent to the original lessor had been made by mailing of checks to his assignee. Appellant was entitled to continue payment by mailing of checks so long as he had not been notified that this form of payment was no longer acceptable. The change of title of the property to appellants did not in any way change or affect the lease. Macdonough v. Starbird,

105 Cal. 15, 19, 38 P. 510. If the payment by mailing of check, a normal mode of payment though not a legal tender, was not acceptable to appellants, as it had been to their predecessors, they should have notified respondent to that effect. Neither was respondent after the mailing under duty to take special measures to check timely receipt of the checks. "The ordinary principles of reason, common sense and justice should govern in questions of this kind. The lessee, in law, had a right to assume that the post office department would do its duty and deliver the envelop containing the rent in due time, and that the lessor would, in justice, accept such rent; and if for any reason it was not received or delivered the lessee should, as a matter of ordinary fairness and justice, be advised of such fact and have a chance to remedy the same." Farmer v. Pitts, supra, 108 Neb. 9, 187 N.W. at page 96, 24 A.L.R. at page 722. This principle was held applicable even where the letter containing the rent was lost in the mail. Paducah Home Oil Co. v. Paxton, supra. It must govern a fortiori here, where the mail functioned correctly and the fact that the checks did not reach appellants was solely attributable to circumstances for which they were responsible. No further action of any kind could be expected from respondent until it was informed, by the return of the unclaimed letter, of the fact that the payment had not been effectuated. If respondent's action is open to any criticism it would be that the deposit of the rent in a bank (on October 7, 1946) did not follow soon enough after the checks were returned (on September 20, 1946). However the delay did not cause any prejudice or make any difference to appellants as they had then already launched the action in unlawful detainer at which they had been aiming ever since respondent refused increase of rent. The shortcoming of respondent is trivial compared to appellants' bad faith.

All the equities are in favor of respondent. The many authorities cited by appellants with respect to the requirements of a tender by an obligor are not in point as they do not involve bad faith of the obligee and the weighing of the equities as between them. In accordance with McCue v. Bradbury, supra, we hold that appellants are not entitled to any payments except of the rents agreed upon.

The judgment is affirmed.

GOODELL and DOOLING, JJ., concur.

87 Cal.App.2d 888

RYAN v. WELTE et al.

Civ. 13639.

District Court of Appeal, First District, Division 1, California.

Oct. 13, 1948.

Rehearing Denied Nov. 12, 1948.

1. Judges ⚷51(1)

The statute providing that in a proceeding to disqualify a judge, judge may file his answer within five days after the filing of objections and that such answer shall be verified is mandatory as to the five day limitation, but a notarized affidavit is a sufficient compliance with the requirement of verification. Code Civ.Proc. § 170, subd. 5.

2. Judges ⚷51(4)

Where judge, in a proceeding for his disqualification, filed his answer within five days after filing of objections and answer was in the form of a notarized affidavit, judge was not automatically disqualified because answer was not verified, particularly where plaintiff's own pleadings did not show bias or prejudice. Code Civ. Proc. § 170, subd. 5.

3. Appeal and error ⚷1024(3)

In proceeding to disqualify a judge, where there was a conflict between the statements contained in plaintiff's objections and answer of judge, findings of fact by second judge who was trying the disqualification proceeding were binding upon reviewing court. Code Civ.Proc. § 170.

4. Judges ⚷49(1)

A wrong opinion of the law of a case does not disqualify a judge nor is it any evidence of bias or prejudice, hence, where a judge is mistaken as to questions of law, a litigant cannot substitute proceeding for disqualification of judge because of alleged bias or prejudice for remedy by appeal. Code Civ.Proc. § 170.

5. Judges ⚷51(4)

In a disqualification proceeding, burden of proving bias or prejudice of judge is upon complaining party.

6. Judges ⚷49(1)

In proceeding for disqualification of judge, the action of judge in striking from court's transcript on appeal the pleadings, the minute orders showing court's action thereon, motion for stay of proceedings and minute order showing denial thereof by reason of the erroneous belief that the only records reviewing court needed on an appeal from an order denying objections to qualification of judge were those directly used in proceedings to disqualify did not show bias or prejudice. Code Civ. Proc. § 170.

7. Judges ⚷49(1)

Generally, it is better policy to stay proceedings until appeal upon question of judge's disqualification is determined, however, a denial of motion for stay when judge believes that disqualification proceeding is taken merely for delay, even coupled with erroneous action of judge in rulings upon the pleadings, is not such a showing of bias or prejudice as to require disqualification. Code Civ.Proc. § 170.

8. Judges ⚷50

Where a trial judge feels that he cannot objectively pass upon credibility of witnesses, something which he alone will know, he should voluntarily step aside and permit another judge to try the case.

9. Judges ⚷51(4)

In proceeding for disqualification of a judge, the affidavits are not relegated to the position merely of pleadings and it is not necessary that oral evidence be introduced to prove matters set forth in affidavit, but they may be considered on their own merits.

◆

Appeal from Superior Court, San Mateo County; Clark Clement, Judge.

Action by Joseph L. Ryan against Alexander John Welte and Eleanor Welte, individually and as executor and executrix respectively of the will and estate of Daniel McSweeney, to establish a trust as to an undivided one-half interest in decedent's estate, wherein plaintiff commenced a proceeding to disqualify Judge Aylett R. Cotton. From an order overruling plaintiff's objections to a hearing before Judge Cotton, plaintiff appeals.

Affirmed.

L. L. James and Carl E. Day, both of San Francisco, for appellant.

R. J. Dolwig and Antonio J. Gaudio, both of So. San Francisco, for respondents.

BRAY, Justice.

Appeal[1] from order overruling plaintiff's objections to a hearing of an action to establish a trust, and to the trial of any issue of fact by Hon. Aylett R. Cotton.

On November 16, 1946, plaintiff filed a complaint against defendants in the superior court of San Mateo County, to establish a trust in his favor as to an undivided half interest in the estate of Daniel McSweeney, deceased, then in course of probate in the same court. The case was assigned to the department in which Judge Cotton regularly presided. On December 9, 1946, defendants demurred generally and specifically to the complaint. The demurrer was argued, briefed and submitted and on March 6, 1947, Judge Cotton ordered "Demurrer sustained, ten days to amend. Probate Court has exclusive jurisdiction. Complaint fails to state a cause of action."

On March 18, 1947, plaintiff filed an amended complaint, substantially the same as the original complaint, to which defendants again generally and specially demurred. This demurrer was sustained by

---

[1] Consolidated with the appeal from judgment on the pleadings rendered by Judge Cotton in favor of defendants. See 87 Cal.App.2d 897, 198 P.2d 357.

Judge Cotton. Later, a second amended complaint was filed, again substantially the same as the first complaint, to which Judge Cotton sustained a demurrer without leave to amend.

On March 31, and before the hearing on the demurrer to the first amended complaint, plaintiff, pursuant to section 170 of the Code of Civil Procedure, commenced these proceedings to disqualify Judge Cotton from further participation in the case, on the grounds of alleged bias and prejudice, by filing "Objections to Hearing of Matter by Honorable Aylett R. Cotton." Judge Cotton filed an "Answer to Objections" to which a reply was filed by plaintiff's attorney, James. Hon. Clark Clement was assigned to hear the objections, and after a hearing, he overruled plaintiff's objections. This appeal is from that order. In his notice to prepare transcript, plaintiff requested the inclusion, in addition to the pleadings on the proceedings to disqualify, of all the other pleadings and the minute orders of Judge Cotton. These were included in the transcript, but on motion of defendants, Judge Cotton ordered these additional matters stricken from the transcript. An application to this court for augmentation of the record, to include these matters, was granted, and the entire record is now before this court.

Plaintiff contends, first, that the answer filed by Judge Cotton was unverified and therefore constituted an admission of the charges of bias and prejudice made by plaintiff in his verified objections; and that the record shows that plaintiff cannot have a fair and impartial trial before Judge Cotton.

Answer was Sufficient.

The answer of Judge Cotton filed on April 3 did not contain a verification. It was in the form of an affidavit and sworn to before a notary public. In the reply thereto of Attorney James, filed on April 10th, the contention was made that the answer did not constitute an answer in law, because it was unverified. On April 17th Judge Cotton subscribed to a verification, which in the transcript follows the answer filed on April 10th. It bears no filing mark.

[1, 2] Subdivision 5 of section 170 of the Code of Civil Procedure provides that in a proceeding of this kind the judge may file his answer within five days after the filing of the objections, and that such answer "shall *be verified* by oath in the manner prescribed by Section 446 of this code for the verification of pleadings." (Emphasis added.) Plaintiff contends that because his answer was unverified, Judge Cotton, under the authority of Rosenfield v. Vosper, 70 Cal.App.2d 217, 160 P.2d 842, which holds that the requirement of filing an answer within five days is mandatory, became automatically disqualified. We agree with the position taken by the court in that case, for while it held that the five day requirement is mandatory, it also rejected an objection to the plaintiff's affidavit not being verified but in the identical form of the one here, and held that a notarized affidavit is sufficient compliance with section 170, and "in form more forceful than the oath made in the verification." 70 Cal.App.2d at page 224, 160 P.2d at page 845. Moreover, as hereafter pointed out, plaintiff's own pleadings do not show bias or prejudice.

Was Judge Cotton Disqualified?

[3] To determine this question requires an analysis primarily of the statements contained in the objections of plaintiff and the reply of Attorney James. There is a conflict between them and the answer of Judge Cotton as to the conversations between the judge and Attorney James, which the trial judge, Judge Clement, resolved in favor of Judge Cotton. Under well established rules [2] this court is bound by Judge Clement's findings on such conflict. However, disregarding entirely Judge Cotton's reply, the showing made by plaintiff was not sufficient to establish any bias, prejudice or disqualification of the judge.

A statement of the cause of action alleged in the complaints filed by plaintiff is set forth in the opinion on the main appeal heretofore referred to. It is unnecessary to detail it here. It is sufficient to say that plaintiff's cause of action is to establish a trust in favor of plaintiff in certain real properties, based on an oral agreement alleged to have been made by the decedent, of whose estate defendants are executor and executrix respectively. Defendants are also joined in their individual capacities, because under the will of Daniel McSweeney, made in claimed violation of the oral agreement upon which the alleged trust is based, they will receive, and under deeds made by Daniel to them in his lifetime, in claimed violation of said agreement, they have already received, some of the properties upon which plaintiff is endeavoring to impress a trust.

---

[2] See **Kreling v. Superior Court,** 63 Cal.App.2d 353, 146 P.2d 935.

The substance of plaintiff's objections follows: After Judge Cotton had sustained the demurrer to the original complaint, Attorney James called upon him in his chambers "and stated that, in view of the fact that permission had been granted to amend plaintiff's complaint he was uncertain in what respects the amendments should be made in view of the fact that the order sustaining demurrer, according to the written notice thereof, was based, at least in part, on the theory that the Probate Court had exclusive jurisdiction. That thereupon said Honorable Aylett R. Cotton stated that plaintiff had no cause of action, that plaintiff could not amend his complaint to satisfy said judge; that if an amended complaint was filed he would sustain any demurrer interposed thereto, that plaintiff had no right to recover because an agreement such as alleged in plaintiff's complaint was required to be in writing; and that granting the right to amend the complaint was a courtesy only." After plaintiff filed his first amended complaint, Attorney James again called upon the judge, and "stated that, in view of said judge's fixed opinion in this matter and his statement that he would sustain any demurrer interposed to said first amended complaint, it was idle for plaintiff to proceed with the case before said Honorable Aylett R. Cotton, and requested that some other judge be called in to hear the arguments on any demurrer interposed to said first amended complaint, and also hear all subsequent matters in said action; and that said Honorable Aylett R. Cotton refused to call in some other judge, stating that what he had previously said with reference to said action, and the merits thereof, 'is my opinion.'"

The reply of Attorney James, after denying certain portions of Judge Cotton's versions of the conversations as given in the answer, avers that the judge "stated categorically that an agreement such as that pleaded had to be in writing" and that Judge Cotton "reiterates his opinion that the agreement upon which plaintiff's complaint is based must be in writing, although the Supreme Court of the State of California has unequivocally held to the contrary in the case of Notten v. Mensing, 3 Cal.2d 469, 45 P.2d 198, as was pointed out to said Honorable Aylett R. Cotton at the time of the hearing of the demurrer to plaintiff's complaint herein. That said Honorable Aylett R. Cotton in his answer filed herein does not deny that he entertains the view that in an action such as that set forth in plaintiff's complaint, the Probate Court has exclusive jurisdiction; * * * That plaintiff and his counsel feel that in view of the definite opinion of Honorable Aylett R. Cotton, contrary to the positive decisions of the Supreme Court of California, and the antagonistic attitude taken by said Judge, plaintiff will proceed with said action before said Judge under a great initial handicap, to which he should not be subjected; that the court decisions referred to herein have all been cited to said Honorable Aylett R. Cotton heretofore, and that in all likelihood they would not now cause him to change his opinion; and that by reason of the filing by the plaintiff herein of his objections to said Judge hearing said matter the prejudice of said Honorable Aylett R. Cotton will be intensified."

[4] There is no claim in any part of the record that Judge Cotton has any prejudice against plaintiff, any of the attorneys for plaintiff, any of plaintiff's witnesses, or bias in favor of any of the defendants, their lawyers, or their witnesses. It is plain that Judge Cotton was of the opinion that on the facts set forth in the various complaints plaintiff could not state a cause of action, because in his opinion the probate court alone had jurisdiction of the subject matter, and because the type of agreement upon which plaintiff relied had to be in writing to be legal. As shown in our decision on the main appeal, plaintiff

is correct in his contention that the judge's opinion on these matters was erroneous. However, a wrong opinion on the law of a case does not disqualify a judge, nor is it any evidence of bias or prejudice. If so, no judge who is reversed by a higher court on any ruling or decision would ever be qualified to proceed further in the particular case. Where a judge is mistaken as to questions of law, a litigant cannot substitute for his remedy by appeal, proceedings for the disqualification of a judge for alleged bias and prejudice.

[5] The burden of proving bias or prejudice is upon the complaining party. Golish v. Feinstein, 123 Cal.App. 547, 11 P.2d 893. As stated in Kreling v. Superior Court, supra, 63 Cal.App.2d at page 359, 146 P.2d at page 937. "A judge is not disqualified to again hear a case because of an expression of opinion by him upon a question of law. * * * Erroneous rulings against a litigant, even when numerous and continuous, form no ground for a charge of bias and prejudice, especially when they are subject to review on appeal. Petitioner's claim that the conduct and statements of the judge indicate that he had formed an opinion regarding the legal questions which had been presented in the case does not entitle him to a change of judge, for it does not measure up to that prejudice against a litigant which the statute contemplates as a basis for disqualifying a judge. * * * while it may constitute sufficient ground for a reversal of the judgment, [it] will not support a charge of disqualification under section 170 of the Code of Civil Procedure. Evans v. Superior Court, supra, 107 Cal.App. 372, 290 P. 662.

Plaintiff cites a number of cases which he claims support his contention that Judge Cotton was biased and prejudiced. In not one of them was there a situation where the only claim of bias and prejudice was because of the judge's incorrect view of the law. In Kreling v. Superior Court, supra, the judge had expressed an opinion as to the lack of credibility of the petitioner. In Evans v. Superior Court, 107 Cal.App. 372, 290 P. 662, 664, the judge expressed a positive opinion as to the credibility of a certain witness, likening him to a "Morgan or Kidd." In Rugenstein v. Ottenheimer, 1915, 78 Or. 371, 152 P. 215, Ann.Cas.1917E, 953, the judge stated that he would see that the third trial of the case would be before him "And I will see that the woman [plaintiff] gets another verdict and judgment that will stand." 152 P. at page 216. In Pratt v. Pratt, 141 Cal. 247, 74 P. 742, the judge in an action for accounting between husband and wife stated, in effect, that if the defendant husband called the daughter of the parties as a witness in his behalf, it would condemn him in the eyes of the court, and "You would have to bolster everything he (defendant) said to make me believe anything after he did that." 141 Cal. at page 250, 74 P. at page 743. In Briggs v. Superior Court, 215 Cal. 336, 10 P.2d 1003, the court found that the remarks admittedly made by the trial court could be reasonably interpreted only as meaning that the petitioners "had deliberately misstated the truth in their affidavit, and that he charged them with having done so" (215 Cal. at page 345, 10 P.2d at page 1007) and therefore it was not humanly possible for the judge to pass upon their credibility with an impartial mind.

In Chastain v. Superior Court, 14 Cal.App.2d 97, 57 P.2d 982, the proceeding was to prevent the trial judge from hearing a personal injury action for the third time. The judge admitted that in granting new trials he had stated that one of the defendants and some of his witnesses had perjured themselves at the former trials and that he was still of the same opinion.

Rosenfield v. Vosper, 45 Cal.App.2d 365, 114 P.2d 29, was an action for the reasonable value of legal services. During the trial, the judge apparently was impatient with the time taken to try the case. On the fifth day the judge called counsel into his chambers and suggested to plaintiff's attorney that he offer a certain sum, much less than that sued for, in settlement of the action. When the attorney consented, the judge then told the attorney for defendants, "'Tell your clients that in my opinion it would be to their best interests to settle on that basis.'" 45 Cal.App.2d at page 370, 114 P.2d at page 31. The Supreme Court held that thereby the judge was forming and expressing an opinion on issues of fact before the case was finally submitted to him, and hence disqualifying himself from proceeding further with the trial.

State ex rel. Barnard v. Board of Education, 19 Wash. 8, 52 P. 317, 40 L.R.A. 317, 67 Am.St.Rep. 706, is also cited by plaintiff. Its inapplicability is easily seen from its facts. Charges were filed before the board of trustees of a school district against the superintendent of schools. The latter claimed that one board member was disqualified from hearing the charges because admittedly he had publicly announced his intention to vote to find the superintendent guilty, *no matter what the evidence might be.*

The most that can be said of plaintiff's charges against Judge Cotton is that in the face of conclusive authorities to the contrary, the judge in an abrupt and violent manner stated that in his opinion the plaintiff could not state a cause of action because the alleged agreement must be in writing and because the probate court alone had jurisdiction of the matters set forth in the complaints. These are, however, opinions as to questions of law. Plaintiff has cited no case, and we are unable to find any, which holds that a judge's error in questions of law, no matter how gross, constitutes bias or prejudice or is a disqualification to proceed with the trial of the case in which such error was made.

[6, 7] The action of Judge Cotton, at the request of defendants, in striking from the clerk's transcript on appeal, the pleadings, the minute orders showing the court's action thereon, the motion for stay of proceedings, and the minute order showing denial thereof, does not show bias or prejudice. Evidently the judge erroneously thought that the only records this court needs on an appeal of this kind are those directly used in the proceedings to disqualify. While generally it is better to stay proceedings until the appeal upon the question of the judge's alleged disqualification is determined, it sometimes happens that proceedings of this kind are brought merely for delay, and the judge, who thought that he was right upon the questions of law, may have thought that such was the purpose of the proceedings here. We hasten to add that we are satisfied that such was not the purpose of plaintiff or his counsel, but that they acted in good faith. However, the denial of the motion to stay, even coupled with the erroneous action of the judge upon the demurrers, does not make it "appear probable that, by reason of bias or prejudice of such * * * judge * * *a fair and impartial trial can not be had before him." Sec. 170, Code Civ.Proc. We cannot assume, as plaintiff would have us do, that Judge Cotton, after our decision on the main appeal, will continue to hold that the facts alleged do not constitute a valid cause of action. If such should occur an appeal from that judgment is an adequate remedy.

[8] Counsel for plaintiff argue that a reversal in the main case will afford his client no adequate remedy, because, so it is asserted, when the case is tried on its merits, Judge Cotton will not objectively pass on the facts but will be desirous of upholding his alleged preconceived conclusion that plaintiff should not prevail. We have no doubt that in any case if a trial judge feels that he cannot objectively pass upon the credibility of the witnesses, something which he alone will know, that he will voluntarily step aside and permit another judge to try the case.

Procedure.

[9] The point raised by defendants that in a proceeding to disqualify a judge, the affidavits are merely pleadings to get the matter before the court, and that oral evidence must be introduced to prove the matters set forth in the affidavits, needs but little consideration, as the case of Bixby v. Hotchkis, 72 Cal.App.2d 368, 164 P.2d 808, definitely holds that the procedure followed by Judge Clement is the proper one.[3]

The order appealed from is affirmed.

PETERS, P. J., and WARD, J., concur.

---

[3] Judge Clement not only considered all affidavits presented, but encouraged and considered argument.

87 Cal.App.2d 897

RYAN v. WELTE et al.

Civ. 13703.

District Court of Appeal, First District,
Division 1, California.

Oct. 13, 1948.

Rehearing Denied Nov. 12, 1948.

Hearing Denied Dec. 9, 1948.

1. Courts 🔑472(4)

Action to establish a trust in an undivided half of an estate must be tried in a court of equity and not in probate court.

2. Pleading 🔑214(3), 216(1)

For purposes of demurrer to complaint to establish a trust for plaintiff's benefit in an undivided half of his stepfather's estate, existence of alleged oral agreement between plaintiff's mother and his stepfather was admitted, and whether conveyances by stepfather, in his lifetime to plaintiff, plus devise to him in will, equalled share to which plaintiff was entitled under agreement was a matter of defense and a question for trier of fact, not to be determined on demurrer.

3. Pleading 🔑205(2)

A general demurrer does not reach the objection that averments of complaint are inconsistent with an exhibit attached to and made a part thereof.

4. Trusts 🔑371(2)

In action to establish a trust in plaintiff's favor in an undivided half of his stepfather's estate, allegation that stepfather, in disregard of his agreement with plaintiff's mother, conveyed and devised property to others than those entitled to it under the agreement sufficiently alleged "constructive fraud", notwithstanding that the word "fraud" was not used.

See Words and Phrases, Permanent Edition, for all other definitions of "Constructive Fraud".

5. Frauds, statute of 🔑144

To raise an equitable estoppel against statute of frauds, fraud in some form is essential, but it is not required that an actual intent to defraud or mislead exists, it merely being required that there exist a fraud inhering in consequence of setting up the statute. Civ.Code § 1624, subd. 6; Code Civ.Proc § 1973, subd. 6.

6. Fraud 🔑41

Fraud need not be alleged as a conclusion where facts from which that conclusion necessarily follows are alleged.

7. Trusts 🔑371(2)

Allegation that plaintiff's stepfather, in disregard of oral agreement with plaintiff's mother respecting devolution of jointly owned property, devised property to third person, stated facts sufficient to raise a constructive trust and to show constructive fraud precluding application of statute of frauds. Civ.Code, § 1624, subd. 6; Code Civ.Proc. § 1973, subd. 6.

8. Pleading 🔑207

Challenge to a cause of action on the ground that it is ambiguous, indefinite and uncertain must be made by special demurrer.

9. Pleading 🔑225(1)

That a cause of action is ambiguous, indefinite and uncertain, even if the matter is raised by special demurrer, does not justify sustaining demurrer without leave to amend.

10. Limitation of actions 🔑180(1)
Pleading 🔑87

Special demurrer charging that complaint failed to allege any facts in avoidance of the defense of laches and the statutes of limitations involved was bad where there was no plea of statutes of limitations in demurrer, and in light of fact, that laches is a matter of defense which must be alleged and approved by party asserting such defense.

11. Trusts 🔑371(2)

Allegation that plaintiff's stepfather in disregard of the agreement respecting devolution of jointly owned property with plaintiff's mother without consideration, and with full knowledge of grantees concerning agreement, attempted to transfer by deeds certain properties to third party grantees stated a cause of action to have third party grantees declared trustees of such property for plaintiff.

12. Appeal and error 🔑78(3)

Order sustaining demurrer without leave to amend and order granting motion for judgment on the pleadings are not appealable, it being the judgment entered thereafter which is appealable.

◆

Appeal from Superior Court, San Mateo County; A. R. Cotton, Judge.

Action by Joseph L. Ryan against Alexander John Welte and Eleanor Welte individually and as executor and executrix, respectively, of the will and estate of Daniel McSweeney, deceased, to establish a trust as to an undivided half interest in decedent's estate. From a judgment on the pleadings for defendant, plaintiff appeals.

Reversed.

L. L. James and Carl E. Day, both of San Francisco, for appellant.

Richard J. Dolwig and Antonio J. Gaudio, both of San Francisco, for respondents.

BRAY, Justice.

Appeal[1] by plaintiff from a judgment in favor of defendants on the pleadings. While the judgment followed a motion for judgment on the pleadings, it is obvious from the record that the judgment was, in effect, one after a demurrer to the second amended complaint was sustained without leave to amend.

The action is for the purpose of establishing a trust in favor of plaintiff in certain properties standing of record at the time of his death in the name of Daniel McSweeney, deceased, of whose estate defendants are executor and executrix respectively.

The second amended complaint is in two causes of action. The substance of the allegations of the first cause of action follows: Plaintiff is the son of Joseph Ryan and Mae Ryan. Joseph died many years ago, leaving Mae Ryan as his widow. In 1912 or 1913, Mae married Daniel McSweeney (the decedent here). At the time of this marriage Mae had $1,500; Dan had nothing, not even a job. With Mae's money and their joint efforts, within two or three years they began to accumulate money and property. About this time they orally agreed, which agreement was orally reaffirmed many times, that everything accumulated during their married life, by either or both, should be owned jointly; to go to the survivor in the event of the death of either. On the death of the survivor, any estate that was left should go to plaintiff and his sister, in equal shares, or to the survivor of them. It was further agreed that the survivor of Dan and Mae would do all things necessary to effectuate this agreement.

In pursuance of the agreement, large amounts of money and property were accumulated by them in joint tenancy, and were so held at the time of the death of Mae in 1934. By her agreement to permit all accumulations to be held in joint tenancy, Mae did forego, in reliance upon the agreement, her right to make testamentary disposition of any of the property to plaintiff and his sister or any one else.

Upon Mae's death all of the property and money, pursuant and subject to the agreement, passed to Daniel. who accepted the benefits of the agreement and retained the property. Daniel died in 1946 and at the time of his death held title, pursuant to the agreement, to the money and property described. In 1940 Daniel made a will (a copy of which is annexed to the complaint) in which, in violation and disregard of the agreement, he disposed of certain moneys and property to defendants Alexander John Welte (the husband of plaintiff's sister) and Eleanor Welte, the former wife of plaintiff. Plaintiff asks that a trust be declared in his favor in one-half of this money and property.

The second cause of action includes the allegations of the first as to the facts upon which the claim of trust is based, and then alleges that Daniel, in his lifetime, in disregard and violation of the agreement, without consideration, and with full knowledge by the grantees of the agreement between Daniel and Mae, attempted to transfer by deeds certain properties to defendants Alexander and Eleanor Welte. As to an undivided one-half of these properties, plaintiff asks that it be determined that these defendants are holding it in trust for him.

---

[1] Consolidated with the appeal from the order of Judge Clark Clement overruling plaintiff's objections to the hearing of any matters in this section by Judge Aylett R. Cotton, Cal.App., 198 P.2d 351. For the history of the proceedings in the case up to the hearing of the demurrer to the second amended complaint, see the other appeal. Judge Cotton sustained the demurrer to the second amended complaint without leave to amend, after his qualifications were upheld.

Defendants contend that the demurrer was properly sustained and judgment granted upon four grounds: (1) That the complaint lacks any allegations of actual fraud; (2) that it does not allege facts sufficient to give rise to a constructive trust; (3) that the agreement upon which the action is based is barred by the statute of frauds, Sec. 1624 (6) Civ.Code; and Sec. 1973 (6) Code Civ.Proc.; and (4) that the second cause of action is ambiguous, indefinite and uncertain.

Jurisdiction.

[1-3] One of the grounds upon which the court sustained the demurrer was that the matters set forth in the complaint were only cognizable in the probate court and that the superior court had no jurisdiction thereof. At argument, defendants conceded that this holding was wrong and that the matters alleged, if they stated a cause of action, must be tried in a court of equity and not in the probate court. The authorities are clear on this point. See 26 Cal. Jur. 834; Estate of Rolls, 193 Cal. 594, 226 P. 608; Bank of California v. Superior Court, 16 Cal.2d 516, 106 P.2d 879; Brazil v. Silva, 181 Cal. 490, 185 P. 174; Estate of Berry, 195 Cal. 354, 233 P. 330; Estate of Cropper, 83 Cal.App.2d 105, 187 P.2d 780. In Sonnicksen v. Sonnicksen, 45 Cal.App.2d 46, 113 P.2d 495, the appellate court held under circumstances somewhat similar to those in this case that a suit in equity is the proper procedure. In their brief, defendants advance the claim that the court in its ruling that the probate court alone had jurisdiction based it on that portion of Daniel's will which stated: "I purposely leave and knowingly leave my Step-son, Joseph L. Ryan, property of less value than Mrs. Eleanor Ryan, his wife, and my Step-son-in-Law, Alexander J. Welte, Jr. for the reason that I have provided for said Joseph L. Ryan more during his life than I did for the others mentioned in this Will and he has had more than his share." The court, say defendants, considered that the testamentary disposition in plaintiff's favor when considered with reference to inter vivos transfers "satisfied the terms of the alleged oral agreement in full and relegated appellant to the distribution in the probate court of that portion of the estate devised and bequeathed to him." This reasoning is a bit involved. For the purposes of demurrer, the existence of the oral agreement is necessarily admitted, and whether the conveyances by Daniel, in his lifetime, to plaintiff, plus the devise to him in the will, equalled the share to which plaintiff was entitled, was a matter of defense and a question of fact to be decided at the trial, and not a matter to be determined on demurrer. According to the will, defendant Eleanor Ryan, plaintiff's former wife, receives a substantial devise. There is no provision for her in the agreement. If there is any uncertainty between the allegations of the complaint and the will attached as an exhibit, defendants failed to cite such by way of special demurrer. As stated in 21 Cal. Jur. 110, a general demurrer does not reach the objection that the averments of the complaint are inconsistent with an exhibit attached to and made a part thereof.

Allegations of Fraud.

[4-6] Citing the facts in the cases of Brazil v. Silva, supra, and Fuller v. Nelle, 12 Cal.App.2d 576, 55 P.2d 1248, defendants contend that there are no similar allegations of actual fraud in the complaint here. While the word "fraud" is not used and while the facts here are different than those shown in the cited cases, the complaint does allege the fact that Daniel in complete disregard of his agreement conveyed and devised the property to others than those entitled to it under the agreement. This, as will be pointed out later, constituted constructive fraud. As said in Notten v. Mensing, 3 Cal.2d 469, 476, 45 P.2d 198, 202: "In order to raise the estoppel, fraud in some form is essential, but it is not required that an actual intent to defraud or mislead exist; all that is required is that there exist 'a fraud inhering in the consequence of thus setting up the statute.' * * * *Although in the present case fraud is not alleged as a conclusion, the facts from which that conclusion necessarily follows are alleged.*" (Emphasis added.)

Facts Sufficient to Raise a Constructive Trust. The Statute of Frauds not Applicable.

[7] These two points will be considered together, as both contentions of defendants in this behalf are fully answered by the case of Notten v. Mensing, supra. The facts in that case closely approach those in our case, the only difference being that there the husband and wife agreed to and did make reciprocal wills. There is no logical or reasonable distinction between an agreement to "do all things necessary to effectuate" an agreement for the eventual disposition of the property of husband and wife, and one to make wills for the same purpose. As stated by the court (3 Cal.2d at pages 476, 477, 45 P.2d at page 202): "The complaint alleges the making of the oral agreement to leave the property to their respective collateral kindred upon the death of the survivor; the making of the reciprocal wills pursuant to such agreement; the death of the husband before either will was revoked; the acceptance by the wife of the benefits under her husband's will; the wife's revocation of the old will and the execution of the new will in violation of the oral agreement. These facts clearly constituted a change of position and reliance on the agreement, under the cases cited, sufficient to raise the estoppel." The action there was to enforce a constructive trust on the property devised in violation of the oral agreement and the reciprocal wills executed pursuant thereto, and an order sustaining a demurrer to the complaint, without leave to amend, was reversed. In the Notten case, concerning the question of the enforceability of the oral agreement, the court stated: "There is a long line of authorities in this state to the effect that under the proper circumstances a party may be estopped to plead the statute of frauds. We are of the opinion that the facts pleaded in the complaint present a proper case for the application of that rule. It is our opinion that when two parties execute reciprocal wills pursuant to an oral agreement, and one of the parties dies before either will is revoked, and the other party accepts the benefit of the decedent's will, and then revokes, a constructive fraud sufficient to raise the estoppel has been practiced on the first decedent and on the beneficiaries of the oral agreement." 3 Cal.2d at page 474, 45 P.2d at page 201. The complaint in the Notten case was held sufficient to state a cause of action.

In Aho v. Kusnert, 12 Cal.2d 687, 87 P.2d 358, the second count alleged that plaintiffs' stepfather induced their mother to purchase property with her separate funds in reliance on his representation and promise that plaintiffs should have the property when the mother and stepfather "were gone." In violation of the promise, he devised the property to the defendant, whom he married after the death of plaintiffs' mother. Despite the fact that the agreement was oral, the court held that the defendant received the property in trust for the plaintiffs. As stated in the opinion: "By reason of his promise and understanding with plaintiffs' mother, Kusnert [the father], upon her death, received title to real property paid for in part by her separate funds and in part by community funds. He broke his promise to her when he devised said property to his second wife. In such circumstances equity, through fastening a trust upon the property, will secure to plaintiffs the benefits of said promise although orally made." 12 Cal.2d at page 690, 87 P.2d at page 359.

Defendants attempt to avoid the effect of the Notten and Aho cases by quoting from the Notten case "These facts clearly constituted a change of position and reliance on the agreement, under the cases cited, sufficient to raise the estoppel" (3 Cal.2d at page 477, 45 P.2d at page 202) and then stating: "These factors, while present in one form or another in each of the cases following Notten v. Mensing, supra, are not present in this case and are not alleged in the second-amended complaint." However, contrary to this assertion, the complaint alleges that in reliance upon the agreement, and in accordance therewith, Mae was induced to and did forego the right of testamentary disposition which she had before entering into the agreement, and that Daniel accepted the benefits of the agreement and retained the property received thereunder. These allegations show the change of position and acceptance of benefits upon which the decisions in the Notten and Aho and other cases are based. While, as asserted by defendants, there was no allegation of a "change of position on the part of the *heirs*" (emphasis added) it is the change of position of the *contracting parties,* and not the beneficiaries of the contract, that forms the estoppel to rely upon the statute of frauds.

The same principles as applied in Notten v. Mensing and Aho v. Kusnert, supra, were held to govern Fuller v. Nelle, supra. There, husband and wife conveyed certain parcels of property to their daughter in consideration of her promise not to interfere thereafter in any way with the carrying out of the provisions of any transfer her parents might make of their other properties. They agreed to, and did, execute mutual wills. Following the death of the husband, the wife, after accepting the benefits of his will, revoked her mutual will and attempted a testamentary disposition other than that agreed upon by the spouses. A constructive trust was declared in favor of the beneficiaries of the mutual wills. See, also, Brazil v. Silva, supra, 189 Cal. at page 493, 185 P. 174 to like effect.

In Sonnicksen v. Sonnicksen, supra, the court applied the same rules of "quasi-specific performance" in a separation agreement to make mutual wills leaving the property to the survivor, and on the latter's death to the children of the parties. While there, as in Fuller v. Nelle, supra, the agreement was a written one, the principles stated apply to the instant case.

Defendants rely upon Zellner v. Wassman, 184 Cal. 80, 193 P. 84, and Beard v. Melvin, 60 Cal.App.2d 421, 140 P.2d 720, in which oral agreements to leave money or property by will were held to be within the statute of frauds. The fact that distinguishes the Zellner case from ours is expressed by the court in these words: "The words and conduct on the part of decedent in making the oral promise and accepting plaintiff's performance did not amount to an inducement to plaintiff to, in effect, waive a written instrument in reliance upon a representation that decedent would stand by his agreement and not avail himself of the statute of frauds. There is therefore an absence of the element of fraud which is requisite to an estoppel." 60 Cal.App.2d at page 431, 140 P.2d at page 726. Moreover, in that case, a judgment of non-suit was reversed on the ground that the complaint stated a cause of action for the recovery of the reasonable value of the services rendered. It was in compensation of these services that the oral promise to bequeath money had been made.

In Cazaurang v. Carrey, 117 Cal.App. 511, 4 P.2d 259, in which it was claimed that husband and wife agreed to make mutual wills and keep them in effect, and in which the husband revoked his will, there was no claim of change of circumstances. The court said: "While it may be true that equity may relieve a party from the effects of such a statute in a proper case and upon a sufficient showing, no equitable circumstance, such as fraud or the like, here appears to entitle the appellant to any such equitable relief." 117 Cal.App. at pages 517, 518, 4 P.2d at page 262.

Baker v. Bouchard, 122 Cal.App. 708, 10 P.2d 468, was a case in which the plaintiff sought to establish an alleged oral contract to make a will in her favor, in consideration of her furnishing decedent necessary food and care during his declining years. There the court not only found that there was no such agreement, but that the plaintiff's acts in taking care of the decedent were under an arrangement by which plaintiff was to occupy decedent's home, rent free.

In the Beard case, supra, the dissimilarity with the facts of our case is shown by the following language of the opinion: "Plaintiff's complaint contains no allegation of fraud on the part of Alice Melvin [the mother], and * * * appellant asserts that his complaint is not for enforcement of the contract but for the value of his claim against the estate of Herbert G. Melvin [the father]." 60 Cal.App.2d at page 431, 140 P.2d at page 726.

Second Cause of Action. Laches.

[8-10] Defendants contend that this cause of action is ambiguous, indefinite and uncertain, primarily because the date of the conveyance by Daniel in violation of the agreement is not given. There is no special demurrer on this ground. However, if there were, such ground does not justify sustaining the demurrer without leave to amend. Wennerholm v. Stanford Univ. Sch. of Med., 20 Cal.2d 713, 128 P.2d 522, 141 A.L.R. 1358. There is a special demurrer to the effect that the alleged causes of action are barred by laches. Defendants' position in this regard is that as the date of the conveyance by Daniel is not set forth in the complaint, except that probably it was in the twelve years between the deaths of Mae and Daniel, the complaint "fails to allege any facts in avoidance of the defense of laches and the statutes of limitations * * * involved." There is no plea of the statutes of limitations in the demurrer. Laches is a matter of defense which must be alleged and proved by the party asserting such defense. Katz v. Enos, 68 Cal.App.2d 266, 156 P.2d 461.[2]

[11, 12] The second amended complaint states a cause of action and therefore the demurrer should have been overruled. In addition to appealing from the judgment, plaintiff attempts to appeal from the order sustaining the demurrer without leave to amend and the order granting the motion for judgment on the pleadings. These orders are not appealable. It is the judgment which is appealable.

The judgment is reversed.

PETERS, P. J., and WARD, J., concur.

---

88 Cal.App.2d 63

WILLSON v. NIAGARA DUPLICATOR CO.

Civ. 13672.

District Court of Appeal, First District,
Division 1, California.
Oct. 19, 1948.

1. Contracts 🔑147(1)

The function of interpretation of a contract is to ascertain the intent of the parties.

2. Evidence 🔑397(1), 461(1)

Parol evidence should not be admitted to vary, to add to, or to subtract from the terms of a written agreement, but parol evidence is admissible to explain what the parties meant by what they said. Code Civ.Proc. § 1856.

3. Evidence 🔑450(6)

Where surrounding circumstances established that phrase "company net sales", within employment contract, entitling plaintiff to commissions on "company net sales," meant either that commissions were to apply to contracts secured during plaintiff's employment, or to work done under each contract during plaintiff's employment, parol evidence was admissible to explain the ambiguity. Code Civ.Proc. § 1856.

4. Master and servant 🔑70(2)

Where plaintiff was entitled to commissions on contracts accepted by corporation during plaintiff's employment, in excess of a minimum amount of contracts accepted each month, and when plaintiff left employment before completion of work on all contracts accepted, monthly minimum was deducted, figuring commissions payable prior to when plaintiff left employment, monthly minimum was not deductible again, in figuring commissions to plaintiff on work done after plaintiff left employment, on contracts accepted during plaintiff's employment.

5. Compromise and settlement 🔑23(3)

In action for commissions on contracts accepted by defendant during plaintiff's employment by defendant, evidence sustained finding that a letter from plaintiff to defendant allegedly constituting an offer of settlement of plaintiff's right under employment contract to commissions, had been revoked by plaintiff before acceptance by defendant.

---

[2] See Maguire v. Hibernia S. & L. Soc., 23 Cal.2d 719, at page 735 et seq., 146 P.2d 673, 151 A.L.R. 1062, for a detailed discussion of the defense of laches.

Appeal from Superior Court, City and County of San Francisco; Melvyn I. Cronin, Judge.

Action by R. Duff Willson against Niagara Duplicator Co., a corporation, for commissions earned by plaintiff while employed by defendant. From an adverse judgment, defendant appeals.

Affirmed.

Bronson, Bronson & McKinnon, of San Francisco, for appellant.

Aaron M. Sargent, of San Francisco, for respondent.

PETERS, Presiding Justice.

Plaintiff brought this action to recover certain commissions allegedly earned by him while employed by defendant under a written contract as sales manager and director of public relations. The main question presented is whether the written contract provided for commissions on all contracts secured by the company while plaintiff was employed, or provided for commissions on transactions only where the customer was billed during the term of the employment. Involved in the determination of this question is the problem as to whether parol evidence was properly admitted to explain the written document. The trial court determined all basic issues in favor of plaintiff, and granted him judgment in the sum of $4,142.63. Defendant appeals.

The original complaint prayed for commissions under the contract, and alleged, substantially, that defendant's president had deceived plaintiff with respect to the meaning and effect of the contract. The amended complaint made the same essential allegations, and, in addition, set up a cause of action for declaratory relief to have the meaning of the contract ascertained. At the trial plaintiff abandoned his cause of action for declaratory relief when it appeared that all of the transactions had been completed and were proper subjects of a money judgment. During the trial, over the objections of defendant, the plaintiff was permitted to file a second amended complaint to conform to the proof. That complaint set up the contract, the nature and extent of defendant's business during plaintiff's employment, and repeated, in greater detail, the charges against defendant of misrepresentation and fraud.

The facts most favorable to plaintiff are as follows: L. John Himes was the president and principal stockholder of defendant corporation. All negotiations with plaintiff on behalf of the corporation were carried on by Himes, and it is admitted that he had full authority to act. The business of the company (manufacture of stencils, etc.) was adversely affected by the war. Himes desired to get some subcontracts to manufacture or machine airplane parts. The then existing staff of the corporation was not securing this business, and it was to assist in this regard that plaintiff was employed. Plaintiff is an engineer with over fifteen years' experience in the airplane industry. He first met Himes in November, 1942, and at that time Himes told him that he wanted some one who knew the aircraft industry and who had the proper contacts to get the business. In December of 1942 plaintiff was hired as director of public relations of the defendant at a salary of $400 per month. His chief duty was to introduce the defendant's staff to executives in the aircraft industry. Plaintiff worked under this arrangement until March, 1943, and apparently his services were most satisfactory. On March 6, 1943, plaintiff visited Himes at the latter's home in Arizona. At that time "Himes stated that they were in great need of aircraft business; that Mr. Springer [the then sales representative of defendant in Los Angeles] had not been able to get any orders up to this time; and that if I would take on the job of getting the orders, in addition to just introducing the company to the aircraft industry, he would pay me one per cent of all the business I got as orders, and one-half per cent on all the business that Mr. Springer got with my assistance." On March 12, 1943, Himes verified this oral arrangement by a letter to plaintiff, stating that a formal contract would be later prepared "but you can take this in meantime as fact we agree you are to receive 1% on net sales you turn in as orders." Plaintiff worked under this arrangement until April 23, 1943, and again his services must have been most satisfactory. On this date he again conferred with Himes in Los Angeles. At this conference "Himes told me that he was reorganizing his company, or making some organizational changes in the company, and that he would like to have me take the responsibility of all sales, and be the sales manager. And I asked Mr. Himes what he had in mind. And Mr. Himes said that he wanted me to be the sales manager, and that he would increase my salary $100.00 per month, and give me one-half of one per cent override on all the business done by the company." Plaintiff was also to be elected a vice-president of the company. It was agreed that some minimum amount of business should be excepted from the commission rights of plaintiff, but at this meeting the exact amount of this minimum business was not agreed upon. Plaintiff suggested that the amount of business done between January 1st and May 1st be averaged, and that this figure be the amount to be excepted. Later Himes suggested that this figure be $40,000 per month, but this was unacceptable to plaintiff. The parties finally agreed that the figure should be $20,000 per month. Plaintiff testified that his commission was to attach to "all business" done by the company in excess of $20,000 per month. Plaintiff admitted that prior to this meeting the company had some aircraft business, but it is quite apparent that at that time such business was not very substantial.

At this point a fundamental distinction between the duplicator and the aircraft business of the company should be noted. In manufacturing stencils and other duplicators the company owned the materials, and owned the finished product. This product it sold to its customers. Thus, as to this business, an actual and legal sale took place. The aircraft business was of an entirely different nature. Defendant's plant was equipped to do machine work, and the machinery was peculiarly adapted to machining certain gear boxes to be installed on military aircraft. The desire of Himes was to secure, from the companies constructing the aircraft, sub-contracts to machine these gear boxes. As to these contracts the aircraft company or the government furnished the materials, and the sub-contractors, such as defendant, merely furnished the services of machining the product. Obviously, as to this work of the company there never was a "sale" in the legal sense.

The parties agreed that the arrangement arrived at April 23, 1943, should be reduced to writing It is admitted that on May 1, 1943, plaintiff assumed his new duties under this arrangement, and his increased salary was paid from that date. Various office memoranda were prepared by Himes informing the organization of the new set-up and telling the staff that plaintiff was in full charge of all "sales." It is conceded that, from the time that this arrangement went into effect, until November 14, 1943, when plaintiff quit, contracts totaling over a million and a half dollars were secured from aircraft companies to machine gear boxes. Some of this work was done and some payments for such work were received by the company after plaintiff quit the employment. The basic question involved is whether plaintiff is only entitled to commissions where the work was completed and the aircraft companies billed for the work before November 14, 1943, or whether he is entitled to commissions for all work secured while he was sales manager, less $20,000 per month, even though the company did not finish the work or bill the aircraft companies until after that date. If the latter, the plaintiff has earned commissions in the amount found by the trial court.

The dispute arises because of the following facts: As already pointed out, it was agreed that the arrangement of April 23, 1943, was to be reduced to writing. This was done, and it is the interpretation of this contract that is here involved. Just when it was executed is a matter of dispute. The document is in the form of a letter to plaintiff from Himes as president of defendant and is dated May 1, 1943. It is signed "accepted" by plaintiff, and such acceptance is also dated May 1, 1943. The letter reads in part as follows:

"May 1, 1943

"Mr R. Duff Willson
"126 Main Street
"San Francisco, California

"Dear Duff:

"Starting today your employment arrangement with the company will be changed.

"Up to this date you have been employed in the capacity of a line executive, as Director of Public Relations.

"Starting today you will become Sales Manager of Niagara Duplicator Co., a staff executive. You will be in charge of all company sales, selling, advertising, and public relations work, except as hereinafter provided and you will report to and be accountable to the President of the Company.

"Beginning today your base salary will be $500.00 per month, and you will be paid a sales commission of one-half of one (.00–½%) per cent of company net sales in excess of $20,000.00 per month, or $240,000. per year.

"The above sales commission arrangement will become effective June 1, 1943, inasmuch as that date starts our company fiscal year.

"Your salary will be paid semi-monthly, one-half on the 15th and one-half on the last day of the month. Your sales commission will be accumulated on company records monthly, and will be reported and paid to you each month, within 20 days following the end of each month. It is of course understood that your salary and sales commission are subject to payroll taxes and deductions covering Federal, State, City, and other Governmental taxes, assessments and deductions.

"* * * This employment arrangement is subject to cancellation by the president of the Niagara Duplicator Co. or by yourself at any time on 30 days written notice.

"Your signature at the place provided at the end of this letter will constitute your understanding and acceptance of the foregoing employment arrangement.

"Niagara Duplicator Co.
"L. John Himes
"L. John Himes, President
"Accepted May 1, 1943:
"R. Duff Willson
"R. Duff Willson
"LJH:heh"

The date this letter was delivered to plaintiff and signed by Himes and plaintiff is in dispute. Plaintiff testified that he did not receive it until June 30th or July 1st, and that the dates thereon did not truly reflect the date of its execution. Himes testified that the letter was prepared by him and delivered to plaintiff shortly after May 1, 1943, and that he received it back signed by plaintiff about two days thereafter. The then secretary of Himes, who had typed the letter, directly contradicted his testimony. She testified that the first draft of the letter was prepared about the middle of June, and that the final draft was not dictated until the "latter part of June." She further testified that the letter was dated back to May 1st on orders from Himes. Her dictation book would have disclosed the true date, but, although such book was subpoenaed, it was not produced by defendant, one of its wintesses testifying that it had been destroyed. The secretary of Himes also testified that the May 1st letter was not delivered to plaintiff until a few days before plaintiff dictated to her a certain memorandum dated July 2, 1943. The trial court resolved this conflict in dates by finding in accord with the testimony of plaintiff and his witnesses.

The date the contract was actually executed becomes of vital importance because plaintiff produced the memorandum of July 2nd, and it was signed by him but not by Himes. Plaintiff testified that this memorandum was delivered to Himes, and discussed with him, and an agreement reached as to the meaning of the May 1st agreement, before he, the plaintiff, signed the May 1st agreement. Himes vigorously denied this, but this conflict was resolved against defendant by the trial court. The internal structure of the memorandum supports plaintiff's testimony. The exact date the agreement was signed also becomes important because defendant secured, through plaintiff's efforts, during June of 1943, nearly a million dollars of aircraft contracts.

The trial court, over vigorous objections by defendant, admitted the memorandum into evidence as part of the same exhibit which included the May 1, 1943, letter. The theory of the trial court was that the May 1st letter and the July 2nd memorandum had to be read together in order to understand what the parties actually intended about commissions payable to plaintiff. The memorandum reads as follows:

"Concord Calif.
"July 2, 1943

"Mr. L. John Himes
"Mr. R. Duff Willson
"Working Arrangement

"Dear John:

"I have the proposed new contract for my services dated May 1st. "When we met in Los Angeles, at the time I took this position with you, I knew my ability to produce. You had, I thought, what it took to utilize that ability to produce. I made the remark in accepting your terms that it was 'quite a sacrifice' and you said, 'you produce the business and I'll take care of you,' or words to that effect. The same was repeated, in effect, at Larry's home when I accepted the additional responsibility of General Sales Manager and the promise of election to Vice-President. On your representation of the business being done I too quickly accepted a small raise in pay (an amount still under that offered me by others) and from one per cent commission on my business to one-half per cent commission on all company business.

"* * * Now the commission 'on net sales over twenty thousand per month.' I find that while this amount and much more has been made in the past, the present picture is: 1. that the old stencils are finished with the completion of the Kaiser order—2. that we have no stencils for other orders which have come in—3. That there is an amount of aircraft business on contract obtained prior to May 1, 1943.

"I accepted the responsibility of introducing a New Stencil which will have to be Sold to old customers as well as to New Customers. Therefore, all business in New Stencils will be New Business.

"The proposed contract increases the scope of my services and responsibilities to the company for which I was getting one hundred dollars per month raise in salary. The proposed contract wipes out the one hundred dollars per month by limiting my commission to 'net sales in excess of twenty thousand dollars per month.' The proposed contract reduces my commission on business I have brought in so far more than four thousand dollars—is that mutual profit?

"More is required of R. Duff Willson and less money is received by R. Duff Willson for the extra effort and accomplishment.

"The next point of your letter to which I did not agree—A commission [in], my experience, is earned when the order is brought in and accepted by the company. In some instances, a commission is paid upon the acceptance of the order. In this instance, the commission should be paid when and as payments are received by the company.

"Last, but most important: One should be free to exert All of his efforts to Selling the Customer and Promoting the best interests of the company and in turn to expect his individual interests to be protected and fostered By the Company.

"I want my connection with the Niagara Duplicator Co., as reflected by this new contract, to do just that. I want a commission on all net sales of the company on orders accepted by the company on and after May 1, 1943. I want it stated that commissions are earned as soon as the company accepts the order. I want the commission on the amount of money collected by the company each month and paid to me on the fifteenth of the following month. I hope we can see eye to eye on this.

"Yours very truly,
"R. Duff Willson
"heh"

It was stipulated that by November, 1944, and long before trial, the defendant had completed its work on all aircraft parts and other business contracted for during plaintiff's tenure as sales manager. The defendant has received full payment on all the contracts.

Plaintiff testified that Himes, about the end of June, 1943, dropped the letter of May 1st on his desk; that plaintiff read the letter and took it back to Himes and asked him to discuss some of its terms; that Himes told him that he did not want to discuss the problem orally, but that plaintiff should put his views into writing. It was in response to this invitation that plaintiff prepared the July 2nd memorandum. Plaintiff testified that he delivered the memorandum to Himes; that Himes read it; that this was about July 2, 1943; that then he and Himes had a discussion; that Himes argued that the $20,000 limitation had to stand, and plaintiff finally agreed; that Himes insisted that commission payments had to be paid on the 20th and not the 15th, and plaintiff agreed to that; that then the parties discussed the question as to when the commissions were to be deemed earned under the contract; that plaintiff argued that his commissions must be considered earned when the defendant accepted the orders, and payable when the company was paid; that after he finished his argument Himes said: "We have nothing to argue. It is covered in the contract." On cross-examination plaintiff clarified this by testifying that Himes conceded that the commissions, under the contract, were to be deemed earned as soon as the orders were accepted by the company. This was denied by Himes, but again this conflict was resolved against defendant by the trial court. Plaintiff testified that after the parties had so agreed he signed the May 1st agreement.

There is no dispute that plaintiff worked under the contract until November 14, 1943, when he resigned, having given a 30 day notice to that effect on October 14, 1943. There is no dispute that contracts in the amounts found by the trial court were secured by defendant during the period plaintiff acted as sales manager. There is no dispute that defendant paid plaintiff his salary as provided in the May 1st agreement, and paid him commissions on all work billed to customers over $20,000 per month up to November 14, 1943. The dispute is over commissions on sums received by the company between November, 1943, and November, 1944, for work contracted for while plaintiff was sales manager, but not completed until that employment had been terminated.

It is at once obvious that if plaintiff's oral and written evidence were admissible to explain the true meaning of the expression "company net sales" as used in the May 1st agreement, such parol evidence supports the trial court's finding that such commissions were earned as soon as contracts were accepted by defendant. Appellant urges, however, that all such evidence violated the parol evidence rule. It contends that the contract of May 1st is clear on its face and unambiguous, and that the proffered testimony did not interpret but "changed" the meaning of the terms of that agreement. It is also urged, as part of the same basic contention, that there is no evidence to support the finding that the May 1st and the July 2nd documents constituted but a single contract.

The contentions of defendant on these points are without merit. The trial court found, and the finding is supported, that, before the May 1st agreement was signed, Himes represented to plaintiff that the May 1st letter was intended to express, in reference to commissions, the meaning expressed in the July 2nd memorandum; that Himes represented that the May 1st agreement provided that commissions should be payable on the basis of contracts made, and that it was unnecessary to alter the May 1st agreement to so provide because it already so provided. It was also found that these representations were made with intent to mislead plaintiff and to induce him to sign the May 1st letter; that plaintiff acted on such misrepresentations and signed the letter; that defendant intended plaintiff to believe, and plaintiff did believe, that the letter and memorandum were one contract; that plaintiff was led to believe that the phrase in the May 1st letter "company net sales" referred to all contracts accepted by defendant as orders during his employment. As to these last findings defendant is faced with a dilemma. If the defendant fraudulently deceived the plaintiff as to the meaning of the letter, then the judgment may be sustained on that theory. If the defendant was not fraudulent but made the representations testified to by plaintiff in good faith, then the parties agreed as to the meaning of the contract and evidence of such intended meaning is, of course, admissible. If the phrase "company net sales" referred only to "sales" in the technical sense, then plaintiff could have earned no commissions at all because the company was almost entirely engaged in machining parts for aircraft and none of that business involved a "sale." Defendant contended that the phrase meant—business billed each month to the customers—but had to resort to parol evidence to support this interpretation.

If, for the moment, the competency of the evidence offered by the plaintiff be assumed, it is obvious from the summary of the evidence, supra, that the finding that the two documents were intended as a single contract is amply supported. It is also apparent, under the same assumption, that the finding as to the intent of the parties as to the meaning of the phrase in question is also amply supported. The only real question is whether the evidence is admissible. Again the defendant finds itself on the horns of a dilemma. If the defendant intended the phrase "company net sales" to have the meaning contended for by it, then defendant was fraudulent, and parol evidence is admissible to show such fraud. Section 1856 of the Code of Civil Procedure, after first setting forth the parol evidence rule, provides: "But this section does not exclude other evidence of the circumstances under which the agreement was made or to which it relates, as defined in section eighteen hundred and sixty [permitting evidence of surrounding circumstances], or to explain an extrinsic ambiguity, or to establish illegality or fraud. * * *"

Section 1640 of the Civil Code expresses the same rule even more forcefully. It provides that: "When, through fraud, * * * a written contract fails to express the real intention of the parties, such intention is to be regarded, and the erroneous parts of the writing disregarded."

On the other hand, if there was no fraud, then, under the evidence, the two documents must be read together, and, so read, they either have the effect of establishing plaintiff's interpretation, or, to say the least, there is an apparent and obvious ambiguity on the face of the contract, so that parol evidence was admissible to interpret it. Section 1856 of the Code of Civil Procedure provides that, except in cases of mistake or imperfection of the agreement, or where the validity of the agreement is in fact in dispute, "no evidence of the terms of the agreement other than the contents of the writing" is admissible, but that "this section does not exclude other evidence of the circumstances under which the agreement was made or to which it relates, as defined in section eighteen hundred and sixty". This last mentioned section provides: "For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it, may also be shown, so that the judge be placed in the position of those whose language he is to interpret."

[1, 2] In Wells v. Wells, 74 Cal.App.2d 449, 456, 169 P.2d 23, 27, the court stated: "The function of all interpretation is, of course, to try to ascertain the true intent of the parties. Parol evidence should not be admitted to vary, to add to, or to subtract from the terms of a written agreement, but it should be, and is admissible, to explain what the parties meant by what they said."

[3] In the present case if the phrase "company net sales" be considered entirely unrelated to the transaction to which it was intended to apply, it would mean that the plaintiff would be entitled to no commissions at all because the very business that the contract was intended to cover did not result in a sale. Once the surrounding circumstances are shown, it is at once apparent that the commissions were either intended to apply to contract secured, or to work done under each contract. That is an ambiguity. Such ambiguity, appearing on the face of the instrument, permits the introduction of parol evidence. Universal Sales Corp. v. California Press Mfg. Co., 20 Cal.2d 751, 128 P.2d 665; Wells v. Wells, supra; In re Estate of Rule, 25 Cal.2d 1, 152 P.2d 1003, 155 A.L.R. 1319; Jegen v. Berger, 77 Cal.App.2d 1, 174 P.2d 489;

In re Estate of Gaines, 15 Cal.2d 255, 100 P.2d 1055; Payne v. Commercial Nat. Bank, 177 Cal. 68, 169 P. 1007, L.R.A.1918C, 328. The challenged evidence was clearly admissible.

This disposes of the main question presented on this appeal. Defendant next makes a technical argument about the findings, and contends that, in certain respects, the findings are conflicting and do not support the conclusions of law and the judgment. This somewhat obscure argument is apparently based upon the fact that the trial court found that on April 23, 1943, plaintiff's contract of employment was revised, and that, under the revised agreement, plaintiff was to receive a salary of $500 per month with a commission of one-half of one per cent on all company business in excess of average during the period January 1st to May 1, 1943. It was also found that plaintiff accepted the employment, and that such employment terminated on November 14, 1943. These findings, defendant contends, are contrary to the findings and conclusions relating to the contract dated May 1, 1943. The court did not find, as is assumed by defendant, that the employment continued until November 14, 1943, under the agreement of April 23, 1943, alone. There is no room for doubt that the court found, and that the evidence shows, that the April 23, 1943, conference and agreement fixed the general outline of the new job, and that the letters of May 1st and July 2, 1943, clarified the arrangement as to when commissions should be deemed earned. The findings and conclusions and judgment are not in conflict.

The contention that, since the written contract was not executed until July 2, 1943, the commission agreement could not apply to the contracts secured in June, 1943, totaling over $900,000, is without merit for the obvious reason that Himes' letter dated May 1, 1943, expressly states that the commission arrangement applies as of June 1, 1943.

[4] Defendant next makes an argument that is somewhat difficult to follow. Defendant states that "Because during his employment as sales manager respondent [plaintiff] contributed in a measure to all sales, this minimum [$20,000 per month or $240,000 per year] was and should have been deducted from all of appellant's [defendant's] net sales. But after respondent resigned, if respondent was entitled to any commission, a fact which appellant denies, this minimum should have been deducted from the sales which resulted from orders accepted during respondent's employment rather than from appellant's net sales resulting from orders accepted after respondent left its employ." (App.Op.Br. p. 19.) It is then contended that the finding that the company collected after November 14, 1943, on contracts accepted while plaintiff was employed, a total of $828,526.79, should be reduced by $240,000, which is twelve times $20,000. The argument begs the basic question on this appeal. Once it was determined that plaintiff earned his commissions on all contracts accepted during his employment, less, of course, $20,000 per month during those periods, payable when the money was collected, it was necessarily determined that the minimum deduction was not referable to the actual receipt of the money, but to the period during which the orders were accepted by defendant. The trial court found, and this finding is not challenged, "that on or before November 14, 1943, plaintiff received payment of all commissions which had then become due on billings for general sales of merchandise and for billings to the companies affected under aircraft orders then outstanding; that in making payment for commissions up to this date, defendant made a full deduction at the rate of $20,000 per month before figuring commissions to plaintiff." Thus, for the purpose of figuring commissions prior to November 14, 1943, commissions which defendant admits were due to plaintiff, and which constituted part payment on the commissions on contracts secured prior to November 14, 1943, the defendant deducted the $20,000 monthly minimum. Since the $20,000 deductions had already been made on these contracts, it would have been improper to have duplicated them for the period subsequent to November 14, 1943.

[5] The last contention of defendant is that the trial court failed to find on a material issue raised in the answer of de-

fendant. In its answer defendant had alleged that the written contract of employment had been "cancelled and terminated as of November 14, 1943, by an agreement in writing between plaintiff and defendant." That "agreement" was attached to the answer as an exhibit, and was introduced into evidence during the trial. It is the letter of resignation signed by plaintiff and addressed to Himes and is dated October 14, 1943. The letter first states that plaintiff is giving the 30 day required notice of termination, and then states:

"It is understood that I will be paid my commission on all billings up to and including the 14th day of November and that a complete settlement including salary and receipt for income tax withheld will be affected as of that date.

"Your signature at the bottom of this letter will constitute our agreement in the above." It is marked "accepted" with Himes' signature, dated October 14, 1943. It is urged that this letter amounted to a settlement, and that under it plaintiff agreed that he was only entitled to commissions on billings to customers where the billings were mailed prior to November 14, 1943. The trial court made no finding as to the proper interpretation of this letter because the trial court found that:

"* * * said letter was delivered by plaintiff to L. John Himes, the president of defendant company, to be retained for counter-signature in case such action became necessary to enable plaintiff to obtain a manpower clearance under wartime regulations then in force; that Himes received the original and copy of said letter in accordance with an express understanding to that effect; and that at the date of delivery thereof, plaintiff notified defendant of his intention to claim further commissions, based upon moneys thereafter received by defendant upon aircraft contracts accepted as orders, during the course of plaintiff's employment.

"The court further finds that on or about November 1, 1943, plaintiff ascertained that no manpower clearance would be necessary to enable him to seek other employment, and that he then and there advised said Himes to that effect, and notified the latter that the provisions of said letter were revoked."

The court also found that after plaintiff delivered the letter to Himes he did not receive it back from Himes marked "accepted" until November 15, 1943, which was "after defendant had been notified by plaintiff of the revocation thereof." Thus, the trial court did not find on the alleged defense because the court found, by necessary implication, that the offer of October 14, 1943, if it be deemed an offer, was revoked before it was accepted. Defendant urges that there is no evidence to support such a finding, and quotes certain evidence on the issue which certainly does not support the finding. Defendant has apparently completely overlooked very positive testimony that supports the finding. Plaintiff testified that the letter of October 14th was written in order that he would not be "frozen" into his position by reason of certain wartime regulations, but that he learned prior to October 30th that such regulations did not apply to him; that he thereupon telephoned to Himes and told him the regulations were inapplicable to him and that he was "withdrawing" the letter of October 14th; that he had not then received back the countersigned letter; that when he delivered it to Himes he was told by Himes that he "would not act on it or accept it"; that when he told Himes that he was withdrawing the letter, Himes told him that he would see him two days later, but that Himes failed to keep the appointment; that on November 12th he next saw Himes and was then told by him that Himes had "accepted" the resignation, and that a few days later the countersigned letter was delivered to him. (R.T. pp. 81-83.) Thus, even if the letter be construed as an offer to settle the controversy over commissions (and we gravely doubt whether it can or should be so construed), it is apparent that the quoted finding is amply supported, and that by necessary implication the "offer" was revoked before it was "accepted."

The judgment appealed from is affirmed.

WARD and BRAY, JJ., concur.

88 Cal.App.2d 47

McCOY v. YELLOW CAB CO. OF CALIFORNIA et al.

Civ. 16342.

District Court of Appeal, Second District, Division 1, California.

Oct. 18, 1948.

Rehearing Denied Dec. 16, 1948.

1. Appeal and error ⚿977(3)

The granting of motion for new trial rests within trial judge's discretion to such extent that appellate court will not interfere, unless abuse of discretion clearly appears.

2. Appeal and error ⚿854(6), 933(1)

On appeal from order granting motion for new trial, all presumptions are in favor of order, which will be affirmed, if sustainable on any ground.

3. New trial ⚿71

In considering motion for new trial, trial court is not bound by conflict in evidence, and it does not abuse its discretion in granting motion when there is any evidence supporting judgment for moving party.

4. New trial ⚿71

When only conflict in evidence arises from opposing inferences deducible from uncontradicted probative facts, trial court may draw inferences opposed to those accepted by jury and thus resolve conflicting inferences in favor of party moving for new trial.

5. Appeal and error ⚿979(2)

An appellate court will reverse order granting motion for new trial only where, as matter of law, there is no substantial evidence to support judgment contrary to that rendered.

6. Appeal and error ⚿979(2)

Where there was evidence tending to support verdict for defendants, order granting them new trial on ground of insufficiency of evidence to support jury's verdict against them will not be disturbed on appeal.

7. New trial ⚿70

In ruling on motion for new trial, trial judge must review evidence and pass on its sufficiency, and if he concludes that jury's verdict resulted in miscarriage of justice, his duty is to grant motion.

8. Appeal and error ⚿979(2)

A trial court's action in granting new trial on ground of insufficiency of evidence to support jury's verdict is so far within its discretion that ruling is not reviewable, if there is any appreciable conflict in evidence.

9. Appeal and error ⚿979(2)

The trial court's declaration in order granting defendants a new trial that jury's verdict for plaintiff was excessive does not necessarily mean that trial court was of opinion that verdict was result of passion or prejudice, but is susceptible of interpretation as showing that trial court was not satisfied that jury's finding as to extent of damage suffered by plaintiff was supported by evidence.

10. New trial ⚿71

On defendants' motion for new trial on ground of insufficiency of evidence to support jury's verdict for plaintiff, trial court's province is to weigh conflicting evidence and inferences on all issues, including question of extent of plaintiff's injuries, as such ground extends to quantum of injuries, as well as issues relating to defendants' liability.

11. Appeal and error ⚿854(6)

The trial court's statement on ground of its order granting new trial does not preclude reviewing court from considering entire record on appeal from such order, but entire record must be considered to discover whether there is any error justifying order, and if so, it will be sustained, though other grounds urged on motion were not specified in order.

12. Appeal and error ⚿854(6)

Where insufficiency of evidence to justify jury's verdict for plaintiff is specified in order granting defendants' motion for new trial as ground therefor, reviewing court may conclude that trial court was justified in granting motion on ground that verdict was excessive, if record warrants such conclusion. Code Civ.Proc., § 657.

13. New trial ⚿68

In action for injuries to passenger in defendant's taxicab as result of collision with co-defendant's automobile at street intersection, granting of defendants' motions for new trials on questions of both liability and damages, after jury's verdict for plaintiff, was not abuse of discretion under evidence.

◆

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Elsie L. McCoy against the Yellow Cab Company of California, a corporation and others, for personal injuries sustained in a collision between a taxicab, in which plaintiff was a passenger, and an automobile. From an order granting defendants' motions for new trials after a jury's verdict for plaintiff, plaintiff appeals.

Affirmed.

Bodkin, Breslin & Luddy, of Los Angeles, for appellant.

Harry B. Ellison and James L. Ronnow, both of Los Angeles, for respondents Cab Co. and Sitzer.

Parker, Stanbury & Reese and Harry D. Parker, all of Los Angeles, for respondents Furlong.

YORK, Presiding Justice.

This is an appeal from an order granting the separate motions for new trial of defendants Yellow Cab Company and Allen Joseph Sitzer, the cab driver; and Clarence Furlong and Rose G. Furlong, after the jury had returned a verdict against them in the sum of $20,000 on account of personal injuries sustained by plaintiff on April 28, 1946, when a yellow cab in which she was a passenger collided with the automobile of the Furlongs.

In granting such motions the trial court commented as follows:

"The motion will be granted as to defendants Furlong. I remember the evidence very well and as to them, I do not think there was any evidence to support a verdict against them. Mr. Furlong sat a considerable time waiting to cross Beverly Boulevard; finally an opening presented itself. He was proceeding very slowly, was more than half way across the street. In other words, he was past the center line dividing the northern and southern half of Beverly; and he was struck by this taxicab. He had the right of way and he had no reason to believe he would be deprived of that right of way. I cannot see any merit to it. The motion is granted as to Furlong.

"As to the Yellow Cab Company, the only question here, it seems to me, is the amount of damages.

"This plaintiff was a chiropractor and she had the evidence of one or two chiropractors and also one or two real doctors, and the evidence of the doctors who testified in her favor was dependent entirely upon her own statements, upon the subjective symptoms that she related to them.

"The doctors who examined her found nothing objective, nothing that they could put their finger on to find out what was wrong with her. The impression I received during the trial was she was seeking to pad her injuries to the greatest possible extent.

"Of course, these doctors who testified had a right to believe what she gave as a history of the case. I think they were misled by that history, and I think the woman was not hurt at all.

"The motion will be granted for a new trial as to defendant Yellow Cab Company, unless the plaintiff will agree to reduce the amount of the judgment based upon the verdict from twenty thousand dollars to three thousand dollars. Otherwise, the motion is granted.

"Counsel for plaintiff may have five (5) days from and after today to announce their willingness either to accept or their desire to reject the matter of reduction of the amount.

"Mr. Parker: And, your Honor, I assume that order will be on the insufficiency of the evidence to support the verdict?

"The Court: Yes, it would have to be, because the evidence is insufficient to support the verdict as to twenty thousand dollars. I think the jury just went hog wild with somebody else's money.

"Mr. Bodkin: Is the new trial granted as to the question of liability?

"The Court: As to all questions.

"Mr. Bodkin: The plaintiff will not accept the reduction.

"The Court: Then the motion will be granted as to the Yellow Cab Company on the grounds of insufficiency of the evidence and excessive damages."

It is here urged by appellant that the trial court was guilty of an abuse of discretion when it granted the new trials.

The circumstances out of which the collision occurred are as follows: Clarence Furlong testified that driving a Buick sedan on Sunday evening, April 28, 1946, southerly on Beechwood Drive, he approached its intersection with Beverly Boulevard, where his passage was blocked by a double line of westbound traffic which was stalled by reason of a traffic light as Larchmont; at the stop sign on Beachwood he waited "probably three or four minutes"; that traveling very slowly he edged into the first line of cars on Beverly when someone in that line moved up a bit; that one car in the second line of traffic backed up a little to permit him to go on through; that he did not have to wait for the second line to open up; that as he came out of the second line near the center of Beverly he first saw the Yellow Cab; that it was right in front of him; that as he crossed the street, he saw the reflection of lights coming from the west; "the light of an approaching headlight, whatever it might be" which appeared to be about seventy feet to the west; that he continued straight ahead "at a very slow speed thinking that the other vehicle would let me go on by." That he did not sound his horn or use his brake just prior to the collision.

Respondent Sitzer, the driver of the Yellow cab, testified that on April 28, 1946, with appellant as a passenger, he was driving east on Beverly Boulevard in the traffic lane next to the double center line; that as he approached Beechwood Drive he observed no opening in the west-bound traffic which was stalled at the intersection; that as he crossed the westerly curb line of Beechwood, he first saw the headlights of the Furlong car coming from behind two stalled cars; that he was driving approximately 25 miles per hour and the Furlong car was traveling at a speed of 10 to 15 miles per hour; that he was about 15 feet from the Furlong car when he first observed it; that he heard his brakes screech and skidded about 8 feet after the impact with the Furlong car; that when the two cars came to rest after the collision "the left front fender of the cab and the right front fender of the other car involved were locked together"; also that the "divider glass immediately behind the driver's seat (of the Yellow cab) was shattered"; that he got out of the cab "opened the rear door of the passenger compartment to find out if the passenger had been injured"; that he found her (appellant) seated on the floor with part of the seat down over her and her head in the vicinity of the shattered glass; that appellant appeared dazed and excited; that he asked her if she was hurt and she replied that she didn't think so.

Appellant, a doctor of chiropractic, testified that at the time of the collision she was a passenger in the Yellow cab and was on her way from Hollywood to the Good Samaritan Hospital to see a friend and patient; that she "was thrown with great force against the glass behind the driver, shattering the glass; and then with a terrific recoil in the bottom of the cab; and the large seat was thrown over my abdomen and the jump seat over my legs. * * * I was dazed"; that Mr. Clark, representative of the Cab Company, took her to the Hollywood Receiving Hospital where she was examined; that she had blood on her left cheek, her lips were swollen and her legs bruised; that she did not believe at the time that she was seriously injured; that Mr. Clark drove her to the Good Samaritan Hospital, where she became ill, was in a dazed condition and felt nauseated; that Mr. Clark then took her home; that her brother who lived with her was not at home; that she felt dazed and was ill during the night; that she was not able to sleep and was not able to treat her patients on the following day; that the next day she was taken to the office of Dr. Cunnane, who examined her and had x-rays taken of her neck, head and shoulder; that upon her return home she collapsed and from that time on became very ill; that the entire left side of her head was badly bruised and there was quite a bump on the upper half, above the eye; that she had severe pain in the back of the head, behind her left ear and down the shoulder and in the mid-dorsal region and suffered from nausea; that an agent of the Cab Company called and suggested sending the company's doctor to see her; that evening Dr. Anderson of the Cab Company called; that he said she was suffering from shock and concussion and told her to stay in bed for two weeks and keep an ice pack on her head constantly; that at that time she had a severe pain in her mid-dorsal region and through her shoulder and ear; that this pain started the second day after the accident and kept on continuously. Dr. Anderson gave her sedatives to relieve the pain and induce sleep; that she followed his advice; the nausea and vomiting continued and there was pain and pressure behind her right ear; that during the time that Dr. Anderson was attending her she had no other M.D., but that Dr. Eacrett, a chiropractor, called to see her and gave her treatments; he tried to relieve the tension in her shoulder which she was unable to move; that before the accident she had had no trouble with her right arm or right shoulder and all the time she practiced in Los Angeles she had been able to do sacro-iliac work, which required strength; that until this injury she had sufficient strength to do that work and was able to handle big as well as small men.

Appellant further testified that she was also treated for 5 months by Dr. Thomas Glenn, another M.D., to whom she went the last of May, 1946; that he examined her and had x-rays of her abdomen taken by Dr. Davis at St. Vincent's Hospital; that after examining the x-rays, Dr. Glenn taped appellant's abdomen and upper back, which relieved the pain whereupon the nausea and vomiting discontinued. Meanwhile, appellant with the permission of Dr. Anderson took a trip to Iowa to visit her sister, who was also a chiopractor, it being Dr. Anderson's opinion that it would benefit appellant's nerves to get away; that her nerves were very bad at that time, she was having nightmares and suffered pain in her shoulder, head and neck; that she was under sedatives and her brother bought her railroad ticket and took her to the station in a taxi cab; that her sister met her in Iowa and put her to bed and treated her for two weeks, when she returned to California by train; that although the pain in appellant's ear continued, she felt better and believed she was improving; that she arrived home the last of June and attempted to treat a patient on June 28th but was unable to complete the treatment and was in bed for several days. That about July 1st she was able to treat some patients; that she was ill when she treated the first patient but afterwards was better; that first she tried two patients and then three; that before her injury she treated on an average six to eight patients a day, devoting an hour to each one, working regularly five days a week and in the first three or four months of 1946 she averaged $550 per month; that her business was done on a cash basis and she had a number of regular patients, consisting of secretaries, executives, actors, actresses and judges. She further stated that since her return from Iowa she had been able to work some days and others not; that she had not been able to treat all the patients who came to her, the maximum number being four a day; that sometimes when they came she was unable to treat them because of her illness, and lost patients as a result; that during the balance of 1946 her income was about one-half of what it was the first three months of 1946; that since her return from Iowa the pain in her head had been very severe, with continuous pressure behind the ear and at the base of the brain. Further, she consulted Dr. Adelstein, a brain specialist, and also Dr. John B. Doyle, who examined her for the first time in October, 1946; that the pain in her back was aggravated when she did heavy work, consequently she was unable to do much sacro-iliac work; that when she did such work she became very sick.

Appellant also testified that following the injury she had a lack of balance, pitched forward and to the right, was quite nervous and seemed to be stuttering much of the time for two weeks; that she eventually recovered her balance and speech. At the time of the trial herein, she still had pressure back of her ear and her right shoulder was very painful when she tried to move it; there was a click and the ligaments gave way entirely; also she had a bad pain in the mid-dorsal region; however, at times she felt she was getting better.

Dr. Budge, who examined appellant at the Hollywood Receiving Hospital at the time of the collision, testified that she was able to answer questions intelligently, and his examination revealed that she had a half inch scratch on the left side of her face, contusion of the left frontal area and of right forearm and sprain of right cervical area; that there was no record of any brain injury or evidence of concussion; that appellant was conscious at all times and there was no evidence of nausea or vomiting; that the record showed that appellant was in the hospital for six minutes on the night of her injury.

Dr. Cunnane, who examined appellant the day following the injury, testified he found "swelling and contusion of the left frontal region of the head with slight discoloring, contusion and swelling and discoloration of the left upper lip, contusion, swelling and limited motion of the right upper posterior of the neck, contusion, swelling and limited motion of the left arm in the intra-verticular region. Contusion and swelling and discoloration of the right forearm and slight discoloration of the right calf, and the right shoulder was painful on motion and there was some limitation of motion and crepitus was felt in elevation. * * * She was extremely nervous. I didn't have a record of her having been knocked completely unconscious at the time but she could have suffered a concussion without complete unconsciousness". This doctor examined her again on May 22, 1946 and found that "her scalp was sore to the touch. * * * her back showed a slight curvature to the left opposite the 11th dorsal vertebra; the muscles of the back were rigid and there were a few fibrous lumps in the posterior neck." That the next time he saw the patient was June 25th, when she complained of "pain behind the left ear and down the shoulder to her fingers. This was aggravated by her work. She said she was nervous and frequently nauseated. She stated she felt very good until she started back to work but couldn't carry on her work and that it caused her severe pain from her neck to her shoulder and down the arm." On cross-examination, this doctor testified that when he saw appellant for the last time on June 25, 1946, he found no objective evidence of injury or damage at that time.

Dr. Davis who took x-rays of appellant on the day following the accident, testified that one of them showed a drop in position of the kidney a little over six centimeteres, that is a little over two inches, but he had no knowledge how long this condition had existed.

Dr. Thomas B. Glenn testified that appellant consulted him on May 28, 1946; that he took her history in detail and then started to study her from head to foot; that she complained of a pain in the shoulder, and in the epigastric region and complained of a lump in her abdomen, on the right side and below where the kidney should be; that he felt the lump and determined it was the kidney; that he examined the x-rays taken by Dr. Davis one of which showed the kidney "down in an abnormal position, at little over six centimeteres"; that he found the liver had dropped about two fingers below the normal limit, that is in a prone position; that the patient complained of nausea, vomiting; that he used adhesive tape and lifted the organs into place and strapped her up, which immediately relieved that condition; that she had a pain in the ear, there was a scab in the outer right ear "so that she had some injury there * * * which left a scab. * * * it was not recent; the muscles of the right arm were very tender and she had difficulty in raising the right arm * * * and the neck has been tender every time I have seen her." This witness gave as his opinion that the collision could have caused the displacement of the kidneys and liver; also that there was a causal connection between the pains behind the appellant's ear and headaches and the collision.

Dr. John B. Doyle, an M. D., testified that he first examined appellant at his office October 16, 1946, when he took a complete history, did a general physical examination, an apthalmo-scopic examination and a neurology examination, and concluded therefrom, "assuming the history she gave me is true, to me it would appear that as a result of the accident on April 28, 1946, the patient sustained a mild concussion of the brain, involving the soft tissue of the scalp and thorax or chest. The symptoms referable to these injuries are gradually diminishing or have disappeared. The symptoms which have developed more recently are due to mental causes associated with anxiety about her condition, her future earning power and the possibility that she may be developing some progressive pathology, that is some progressive disease process. The last time I saw Dr. McCoy was on April 28th of this year, at which time I just interviewed her. I think that her tension was as marked or more marked than it was in October, and her depression of spirits, her melancholic trend was a little more marked."

Dr. Elmer T. Anderson, a medical doctor for the Yellow Cab Co., testified that he first saw appellant at her apartment on May 2, 1946, having been requested to call upon her by the company. That Dr. McCoy was lying on a sofa and he took her blood pressure and that there was nothing abnormal or subnormal in the blood pressure which he found; that she was complaining of pain throughout the left side of the forehead and muscle and ligament soreness throughout her shoulders, legs and knees; of dizziness when standing and some nausea; that there was some swelling and redness of the skin on the left arm and left side of the forehead, but no lacerations were seen; that he did not recall any injury to the mouth; that the bump on the head was a minor contusion; that altogether he saw appellant four times: May 2, 3, 7, and 15, 1946; that he had a conversation with appellant after May 15th, in which she stated she was planning a trip to Iowa to visit her sister and that she would communicate with him upon her return around the first of June but that he received no further communication from her. He further stated he had no memory of appellant complaining of suffering any discomfort in the region of the kidneys during the time he saw her from May 2 to 15; that his diagnosis of the case was a mild contusion of the soft tissues over the left side of the forehead and left eyebrow with subjective complaint of pain and vertigo, suggesting a mild cerebral concussion; that he estimated a three week period of total disability and in addition temporary partial disability of three weeks, but that he saw nothing that would suggest any permanent disability. During the period that he treated her, this witness stated he observed no evidence of nervousness except that ordinarily induced by such an accident; and found no evidence of permanent injury or damage to the nervous system.

Dr. F. Earl Brown, a medical doctor, testified he made an examination of appellant on March 7, 1947, and made a written report of his findings to the respondent Yellow Cab Company. Briefly, the witness stated he found no evidence of injury on the top of the head; that the left side of the face had returned to normal; there was no scar there; no evidence of injury to the mouth or lips; the nose was intact; the pupils were equal, that is round and normal, and there was no nystagmus. That test was made because the patient had mentioned having received a concussion of the brain at the time of the accident. That the eardrums were normal and there was no variation in hearing; the scalp moved freely and was not indurated; the head moved normally in all directions; no spastic muscles were indicated, they all functioned fully and displayed no condition other than normal; the spine was in alignment and therefore not injured. She had mentioned straining the neck. In the shoulders she had mentioned a condition over the left clavicle or collar bone and that apparently had cleared when he saw her. There was no evidence of injury there. She also mentioned a condition of the right shoulder which had caused her to have pain down the arm to the fingers; the arm at the right shoulder was capable of full flexion. She complained of a click in the right shoulder and on motion he could not get a click. He did get a friction rub at the inner end of the right collar bone which was not the result of injury. The pain in the arm was purely a subjective symptom;

she had full function in all the fingers and they performed the normal function of the fingers. So with that observation there was no remaining evidence of injury to the median nerve. The evidence in regard to that was purely subjective, simply that the patient complained of it and there was no objective evidence to account for it. She complained of a contusion or bruising in the back between the shoulder blades. Here again there were no spastic muscles. They were both functioning and back bending was in normal limits. The chest extended normally and equally on the two sides and if there had been any injury there at any time the evidence had disappeared and it was not there when he examined her. In the chest the heart and lungs were normal; the blood pressure normal for a person of her age. The heart action was normal. Her lungs sounds were clear and there were no rales and no friction signs and they seemed to be normal.

In the abdomen there had been a history of ptosis of the liver or kidney. They were not enlarged. The right liver could not be felt on inspiration. It did not come down far enough to feel it between the two ends of the side of the abdomen. Otherwise the abdomen was within the normal. The lower extremities functioned fully. There was no evidence of injury there. All of the nerve tests were within the normal except for a slight tremor in the extended arms and fingers. In the Romberg test she was perfectly normal. Coordination was normal on the two sides. The reflexes were present and active and there were no pathological reflexes. Her gait was undisturbed. The patient appeared to be normal and active and quite pleasant during the whole examination and manifested no evidence of any physical disability.

This witness explained that the Romberg test is given primarily to determine whether there is any abnormal condition either in the brain or the spinal cord. It is made by having the patient stand with heels and toes together and standing erect with closed eyes. If the test is positive the patient will sway from side to side; if it is negative, the patient will stand still.

It was this doctor's opinion that if appellant had had any injuries at all that she had fully recovered from them.

On the question of the propriety of granting a motion for a new trial, the supreme court in Ballard v. Pac. Greyhound Lines, 28 Cal.2d 357, 358, 170 P.2d 465, 467, stated:

[1-5] "This court has recently reiterated the settled rule that the granting of a motion for a new trial rests within the discretion of the trial judge to such an extent that an appellate court will not interfere unless an abuse of discretion clearly appears. All presumptions are in favor of the order and it will be affirmed if it is sustainable on any ground. Mazzotta v. Los Angeles Ry. Corp., 25 Cal.2d 165, 169, 153 P.2d 338, and cases cited. The trial court in considering a motion for a new trial is not bound by a conflict in the evidence, and has not abused its discretion when there is any evidence which would support a judgment in favor of the moving party. In re Estate of Green, 25 Cal. 2d 535, 542, 154 P.2d 692; Hames v. Rust, 14 Cal.2d 119, 124, 92 P.2d 1010. The only conflict may be the opposing inferences deducible from uncontradicted probative facts. In such case the trial court may draw inferences opposed to those accepted by the jury and may thus resolve the conflicting inferences in favor of the moving party for 'It is only where it can be said as a matter of law that there is no substantial evidence to support a contrary judgment that an appellate court will reverse the order of the trial court.' Brooks v. Metropolitan Life Ins. Co., 27 Cal.2d 305, 307, 163 P.2d 689, 690; Malloway v. Hughes, 125 Cal.App. 573, 580, 13 P.2d 1062."

[6] The motion for new trial was granted as to the respondents Furlong on the ground of insufficiency of the evidence to support a verdict against them. An examination of the record as to their participation in the collision, briefly shown in the foregoing resume, discloses evidence to the effect that the Furlong car was half way through the intersection when the Yellow cab reached the westerly curb line of Beechwood as it entered the intersection. Since this would tend to support a verdict

in favor of the respondents Furlong, the order granting a new trial will not be disturbed. Ballard v. Pacific Greyhound Lines, supra.

[7] As stated in Hays v. Service Tank Lines, Inc., 74 Cal.App.2d 577, 581, 169 P.2d 249, 251: "In ruling upon a motion for a new trial a trial judge must review the evidence and pass upon its sufficiency, and if he concludes that the verdict has resulted in a miscarriage of justice it is his duty to grant the motion for a new trial. Grover v. Sharp & Fellows etc., Co., 66 Cal.App.2d 736, 737, 153 P.2d 83."

As to respondents Yellow Cab Company and Sitzer, the motion was granted on the grounds (1) that the evidence is insufficient to support the verdict for $20,000 and (2) of excessive damages.

In this connection appellant argues that the statement of the trial court that a new trial would be granted "unless plaintiff within five days consented to a reduction of the verdict from twenty thousand dollars to three thousand dollars, implies a finding that the cab company and its driver were liable."

Assuming that appellant's argument in this regard is correct, it would not constitute sufficient ground upon which to base a reversal of the order.

The record in this case is voluminous. However, the very brief outline of evidence adduced at the trial which is above recited clearly discloses a conflict on the questions of (1) the extent of the injuries suffered by appellant, and (2) whether by reason of the injuries sustained, she has become permanently disabled in the practice of her profession as a chiropractor.

[8] "The action of the trial court in granting a new trial upon the ground of insufficiency of evidence is so far a matter within its discretion that if there is any appreciable conflict in the evidence, its ruling is not open to review." 20 Cal.Jur. 112, sec. 71, and cases there cited.

Notwithstanding the many facetious, but harmless, remarks made by the trial judge during the trial and at the time the instant motions were argued, the record establishes the fact that he believed the evidence presented was insufficient to support a verdict against respondents in the sum of $20,000 and that such verdict was excessive.

[9] In this connection, a statement made by the court in Koyer v. McComber, 12 Cal.2d 175, 182, 82 P.2d 941, 945, is applicable: "* * * where a trial court grants a new trial upon the ground that the verdict is excessive, the declaration of the court that it is excessive does not necessarily mean that the trial court was of the opinion that the verdict was the result of passion or prejudice. It is susceptible of the interpretation that the trial court was not satisfied that the finding of the jury as to the extent of damage suffered by the plaintiff was supported by the evidence adduced upon that phase of the case. Meinberg v. Jordan, 29 Cal.App. 760, 157 P. 1005, 1007."

[10] In Ballard v. Pac. Greyhound Lines, supra, 28 Cal.2d 357, 361, 170 P.2d 465, the following rule is enunciated:

"It was the province of the trial court on the motion to weigh the conflicting evidence and inferences on all the issues, including the question of the extent of the plaintiff's injuries, and to judge the credibility of the witnesses. The ground of insufficiency of the evidence to justify the verdict extends to the quantum of the injuries, as well as to the issues relating to the defendant's liability. See Phillips v. Powell, supra, 210 Cal. 39, 42, 290 P. 441. It is necessarily inclusive, and the specification by the court of the ground of insufficiency indicates an examination into the evidence on all of the factual issues.

[11, 12] "It has long been the settled rule in this state that the statement of the ground of the order granting a new trial does not preclude the reviewing court from considering the entire record on the appeal from the order. The review is not restricted to a consideration of the ground mentioned in the order. In fact it is the duty of the court on appeal to consider the entire record upon which the order was based to discover whether there is any error which would have justified the trial court in making the order, and if so the order will be sustained although the

grounds urged on the motion (with the exception of the ground of insufficiency of the evidence) were not specified in the order. Cahill v. E. B. & A. L. Stone Co., 167 Cal. 126, 129, 138 P. 712; Weisser v. Southern Pacific Ry. Co., 148 Cal. 426, 428, 83 P. 439, 7 Ann.Cas. [636], 639; Kauffman v. Maier, 94 Cal. 269, 29 P. 481, 18 L.R.A. 124; Scott v. Renz, 67 Cal.App.2d 428, 432, 154 P.2d 738. Since 1919 the reviewing court may not consider the ground of insufficiency of the evidence to justify the verdict unless it is stated in the order. Code Civ.Proc. § 657. And where that ground is specified in the order there is no doubt that the reviewing court may conclude that the trial court was justified in granting the motion on the ground that the verdict was excessive, if the record warrants that conclusion. Phillips v. Powell, supra, 210 Cal. 39, 42, 290 P. 441."

[13] In the circumstances presented by the record herein, there was no abuse of discretion by the court in the granting of the motions.

The order appealed from is affirmed.

DORAN and WHITE, JJ., concur.

Rehearing denied; CARTER, J., dissenting.

88 Cal.App.2d 34

PEOPLE v. BEAN et al.

Cr. 2088.

District Court of Appeal, Third District, California.

Oct. 15, 1948.

Hearing Denied Nov. 9, 1948.

1. Kidnapping 🔑1

Whatever may have been the original motive of kidnapping, if the kidnapper commits extortion or robbery during the kidnapping, he holds or detains his victim to commit extortion or robbery within statute providing that every person who seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps, or carries away any individual by any means whatsoever with intent to hold or detain or who holds or detains such individual for ransom, reward, or to commit extortion or robbery or who aids or abets any such act is guilty of a felony. Pen.Code, § 209.

2. Kidnapping 🔑4

Where the information alleged that defendants wilfully, unlawfully and feloniously and in violation of statute seized, kidnapped and carried away a named individual by force and violence and did hold and detain said individual to commit robbery of said individual, and said kidnapping and violation of statute did proximately cause the individual to suffer bodily harm, information was sufficient though there was no allegation that kidnapping was done with an intent. Pen.Code, §§ 209, 958, 960; Const. art. 6, § 4½.

3. Criminal law 🔑1086(14)

Where the record did not show that defendants asked for argument or made any objection in the lower court to the course there pursued, defendant's assertion that they were deprived of an opportunity to argue their demurrers would not be considered upon appeal.

4. Criminal law 🔑798½

Where in prosecution for kidnapping to commit robbery, jury were given five forms of verdict, first permitted jury in event that it found defendant guilty to fix punishment at death, second permitted it to fix punishment at life imprisonment without possibility of parole, third omitted fixing of any penalty by the jury, and fourth permitted a verdict for a lesser offense, and evidence was ample to sustain any one of the verdicts submitted, submission of all forms was proper, even though four of them were guilty forms. Pen.Code, §§ 207, 209.

5. Criminal law 🔑798½

It was proper practice to provide jury with separate and specific forms of verdict providing for every legal conclusion at which they might arrive.

6. Criminal law 🔑1037(1, 2)

Where defendants contended that conduct of the district attorney was prejudicial but no objection was made by defendants' counsel nor was any request made to instruct jury to disregard it, objection could not be urged for the first time upon appeal.

7. Kidnapping ⚷1

Where a kidnapping takes place after the actual perpetration of a robbery, such kidnapping may nevertheless be a kidnapping for the purpose of robbery. Pen.Code, § 209.

8. Kidnapping ⚷5

Evidence sustained conviction for kidnapping to commit robbery. Pen.Code, § 209.

9. Criminal law ⚷1175

Where defendant was convicted of two offenses and contended one offense was included in the other but sentences ran concurrently, error, if any, was not prejudicial. Pen.Code, § 487; Vehicle Code, § 503.

10. Criminal law ⚷1144(15)

In the absence of anything in the record to indicate to the contrary, the court will assume that jury acted without passion or prejudice.

◆

Appeal from Superior Court, Humboldt County; Delos A. Mace, Judge.

Darrell Bean, Vernon Flachsman and Richard J. Maxey were convicted of kidnapping an individual to commit robbery wherein he suffered bodily harm, taking $20 from the same individual without his consent and against his will by means of force and putting him in fear, taking an automobile without consent of the owner, and stealing an automobile, and they appeal.

Affirmed.

Chester Monette and Stanley Woodman, both of Eureka, for appellants.

Fred N. Howser, Atty. Gen. and Doris H. Maier, Deputy Atty. Gen., for respondent.

ADAMS, Presiding Justice.

In an information filed in the Superior Court of Humboldt County defendants were jointly charged in five counts. The first count charged them with a violation of section 209 of the Penal Code. The second count charged a violation of section 217 of the Penal Code, to wit, an assault upon Eugene Shephard with intent to murder him. The third count alleged that defendants took $20 from Shephard without his consent and against his will and by means of force and putting him in fear. The fourth count charged a violation of section 503 of the Vehicle Code; and count five charged a violation of section 487 of the Penal code, to wit, the stealing of the automobile referred to in count four.

In the proceedings following the arrest of defendants, Bean was represented by counsel of his own choosing, while the court appointed counsel for the other two defendants. Bean and Maxey interposed demurrers to the information which were overruled, and motions to dismiss which were denied. Flachsman filed a motion to strike count two which motion was denied. All defendants were found guilty on counts one, three, four and five, and not guilty on count two. All made motions for new trials, and Bean and Maxey made motions in arrest of judgment. All motions were denied.

Defendants were sentenced to life imprisonment on count one, without possibility of parole as provided in the verdicts on this count. Sentences on counts three, four and five were ordered to run concurrently with the sentence on count one.

All three defendants have appealed. Appellants Bean and Maxey have joined in a single brief, while Flachsman has filed a separate one. Bean and Maxey urge as grounds for reversal that the trial court erred in overruling their demurrers, and in denying motions in arrest of judgment; that it erred in giving to the jury certain forms of verdicts in respect to count one; that it also erred in giving certain instructions; and that the District Attorney was guilty of prejudicial misconduct. Appellant Flachsman urges that the evidence does not show kidnaping with intent to commit robbery; that a violation of section 503 of the Vehicle Code charged in count four is included in the crime of grand theft charged in count five; and that his conviction on count one was the result of passion and prejudice on the part of the jury.

The gist of the argument of Bean and Maxey, that the trial court erred in overruling their demurrers, is that count one is fatally defective because it does not allege that the kidnaping was done with an "intent". Section 209 of the Penal Code provides that: "Every person who seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away any individual by any means whatsoever with intent to hold or detain, *or* who holds *or* detains, such individual for ransom, reward *or to commit extortion or robbery* * * * or who aids or abets any such act, is guilty of a felony and upon conviction thereof shall suffer death or shall be punished by imprisonment in the State prison for life without possibility of parole, at the discretion of the jury trying the same, in cases in which the person or persons subjected to such kidnaping suffers or suffer bodily harm * * *." (Italics added.)

The information here alleges that the defendants did "then and there wilfully, unlawfully and feloniously, and in violation of Section 209 of the Penal Code of the State of California, seize, kidnap and carry away one Eugene Shephard, then and there a human being, by force and violence, and did hold and detain said Eugene Shephard to commit Robbery of said Eugene Shephard, which said Kidnapping and violation of said Section 209 of said Penal Code did proximately cause said Eugene Shephard, so subjected thereto, to suffer bodily harm."

[1] Appellants are hypercritical in this behalf, and also ignore the portions of the statute above underlined. In People v. Brown, 29 Cal.2d 555, 558, 176 P.2d 929, 931, the court said that "whatever may have been the original motive of the kidnaping, if the kidnaper commits extortion or robbery during the kidnaping, he 'holds or detains' his victim 'to commit extortion or robbery' within the meaning of section 209." Also see People v. Dorman, 28 Cal.2d 846, 852, 853, 172 P.2d 686.

[2] Appellants cite no authority supporting their contention that the first count fails to state an offense, nor do they assert that they were misled to their injury, or that any substantial right of theirs was prejudiced by reason of the defect, if it be such. Section 958 of the Penal Code provides that words used in a statute to define a public offense need not be strictly pursued in the information, but other words conveying the same meaning may be used; and section 960 of said code provides that no information is insufficient nor can it be affected by reason of any defect or imperfection in matter of form which does not prejudice a substantial right of the defendant upon the merits. In view of those sections and the provisions of art. VI, section 4½, of the Constitution, the alleged insufficiency of the information does not justify a reversal of the judgment.

[3] Appellants Bean and Maxey also say that they were deprived of an opportunity to argue their demurrers; but the record does not show that they asked for argument or made, in the lower court, any objection to the course there pursued; and it is well established that objections not made in a trial court will not be considered upon appeal. 8 Cal.Jur., sec. 520, p. 506; MacKenzie v. Angle, 82 Cal.App.2d 254, 186 P.2d 30.

[4, 5] The second alleged error is that the trial court erred in giving to the jury five forms of verdict on count one, because four of them were "guilty forms," which caused the jury to be confused, biased and prejudiced. The first of these forms permitted the jury, in the event that it found the defendants guilty, to fix the punishment at death; the second one permitted it to fix the punishment at life imprisonment without possibility of parole; the third omitted the fixing of any penalty by the jury; and the fourth permitted a verdict under the lesser offense defined by section 207 of the Penal Code. All of these forms were proper since, under the statute, it was discretionary with the jury whether defendants suffer death or life imprisonment without possibility of parole. There is no evidence that the jury was confused, biased or prejudiced. The evidence was ample to sustain any one of the verdicts submitted. The court instructed the jury as to the purpose for which such separate forms were given to them, and it was proper practice for it to see that they were provided with separate and specific forms of verdict pro-

viding for every legal conclusion at which they might arrive. See People v. Horiuchi, 114 Cal.App. 415, 436, 300 P. 457; People v. Truesdell, 124 Cal.App. 360, 366, 12 P. 2d 476; People v. Pratt, 67 Cal.App. 606, 608, 228 P. 47.

As for the instructions which Bean and Maxey assert were erroneous, their argument is based upon the same proposition urged regarding their demurrers—that they were not applicable because the information did not show a violation of section 209, supra. Two of the instructions were taken from California Jury Instructions in criminal cases, Nos. 658 and 659, and find support in the cases therein cited as authority therefor. The third is based upon the law stated in People v. Kristy, 4 Cal.2d 504, 507, 508, 50 P.2d 798, and is applicable to the facts of this case. Appellants cite no authority in support of their attack on the given instructions, and we find no merit therein.

[6] The final contention of these appellants, that there was prejudicial misconduct on the part of the district attorney, first in that he intimated, by asking, after the court had ordered that witnesses be excluded from the court room, that certain deputy sheriffs who were present as witnesses remain reasonably close to the court room, as this imputed a dangerous character to the defendants and served to prejudice the jury. They also urge that the district attorney was guilty of misconduct because he stated to the jury certain principles of law upon which he believed the court would instruct as he was stating them; that it was for the judge to instruct the jury. No objection was made by defendants' counsel to these statements of the district attorney, nor was any request made of the court to instruct the jury to disregard them. It is sufficient to say here that such objections cannot be urged for the first time on this appeal. People v. Codina, 30 Cal.2d 356, 362, 181 P.2d 881.

As for the three points raised by appellant Flachsman in his brief, it is admitted by him that the evidence, without material conflict, shows the following facts: About 11:00 p. m. on November 26, 1947, Eugene Shephard, a taxi driver in the city of Eureka, was employed by defendants to take them to two different places in the city of Eureka. During the drive they asked him what he would charge to take them to Carson's Camp, a place some twelve miles distant. They did not then employ him, and he returned to his taxi stand. Shortly after 12:00 o'clock, midnight, appellants returned to the taxi stand and then engaged Shephard to take them to Carson's Camp. On the way appellants requested Shephard to stop so that they could urinate; and the three men and Shephard got out of the cab. After they had reentered and were again proceeding on the way, appellant Bean stated that he had lost his wallet at the place where they had stopped, whereupon Shephard returned them to that spot and they all got out and searched for the wallet, without success. After they reentered the cab and while Shephard was proceeding to turn it around one of the appellants hit him on the head with a wine bottle. Shephard tried to get away but appellants prevented him by pulling his coat down to bind his arms. They then beat him with their fists, rocks and chunks of concrete pavement until he became dazed and fell over on the seat of the taxicab. Appellants then took his wallet and some change which was in his pocket, the amount taken being $25 or $30. When he tried to get up on the seat of the cab one of the appellants took off his undershirt and cinched it around Shephard's neck until he appeared to be unconscious, whereupon the cinch was removed. Appellants then drove the cab, with Shephard in it, a distance of about twelve miles to a point about halfway between Eureka and Arcata. There they dragged Shephard out of the cab and put him in a ditch two or three feet wide in which there were about eight inches of water. Boards were placed over him to conceal his body. Shephard did not entirely lose consciousness but feigned death to avoid further violence. Appellants then took the taxicab and drove to Requa in Del Norte County where they abandoned it. Shephard emerged from the ditch and walked to the highway where he secured a ride back to Eureka. Because of the attacks upon him he sustained a broken nose and a fractured skull, his left eye was closed and the right eye nearly closed.

He was hospitalized for over two weeks and thereafter suffered dizziness and headaches. Defendants were apprehended near Klamath about 65 miles north of Eureka, and the taxicab was found the next day hidden by an old cannery.

Flachsman argues that the foregoing facts, though showing a violation of section 207 of the Penal Code, do not show a violation of section 209 thereof, and that therefore the penalty imposed upon them is without justification in law. His argument is that no kidnaping of Shepard occurred until after he had been robbed of his money, though it is conceded that he was thereafter kidnaped. Therefore he says that there is no evidence that he was kidnaped for robbery nor evidence from which it might even be inferred that there was an intent to rob him prior to the robbery and the driving away of the taxicab with Shephard in it after the robbery. He concedes that People v. Kristy, supra, holds that a kidnaping after robbery may be punishable under section 209 because of a general scheme or plan involving all of the transactions, but insists that the evidence in the present case indicates that neither the kidnaping nor the robbery was part of a concerted scheme or all of one transaction.

Respondent replies that there is abundant evidence in the statements of the defendants themselves that prior to their hiring the cab to take them to Carson's Camp they had formed a plan and intention to attack the driver, rob him of his money and deprive him of the cab for the purpose of driving to Klamath in order to hold up a bar; that such evidence sufficiently shows that the defendants enticed, inveigled or decoyed, within the meaning of section 209, Shephard to take them to a deserted spot for the purpose of holding and detaining him to commit robbery; and that this is further shown by the pretense of going back to the spot where they had stopped to urinate because one of them purported to have lost his wallet, all of which was for the purpose of putting Shephard in a position where they might more easily attack him and deprive him of the money and the cab. Respondent further says that the taking of the cab from the immediate presence of Shephard itself constituted robbery (Pen. Code, sec. 211), and took place subsequent to the kidnaping. Respondent further urges that where a kidnaping takes place after the actual perpetration of a robbery such kidnaping may, nevertheless, be a kidnaping for the purpose of robbery if it may reasonably be inferred that the transportation of the victim was for the purpose of reducing the property to more than a scrambling possession, to effect the escape of the robbers, or to remove the victim to another place where he might less easily sound an alarm; and they cite People v. Kristy, supra, and People v. Raucho, 8 Cal.App.2d 655, 664, 665, 47 P.2d 1108.

[7, 8] We think that respondent's contention is supported by the record and must be sustained upon authority of the cited cases. In the Kristy case it was argued, as it is here, that the victims of the robbery and kidnaping were first robbed of their money and *thereafter* driven away or kidnaped by defendants. But the kidnapers were, nevertheless, held to be guilty of a violation of section 209 of the Penal Code. See 4 Cal.2d at pages 507, 508 of that opinion, 50 P.2d 798. Also see People v. Wallace, 36 Cal.App.2d 1, 4, 97 P.2d 256; People v. Melendrez, 25 Cal.App.2d 490, 494, 77 P.2d 870. Furthermore, it is conceded that appellants took the cab from the possession of Shephard after the kidnaping. See section 211 of the Penal Code, and compare Clark v. State, 87 Tex.Cr.R. 107, 220 S.W. 100; Etzler v. State, 143 Tex.Cr.R. 327, 158 S.W.2d 495, 497.

[9] Flachsman's next ground for reversal is that a violation of section 503 of the Vehicle Code is included in the offense of grand theft. There is substantial authority to the contrary (People v. Jeffries, 47 Cal. App.2d 801, 809, 119 P.2d 190); but it is immaterial here, for appellant's sentences run concurrently, and even if there was error, defendant is not prejudiced thereby. People v. Dallas, 42 Cal.App.2d 596, 604, 109 P.2d 409; Caldwell v. United States, 10 Cir., 36 F.2d 738.

[10] Flachsman's final contention, that his conviction was the result of passion and prejudice, is without merit. He cites no authority supporting his position; and the

evidence is entirely sufficient to sustain defendants' conviction. In the absence of anything in the record to indicate the contrary, we assume that the jury acted without passion or prejudice; also the trial judge, by his rulings on the motions after the verdicts, evidenced his satisfaction with the conclusions of the jury.

The judgments and orders appealed from are and each of them is affirmed.

PEEK and THOMPSON, JJ., concur.

88 Cal.App.2d 129

PEOPLE v. YOUNG et al.

Cr. 4208.

District Court of Appeal, Second District,
Division 2, California.

Oct. 21, 1948.

Hearing Denied Nov. 18, 1948.

1. Criminal law ⇨1144(13)

Where defendant was convicted of assault by means of force likely to produce great bodily injury, evidence would be viewed in the light most favorable to the prosecution.

2. Criminal law ⇨1170½(1)
Witnesses ⇨281

Where both defendant and prosecuting witness had testified that defendants charged with assault, had run after and overtaken prosecuting witness, overruling of defendant's objection to question which assumed that defendant had "chased" prosecuting witness on ground that there was no evidence that defendant had chased prosecuting witness was not prejudicial error.

3. Criminal law ⇨696(3)

In prosecution for assault, trial court properly refused to strike word "weapon" from the testimony on ground that it assumed a fact not in evidence, where complaining witness testified that he had been hit by an object which he believed was a blackjack.

4. Criminal law ⇨814(8)

In prosecution for assault, defendants' requested instruction that person may protect his property as well as his person, was properly refused, where there was no evidence that defendants' property was in jeopardy.

5. Criminal law ⇨829(18)

In prosecution for assault, refusal to give defendants' requested instruction that any fact or circumstance which was not proven beyond a reasonable doubt should be wholly dismissed from jury's consideration was not error, where court instructed that in case of reasonable doubt whether a defendant's guilt is satisfactorily shown he is entitled to acquittal.

6. Criminal law ⇨829(1)

It is not error to refuse a requested instruction if the subject matter thereof is substantially incorporated in the instructions given.

7. Criminal law ⇨829(1)

In prosecution for assault, defendants' requested instruction that jury should not be prejudiced against defendants because of the fact that they were charged with an offense nor to convict defendants for fear that the alleged crime may go unavenged or unpunished or for purpose of deterring or preventing others from the commission of like offense was properly refused where the instruction given by trial court included essentially the same instructions.

8. Criminal law ⇨829(17)

In prosecution for an assault, defendants' requested instruction that jury was to judge evidence given by defendants by the same rules that they would judge any other witness and had no right to disregard their testimony merely on the ground that they are defendants was properly refused, where general instruction as to the credibility of witnesses was given.

9. Criminal law ⇨811(6)

A defendant testifying in his own behalf is placed in the same category as other witnesses and the trial judge should not single out the testimony of the defendant and make reference thereto.

10. Criminal law ⚷814(20)

Where the evidence disclosed either the commission of the crime of assault by means of force likely to produce great bodily injury or that defendant was not guilty, and there was no evidence of simple assault, an instruction relative to simple assault was properly refused.

11. Assault and battery ⚷96(3)

In prosecution for assault, instruction that kind and degree of force which person may lawfully use in self-defense is limited by what a reasonable person in same situation as such person, seeing what he sees and knowing what he knows would then believe to be apparently necessary and that any use of force beyond that is regarded by law as excessive was proper.

12. Criminal law ⚷829(5)

In prosecution for assault, defendants' requested instruction that the law does not measure the degree of force with a nice hand and that defendants were not accountable for force slightly disproportionate to the assault was properly refused, where substance of the instruction was given by trial court.

13. Criminal law ⚷1186(4)

In prosecution for assault, trial court's failure to comply with statute providing that at time of hearing on application for probation judge was to consider the probation report and order a statement so showing filed with the clerk of court, was not prejudicial, where defendants were not eligible for probation because in the perpetration of the crime they had inflicted great bodily injury on the prosecuting witness. Pen.Code, § 1203; Const.art. 6, § 4½.

14. Criminal law ⚷982

In prosecution for assault, where evidence disclosed that in the commission of the crime defendants inflicted great bodily injury on the prosecuting witness, the trial court was without discretion to grant probation and properly denied defendant's application. Pen.Code, § 1203.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Jesse E. Young, and another, were convicted of assault by means of force likely to produce great bodily injury, and they appeal.

Affirmed.

Hanifin & Sease, and Cletus J. Hanifin, all of Los Angeles, for appellants.

Fred N. Howser, Atty. Gen. and William E. James, Deputy Atty. Gen., for respondent.

McCOMB, Justice.

After trial before a jury, defendants appeal from a judgment of guilty of assault by means of force likely to produce great bodily injury.

[1] The evidence being viewed in the light most favorable to the people (respondent) discloses the following facts:

On the 18th of August, 1947, at Huntington Park, defendants and their wives entered a taxicab of the All-American Cab Company. The driver then drove them to the 3500 block on East Seventh Street in Los Angeles where his passengers got out of the cab. A dispute then arose over the fare resulting in a fight in which the driver, Boyd Caddell, testified that he was beaten over the head with a flashlight and kicked by defendants.

After being beaten Mr. Caddell was helped into his cab and he drove to a nearby filling station where he telephoned to the police. As a result of the blows he had received he bled from his nose, right eye, right ear, and his right jaw was broken. he was subsequently confined in a hospital for five days.

After defendants were found guilty the matter was referred to the probation officer for investigation and report in accordance with the provisions of section 1203, Penal Code. When this report came on for hearing the trial judge stated, "In view of the injuries inflicted on the victim of this crime, the defendants are ineligible for probation." The record fails to disclose, however, that at the time of the hearing the trial judge considered the report and made a statement that he had considered such report and filed the same with the clerk of the court as required by section 1203, Penal Code.

Questions Presented for Determination

(i) *Rulings on the admission of evidence.*

Did the trial court commit prejudicial error in its rulings on the admission of evidence?

This question must be answered in the negative.

(a) On cross-examination of defendant Jesse Young the district attorney asked him, "When you and your brother chased Mr. Caddell in the direction the flashlight was thrown, did you see the flashlight after that?" To this question defendants objected on the ground that there was no evidence that defendants had "chased" the complaining witness, Mr. Caddell. Mr. Caddell testified as follows: "A. Well, then I turned and started to run away from them. I got probably 15 steps away— Q. Yes. A. And they ran after me and got me and kicked me." Defendant had stated, "So then my brother and I both ran after him and we all hit the ground about the same time."

[2] The foregoing evidence was sufficient to support a finding that defendants chased the complaining witness and the court's ruling was correct.

(b) During the examination of the complaining witness the following questions were asked him: "Q. The next thing you knew you were struck by some instrument —A. Yes, sir. Q. On the ear, you say? A. Yes sir. Q. You know it was an object, but you do not know what it was? A. I couldn't say. Q. Your answer is you don't know? A. No, I don't, because I didn't see that weapon. Q. You didn't see the weapon? A. I didn't see that weapon. I didn't know anybody was going to hit me. * * * Q. Mr. Caddell, you said you were struck on the head with a weapon. Do you know what the weapon was? A. I couldn't say. I would make a guess it was a blackjack. Q. A blackjack? A. That is a guess. I don't know whether it was a blackjack, because I didn't see it."

[3] Defendants moved to strike from the foregoing evidence the word "weapon" on the ground that it assumed a fact not in evidence. This objection was untenable. The complaining witness testified that he had been struck with an "object" which he believed was a blackjack. Such evidence clearly would sustain a finding that the complaining witness has been hit with a weapon, and the trial court's ruling was correct.

(ii) *Instructions.*

Did the trial court commit prejudicial error in declining to give certain instructions proposed by defendants?

This question must be answered in the negative. Defendants requested the following instructions which were refused:

(a) "You are instructed that you must not, under any circumstances, take into consideration the punishment that may be inflicted if you should find the defendants guilty. You are instructed that a person may defend his property as well as his person."

[4] The foregoing instruction was properly refused by the trial court for the reason that the last sentence of the instruction was a statement of an abstract principle of law calculated to mislead the jury and not based on any evidence received in the case. There was no testimony that any property of defendants or either of them was in jeopardy. Hence the instruction was properly refused.

(b) "That no fact or circumstance can be used by you as a basis for any inferences of guilt against the Defendants, unless such fact or circumstance is proven beyond every reasonable doubt, and every fact or circumstance in the case, which is not so proven beyond a reasonable doubt, should be wholly dismissed from your consideration, and must not be permitted by you to influence you in any degree against the Defendants in your deliberations."

[5, 6] The substance of the foregoing instruction was fully covered in an instruction which was given to the jury by the trial judge, reading as follows: "A defendant in a criminal action is presumed to be innocent until the contrary is proved,

and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal, but the effect of this presumption is only to place upon the State the burden of proving him guilty beyond a reasonable doubt. Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge."

The law is settled that it is not error to refuse a requested instruction if the subject matter thereof is substantially incorporated in the instructions given. (People v. Barber, 62 Cal.App.2d 206, 213, 144 P.2d 371.) This rule is applicable to the present situation.

[7] (c) "You are further instructed that you must not suffer yourself to be prejudiced against the Defendants because of the fact that he is charged with this offense, and you must not permit yourself to be led to convict the Defendants for fear that an alleged crime may go unavenged, or unpunished, or for the purpose of deterring or preventing others from the commission of like offenses, or because of any sense of public duty. No such argument or reason can be sufficient to justify you in laying aside that proper and most humane rule of the law, which says that you must acquit the Defendants unless every fact necessary to establish his guilt has been proven to you beyond a reasonable doubt."

The subject matter of this instruction was fully covered in another instruction given by the court to the jury which reads in part as follows: "You must not suffer yourselves to be biased against the defendants because of the fact that they have been arrested for this offense, or because an information has been filed against them or because they have been brought before the court to stand trial. None of these facts is evidence of guilt, and you are not permitted to infer or to speculate from any or all of them that they were more likely to be guilty than innocent. You are to be governed solely by the evidence introduced in this trial and the law as stated to you by me. The law forbids you to be governed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling. Both the People and the defendant have a right to demand, and they do demand and expect, that you will conscientiously and dispassionately consider and weigh the evidence and apply the law of the case, and that you will reach a just verdict, regardless of what the consequences of such verdict may be."

In view of the instruction given the trial court properly refused this requested instruction.

(d) "The Defendants in this case have offered themselves as witnesses in their own behalf, and you are to judge their evidence by the same rules that you would that of any other witnesses. You have no right to disregard their testimony merely upon the ground that they are the Defendants; you should fairly and impartially judge his testimony, together with all other evidence in this case."

[8, 9] This instruction likewise was properly refused for the reason that a general instruction as to the credibility of witnesses was given by the trial judge and thus the matter was fully covered. It is established that a defendant testifying on his own behalf is placed in the same category as other witnesses and a trial judge should not single out the testimony of the defendant and make reference thereto. (People v. Jeans, 79 Cal.App. 464, 466, 249 P. 1089; People v. Brown, 62 Cal.App. 96, 103, 216 P. 411.)

(e) "A person who has been attacked and who is exercising his right of lawful self-defense is not required to retreat, and he not only may stand his ground and defend himself against the attack but may also pursue his assailant until he has secured himself from danger if that course appears to him, and would appear to a reasonable person in the same situation, to be reasonably and apparently necessary; and this is his right even though he might more easily have gained safety by withdrawing from the scene."

Defendants' claim that the foregoing instruction was not given by the trial court is refuted by the record. Such instruction was given by the court and appears on page 14 of the clerk's transcript.

(f) "You are instructed that when the information charges that a defendant committed an assault by means of force likely to produce great bodily injury if the jury should find that he committed a simple assault but that he did not commit the assault by means of force likely to produce great bodily injury then you are instructed that such defendants may be found guilty only of the lesser offense, namely, simple assault."

[10] This instruction was likewise properly refused for the reason that if defendants were guilty of any offense they were guilty of the crime charged and not of a simple assault. The law is established that where the evidence discloses either the commission of the crime of assault by means of force likely to produce great bodily injury or that defendant was not guilty, and there is an absence of evidence of simple assault, an instruction relative to simple assault is properly refused. (People v. Lain, 57 Cal.App.2d 123, 134, 134 P.2d 284; People v. Swist, 136 Cal. 520, 524, 69 P. 223.)

(g) "You are instructed that the right of the defendants to use force on the person of Boyd Caddell at the time and place in question did not depend upon the question whether the said Boyd Caddell actually intended or attempted to inflict serious injuries upon the defendants. If the circumstances as they appeared to the defendants were such that a reasonable person in the position of the defendants would be justified in believing that the said Boyd Caddell had the ability to inflict serious injury upon the defendants, or either of them, and that the said Boyd Caddell intended to do so, then you are instructed that the defendants were justified in using such force as was reasonably necessary to defend their persons."

[11] The subject matter of the foregoing instruction was given in another instruction which reads in part as follows: "The kind and degree of force which a person may lawfully use in self-defense are limited by what a reasonable person in the same situation as such person, seeing what he sees and knowing what he knows, then would believe to be apparently necessary. Any use of force beyond that is regarded by the law as excessive. Although a person may believe that he is acting, and may act, in self-defense, he is not justified in using a greater degree of force than that permitted by the rule just stated to you."

The instruction given conforms to the rule announced in Vaughn v. Jonas, 31 Cal.2d 586, 191 P.2d 432.

(h) "You are instructed that the law doesn't measure the degree of force with a nice hand in that the defendants are not accountable for force slightly disproportioned to the assault."

[12] The substance of the foregoing instruction was given by the trial court to the jury in the following language: "If a person is acting in lawful self defense he is not accountable if he uses force slightly disproportionate to the assault he is resisting but if he goes beyond this and uses force clearly not necessary to his defense the use of said excessive force is an assault for which he is accountable even though, up to the use of excessive force, he was acting in lawful self defense."

(iii) *Hearing on the application for probation.*

Was it prejudicially erroneous for the trial court to fail to comply with the requirements of section 1203, Penal Code?

[13] This question must be answered in the negative. Though it is error for the trial judge not to comply with the requirements of section 1203, Penal Code, such error is not prejudicial where, as in the present case, defendants were ineligible for probation because of the fact that in the perpetration of the crime they had inflicted great bodily injury upon the prosecuting witness. (Sec. 1203, Pen.Code.) Had the record disclosed that the trial judge had in fact complied with the provisions of section 1203 of the Penal Code now under consideration by stating at the time of the hearing on the application for probation that he had

considered the probation report and ordered such statement filed with the clerk of the court, it still would not have made any difference in the ultimate disposition of their application for probation since they were not eligible for probation. Therefore under Article VI, Section 4½ of the Constitution of the State of California such error not being prejudicial we must disregard it.

(iv) *Discretion exercised by the trial judge in denying probation.*

Was there an abuse of discretion by the trial judge in denying defendants' application for probation?

[14] This question must likewise be answered in the negative. The evidence discloses that in the commission of the crime defendants inflicted great bodily injury on the prosecuting witness. Therefore under section 1203 of the Penal Code, which prohibits the granting of probation to a defendant who in the perpetration of a crime has inflicted great bodily injury, the trial court was without discretion to grant probation and properly denied defendants' application therefor.

In view of the fact that the record is free from error, the judgments are and each is affirmed.

MOORE, P. J., and WILSON, J., concur.

---

88 Cal.App.2d 137

FISCHER v. MEANS.

Civ. 7495.

District Court of Appeal, Third District, California.
Oct. 21, 1948.

1. Sales 🔑52(5), 181(11)

In action for sum alleged to have been loaned to defendant by plaintiff to pay cost of producing squash crop, which defendant's cross-complaint alleged that he agreed to sell to plaintiff, evidence supported findings that plaintiff signed contract to purchase crop, paid sum sued for in earnest to bind agreement, and wrongfully refused to accept squash when notified by defendant that he was ready to deliver it, so as to warrent judgment for defendant on cross-complaint.

2. Sales 🔑384(7)

On contracting to buy another's entire squash crop, but refusing to accept delivery thereof after due notice from seller that crop was ready for delivery and permitting squash to deteriorate and become unmarketable without seller's fault, became liable for entire contract price, less amount advanced thereon and sum realized by seller from sale of part of crop to others. Civ. Code, § 1771.

3. Sales 🔑79

The place for delivery of goods sold, if not specified in contract, is either at seller's residence or at building wherein parties stipulate that goods shall be stored. Civ.Code, § 1763.

4. Contracts 🔑175(1)

A contract written by wife of one party thereto in his presence must be assumed to have been prepared under his direction.

5. Contracts 🔑155

Where language of written contract is ambiguous, it must be construed most strongly against person who prepared document and caused uncertainty. Civ.Code, § 1654.

6. Appeal and error 🔑1008(3)

On appeal from judgment for defendant on cross-complaint for breach of contract, District Court of Appeal is not bound by trial judge's construction of contract, which is purely law question, but must make final determination in accordance with applicable legal principles.

7. Sales 🔑54

A sale contract should be read and construed as a whole.

8. Sales 🔑177, 183, 214

Under contract to raise squash to be sold to named person only at specified price and stored in seller's building until ready for delivery and called for on or before January 31, 1947, title to squash crop passed to buyer, and he was bound to call for it and accept all sound squash at such building, when notified by seller on or about November 15, 1946, that squash was ready for delivery thereat, and buyer could not avoid liability for purchase price by refusing to accept delivery until following January 31st, by which time most of squash had become worthless. Civ.Code, § 1725(3).

◆

Appeal from Superior Court, Sutter County; Arthur Coats, Judge.

Action by Jack Fischer against D. C. Means to recover an amount paid on the purchase price of squash sold to plaintiff by defendant, who filed a cross-complaint to recover damages for plaintiff's failure to accept delivery of the squash. Judgment for defendant on the cross-complaint, and plaintiff appeals.

Affirmed.

Rich, Weis, Carlin & Fuidge, of Marysville, for appellant.

John T. Kenward, of Yuba City, for respondent.

THOMPSON, Justice.

The plaintiff and cross-defendant has appealed from a judgment of $2,090 which was rendered against him upon the cross-complaint, as damages for failure to accept delivery of a crop of banana squash purchased pursuant to a written contract. The squash were raised by the defendant and sold on contract to the plaintiff at a stipulated sum per ton. They were harvested and stored in defendant's barn as per agreement and plaintiff was immediately notified that the crop was ready for delivery, but failed and refused to take or accept delivery. The squash deteriorated and rotted until they became substantially worthless.

Plaintiff brought suit against the defendant June 3, 1947, for $200 alleged to have been loaned, but which the court found was paid on the purchase price of the squash. Defendant answered, denying the material allegations of the complaint, and filed a cross-complaint for damages for failure to accept delivery of the crop as previously stated. The court adopted findings favorable to the defendant in every respect. Judgment was rendered accordingly. From that judgment this appeal was taken.

The defendant's cross-complaint alleges that, in 1946, he raised 150 tons of banana squash on his fifteen acre ranch in Sutter County, which he agreed, on April 22, 1946, to sell to the plaintiff for $20 per ton, upon which purchase price the plaintiff then paid the sum of $200 to bind the bargain; that on or about the 15th day of November, 1946, the cross-complainant notified plaintiff that he was ready to deliver to plaintiff, pursuant to the terms of their contract, said 150 tons of "#1 pink banana squash, of the contract value of $3000," but that the plaintiff wrongfully refused to accept said squash, or any part thereof, to cross-complainant's damage in the sum of $2,758. The written contract was alleged in the following language:

"April 22, 1946

Received from Jack Fischer, the sum of $200.00 for items listed as follows.

I the undersigned agree to plant and raise in Sutter County 15 acres of banana squash and *sole* #1 crop squash to be sold to Jack Fischer *only* at $20.00 per ton. I am to store squash in my building until ready for delivery & called for on or before Jan 31—1947.

Signed: D. C. Means
899
Signed: Jack Fischer."

The material allegations of the cross-complaint were denied. Upon trial the court adopted findings favorable to the defendant and cross-complainant, determining that plaintiff signed and retained a duplicate copy of the contract, on the date and in the form alleged, and at the same time paid to the cross-complainant the sum of $200 "in earnest to bind the agreement;" that the cross-complainant duly performed the contract on his part, and on November 15, 1946, notified plaintiff he was then ready to deliver, pursuant to the contract, "116 tons and 1200 pounds of #1 pink banana squash, of the contract value of $2,332," which plaintiff wrongfully refused to accept; that plaintiff was entitled to credit on said purchase price the sum of $200, and the further sum of $42, being the value of squash salvaged by the cross-complainant, and that the cross-complainant was thereby damaged in the sum of $2,090. The court further found that all allegations of the complaint and answer to the cross-complaint, inconsistent with the foregoing determined facts, are untrue. Judgment was accordingly rendered against plaintiff for the last mentioned sum.

The appellant contends that the findings and judgment are not supported by the evidence, and that the court erroneously construed the written contract to mean that plaintiff agreed to accept and pay for the squash at $20 per ton when the crop was harvested and "ready for delivery." On the contrary, appellant asserts that, according to the said agreement, he was not required to accept delivery of the crop until January 31, 1947, and that the grower was required to store the squash and keep it in good condition for delivery until that time.

[1] We are of the opinion the findings and judgment are adequately supported by the evidence. There is a conflict of evidence as to whether plaintiff entered into or signed the alleged written contract. The plaintiff positively testified that he did not agree to purchase the crop of squash; that he merely loaned the cross-complainant said sum of $200 with which to pay the cost of producing the crop, and that, when he first saw the squash which were stored in a barn, on or about the 31st day of January, 1947, they were substantially all rotten, deteriorated and worthless.

There is sufficient evidence to show that the plaintiff and the cross-complainant were neighbors living about one mile apart; that plaintiff had been engaged in the business of a fruit and produce merchant for about twenty years, and that the cross-complainant had never before raised squash and knew very little about that particular product; that prior to April 1946, the cross-complainant talked with plaintiff about his desire to raise squash on his fifteen acres of leased land, and that plaintiff encouraged him to do so; that the parties met at the home of plaintiff on April 22, 1946, in the presence of plaintiff's wife, and that plaintiff then agreed to purchase the entire crop of squash to be produced on said land for that season, at the price of $20 per ton, and then paid the cross-complainant said sum of $200 to bind the bargain and as part payment therefor; that plaintiff's wife then wrote duplicate copies of the contract in the exact language alleged in the cross-complaint, one of which copies was signed by plaintiff and handed to Mr. Means, and the other was signed by the cross-complainant and retained by plaintiff; that Mr. Means thereafter planted, cultivated and produced about 117 tons of #1 pink banana squash which he stored in good condition in his barn on his premises on November 12th to the 15th; that he immediately notified plaintiff the crop was then ready to deliver, but that the plaintiff failed and refused to call for or accept delivery of the squash. There is no evidence that the barn was not perfectly dry and suitable for storing the crop. Several neighbors saw the crop after it was stored and testified that the fruit was in good condition. Several days later Mr. Means again notified plaintiff that the crop was ready for delivery, but plaintiff again failed to call for or accept delivery thereof. About January 1, 1947, Means observed some evidence of deterioration of some of the stored squash, and he notified plaintiff of that fact. He testified that he had told plaintiff he had been offered $17 per ton for it, and asked plaintiff to release him from his contract of sale, which plaintiff refused to do. Without that release Mr. Means was unable to sell the crop to anyone else for the reason that the contract provides that it would be sold "to Jack Fischer *only*." Plaintiff went to the barn in company with a workman on his premises, and found some spots on, and evidence of deterioration of, some of the fruit. He then condemned the entire crop and refused to accept delivery of any portion thereof. There is some evidence that Means salvaged about two tons of the squash, but the balance of the crop was a total loss, due to plaintiff's refusal to accept delivery thereof.

[2] It is evident we are bound by the findings to the effect that plaintiff contracted in writing to buy the entire crop of

#1 pink banana squash from Mr. Means at $20 per ton, and that if, after due notice that they were ready for delivery pursuant to the contract, the plaintiff neglected and refused to accept delivery thereof, or repudiated the agreement, and without fault of the seller permitted the squash to deteriorate and become unmarketable, plaintiff would be liable for the entire contract price thereof. Civil Code, sec. 1771; Bishop v. Descalzi, 46 Cal.App. 228, 234, 189 P. 122; California Pear Growers Assn. v. Herspring, 60 Cal.App. 503, 507, 213 P. 518; 44 A.L.R. p. 267, note; 108 A.L.R. p. 1496, note. Section 1771 of the Civil Code provides that: "When the seller is ready and willing to deliver the goods, and requests the buyer to take delivery, and the buyer does not within a reasonable time after such request take delivery of the goods, *he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery* * * *. If the neglect or refusal of the buyer to take delivery amounts to a repudiation or breach of the entire contract, the seller shall have the rights against the goods *and on the contract* hereinafter provided in favor of the seller when the buyer is in default." (Italics added.)

In the headnote found in 44 American Law Reports at page 267, which is supported by numerous authorities, it is said in regard to the liability of a purchaser of personal property, who, by his negligence or refusal to accept delivery, permits it to become worthless, that: "* * * Where, without fault of the seller, or opportunity for him to make other disposition, the property is destroyed or becomes worthless after the buyer refuses to receive it, the only allowance which will fully indemnify the seller may be the full contract price."

The foregoing authorities appear to fit the facts in this case. The measure of damages was the full contract price of the crop, less the $200 advanced thereon, and the further sum of $42 realized by Mr. Means from the small quantity of squash which he was able to dispose of.

[3] We assume the plaintiff was to accept delivery of the squash, pursuant to the contract, at the building where it was stored. It has been held that if the contract does not specify the place of delivery, it would be deemed to be either at the residence of the seller or at the building where the parties stipulated that the goods should be stored. Civil Code, Sec. 1763; Robbins v. Pacific Eastern Corp., 8 Cal.2d 241, 270, 65 P.2d 42; 22 Cal.Jur. p. 931, sec. 22; 46 Am.Jur. p. 346, sec. 170. Section 1763 of the Civil Code provides in that regard: "Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract, express or implied, between the parties. Apart from any such contract, express or implied, or usage of trade to the contrary, the place of delivery is the seller's place of business if he have one, and if not his residence; but in case of a contract to sell or a sale of specific goods, which to the knowledge of the parties when the contract or the sale was made were in some other place, then that place is the place of delivery."

In this case it was agreed the squash should be stored in the building on Means' premises, and we therefore assume that was the place agreed upon for delivery.

[4, 5] Finally, the appellant contends that the court erred in construing the contract to mean that the crop of squash was to be delivered when "ready for delivery;" that plaintiff was not required to accept delivery until January 31, 1947, and that the deterioration of the fruit prior to that time was due to the negligence of the grower, which relieves plaintiff of liability. We cannot agree with that construction of the contract. The agreement in this case was written by the wife of plaintiff in his presence. We must assume it was prepared under his direction. It is a settled principle of construction of a contract that if the language is ambiguous it must be construed most strongly against the person who prepared the document and caused the uncertainty to exist. Civil Code, sec. 1654; Pacific Lumber Co. v. Ind. Acc. Comm., 22 Cal.2d 410, 422, 139 P.2d 892; Laidlaw v. Marye, 133 Cal. 170, 179, 65 P. 391; 6 Cal. Jur., p. 307, sec. 185.

We are of the opinion the title to the property passed to plaintiff in this case when he was notified that the fruit was ready for delivery at the building where the parties stipulated it should be stored. But it may be immaterial whether the title then passed or not. Section 1725(3) of the Civil Code provides that: "Where the parties purport to effect a present sale of future goods, the agreement operates as a contract to sell the goods and as soon as the seller acquires the goods the property therein shall pass to the buyer without further act if the parties so intend unless the agreement otherwise provides."

[6] It is true that, on appeal, this court is not bound by the construction of the language of the contract which was placed upon it by the trial judge. In the case of La Lumia v. Northern California Packing Co., 75 Cal.App.2d 917, at page 922, 172 P.2d 94, 98, it is said in that regard: "The construction of the language of a contract, in the absence of other evidence, is purely a question of law. Under such circumstances a reviewing court is not bound by the construction thereof by the trial court, but must 'make the final determination in accordance with the applicable principles of law.' Estate of Platt, 21 Cal.2d 343, 352, 131 P.2d 825, 830; 6 Cal.Jur. sec. 192, p. 326. * * *"

[7, 8] It should be recalled that the crop of squash which is involved in this case was not in existence when the contract for sale was executed on April 22, 1946. It was a contract to sell to plaintiff, and to no one else, the entire crop when it was produced and stored in the building. The language of that contract which is in controversy is as follows: "I am to store squash in my building until ready for delivery & called for on or *before* Jan. 31—1947." (Italics added.) The appellant contends that language should be construed to mean that the fruit was to be stored by the seller in his building, and kept in sound merchantable condition "until * * * called for," and that plaintiff was not required to call for it until January 31, 1947. That was a period of two and a half months after it was stored and ready for delivery. Plaintiff was engaged in a fruit and produce business and should be charged with knowledge that the fruit was likely to deteriorate and to become worthless in that period of time. The contract should be read and construed as a whole. It is reasonable to assume the parties knew and took into consideration the fact that the exact time when a crop of squash would mature and be ready for delivery would necessarily be uncertain, and that while the seller agreed to store it until it was ready for delivery, "on or *before* Jan. 31—1947," in no event would he be required to store it beyond that specified date. It will be observed that the contract provides that it will be "called for on or *before*" that date. It is reasonable to assume from the language employed that the parties agreed that the seller would store the fruit and that the purchaser would call for it when he was notified that it was "ready for delivery." That is the construction placed upon the language by the trial court. We think it was correctly construed. Any other construction would enable the plaintiff to unduly delay the acceptance of the squash until it deteriorated and became worthless. This is particularly true since the cross-complainant could not sell the crop to any person other than plaintiff. There is evidence that Mr. Means informed plaintiff in November, 1946, that he had an offer of $17 per ton from another prospective purchaser but that plaintiff refused to release him from the contract.

The case of Talbott & Co. v. Byler, Mo. App., 217 S.W. 852, 853, upon which appellant relies in support of his construction of the contract is clearly distinguishable from the present case. In that case the contract required delivery of 500 bushels of white corn at Wheeling, Missouri, "on or before the 10th day of December, 1917." Unlike the present case, there was no provision for delivery of the corn when it was "ready for delivery." In the Talbott case the court merely said: "Of course, if it was to be delivered by that time, the corresponding obligation was on plaintiff to take it within that period. The phrase 'on or before' a certain date in a contract, with reference to the time it is to be performed, limits the time of performance to the date last mentioned if the subject-matter of the contract and the circumstances are such that time may be deemed as of the essence. (Citing authorities.)"

The distinction between that case and this is that in the present case the language of the contract further qualified the time of delivery by also stating that the seller of the squash would store it "until ready for delivery." The last quoted language evidently contemplates that the plaintiff would accept delivery when the fruit was ready for delivery at any time on or before January 31, 1947.

Likewise, the case of Liondale Mercantile Co. v. Gerber, 197 App.Div. 345, 188 N.Y.S. 825, 831, upon which the appellant also relies, is distinguishable from this case. In that case the contract merely provided that the goods in question were to be delivered "when called for" by the purchaser. There was no provision of the contract, as there is in the present case, that the seller was to store the goods "until ready for delivery." No specified limitation of time within which delivery was to be made was mentioned in the Gerber case. The New York court therefore properly said, "The words 'when called for' were intended to obligate the seller to hold the goods until the defendant desired delivery thereof and gave it notice of the place he desired delivery to be made." The very circumstances of the present case would seem to preclude the application of the definition given in the New York case of the term "when called for". That construction would enable the purchaser in this case to avoid liability under his contract by merely failing and refusing to accept delivery after notice and thus allowing the squash to deteriorate and become worthless.

We are satisfied the plaintiff in this case was bound, under the reasonable construction of his contract, to call for and accept all sound squash when he was notified that they were ready for delivery.

For the foregoing reasons, the judgment is affirmed.

ADAMS, P. J., and PEEK, J., concur.

32 Cal.2d 819

PEOPLE v. TUTHILL.

Cr. 4807, 4893.

Supreme Court of California, in Bank.
Oct. 19, 1948.

Rehearing Denied Nov. 15, 1948.

1. Criminal law 🔑997

A petition for writ of error coram nobis is the equivalent of a motion to vacate the judgment.

2. Criminal law 🔑997

Where application for writ of error coram nobis did not purport to allege grounds on which defendant sought to have judgment of conviction vacated or grounds upon which he based his appeal, and there was showing that he was diligent in applying for writ or that appeal from denial thereof had merit, application was fatally defective, but would be considered on merits, in view of nature of judgment to be executed, and fact that Supreme Court had not previously ruled upon a case squarely presenting all of the elements involved.

3. Criminal law 🔑997

The office of "writ of coram nobis" is to bring attention of court to, and obtain relief from, errors of fact, such as a valid defense existing in facts of case, but which, without negligence on defendant's part, was not made, either through duress or fraud or excusable mistake, where facts did not appear on face of record, and were such as, if known in season, would have prevented rendition of the judgment questioned.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Writ of Coram Nobis".

4. Criminal law 🔑997

Generally, writ of error coram nobis will not be granted for newly discovered evidence going to the merits of issues tried, but rather issues of fact, once adjudicated, even though incorrectly, cannot be reopened except on motion for new trial.

5. Criminal law 🔑997

A writ of error coram nobis does not lie to correct errors of law.

6. Criminal law 🔑997

Where "new fact" relied upon by defendant who had been convicted of first degree murder and sentenced to death was discovery that he had sustained a head injury on night of shooting as result of altercation with certain person, such new fact, though it would have been material to defendant's defense that he had no recollection of the shooting, would not have necessarily precluded entry of judgment which was rendered, and, hence, did not authorize issuance of writ of error coram nobis.

7. Criminal law 🔑997

Supreme Court could not act upon those arguments on behalf of defendant who was convicted of first degree murder and sentenced to death which tended to show that punishment to which defendant had been sentenced was disproportionately severe or would have been affected by "new fact" asserted on defendant's petition for writ of error coram nobis, but only governor was empowered to consider and to give effect to such arguments. Const. art. 7, § 1.

◆

Appeal from Superior Court, Riverside County; Russell S. Waite, Judge.

Marvin James Tuthill was convicted of murder in first degree and sentenced to death, which judgment of conviction was affirmed, 187 P.2d 16, and thereafter he filed a petition with Superior Court for a writ of error coram nobis. From judgment denying petition, the defendant appeals.

Affirmed.

R. T. Sullivan, Jr., of Riverside, Paul E. Sloane, of San Francisco, and R. A. Sikes, for appellant.

Fred N. Howser, Atty. Gen., and Walter L. Bowers, Asst. Atty. Gen., for respondent.

SCHAUER, Justice.

[1] Marvin James Tuthill is confined in the state prison at San Quentin under sentence of death entered pursuant to the verdict of a jury which found him guilty of the first degree murder of Mrs. Charlotte Beverly. The judgment of conviction was affirmed on December 9, 1947. (People v. Tuthill, Cal.Sup, 187 P.2d 16.) Tuthill then attacked the judgment by application for the writ of habeas corpus, filed with this court on March 24, 1948, and

denied without opinion on March 29, 1948. (Cr. 4889.) On April 2, 1948, Tuthill filed with this court an application for a stay of execution. His application alleges that on March 30, 1948, Tuthill filed with the superior court a petition for writ of error coram nobis (which, under our procedure, is the equivalent of a motion to vacate the judgment); that such petition was denied on April 1, 1948; that petitioner filed notice of appeal from the order denying such petition; that Tuthill requested and the superior court "unjustifiably refused" a stay of execution; and that April 2, 1948, was fixed as the day of execution. Because of the nature of the judgment to be executed, because also of the fact that we had not previously ruled upon a case squarely presenting all of the elements here involved, and because, further, we wished to guard against possible inadvertence of counsel in failing, under the circumstances, to adequately support the application, but not because of any showing of merit, we granted a temporary stay.

[2] The application does not purport to allege the grounds on which Tuthill sought to have the judgment vacated or the grounds on which he based his appeal. There is no showing that he was diligent in applying for the writ or that the appeal has merit. For the reasons stated in People v. Shorts (Cal.Sup. 1948), 197 P.2d 330, the application is, therefore, fatally defective and, in accord with that holding, not only its denial but also forthwith dismissal of the appeal would be warranted. Since the granting of the temporary stay, however, the record on appeal from the trial court's order denying the petition for the writ coram nobis has been filed with this court and the appeal has been briefed and argued on its merits. It now appears that the application for the writ and the appeal are based upon a sincerely held, diligently argued, but mistaken contention as to the scope of relief available on coram nobis.

[3-5] Defendant recognizes the following settled rule: "The office of the writ of coram nobis is to bring the attention of the court to, and obtain relief from, errors of fact, such as * * * *a valid defense existing in the facts of the case, but which, without negligence on the part of the defendant,* was not made, either through duress or fraud or *excusable mistake;* these facts not appearing on the face of the record, and being such as, if known in season, would have prevented the rendition and entry of the judgment questioned." (People v. Reid (1924), 195 Cal. 249, 255, 232 P. 457, 459, 36 A.L.R. 1435, and People v. Superior Court (1938), 28 Cal.App.2d 442, 444, 82 P.2d 718, quoting from 5 Encyclopedia of Pleading and Practice 27. Italics defendant's.) It is a general rule that the writ will not be granted for newly discovered evidence going to the merits of the issues tried; issues of fact, once adjudicated, even though incorrectly, cannot be reopened except on motion for new trial. (In re Lindley (1947), 29 Cal.2d 709, 725, 177 P.2d 918; People v. Paysen (1932), 123 Cal.App. 396, 402, 11 P.2d 431; People v. Vernon (1935), 9 Cal.App.2d 138, 146, 49 P.2d 326; People v. Cox (1936), 18 Cal.App.2d 283, 286, 63 P.2d 849; People v. Hanks (1939), 35 Cal.App.2d 290, 300, 95 P.2d 478.) And the writ does not lie to correct errors of law; it "is not intended to authorize any court to review and revise its opinions". (People v. Mooney (1918), 178 Cal. 525, 528, 174 P. 325, 326; People v. Gilbert (1944), 25 Cal.2d 422, 442, 154 P.2d 657; People v. Egan (1946), 73 Cal.App.2d 894, 899, 167 P.2d 766.)

Defendant contends that the delay in discovering the facts comprising his assertedly new defense is "excusable on account of defendant's imprisonment, his lack of funds, friends and an attorney from the date of the alleged crime [January 1, 1947] and his imprisonment until 27 days after said date, and because of [his court-appointed] * * * attorneys' lack of means and time to procure a thorough investigation as to material facts and evidence," and because ever since the night of the killing defendant has "suffered a complete lapse of memory * * * of the events that occurred during two hours either side of the moment of the homicide."

Certain facts adduced at the trial and the facts now relied upon as constituting a new defense, all as hereinafter summarized, show that this is not a case where, by excusable mistake and ignorance of the defendant, he was deprived of a defense which, had it been known to the trial court, would have prevented his conviction. Rather, defendant would have the judgment of conviction vacated so that he can make a more effective and complete presentation relative to facts which were in evidence at the trial, together with a single new fact, and again present to a trier of fact the question whether the evidence shows that the killing was murder of the first degree. While it is our view that upon the showing made we are precluded by the established law of this state from granting the relief sought, or any relief herein, candor requires us to recognize that the new fact now urged on behalf of defendant, if it be a fact, would have been material, and might well have been considered persuasive by the triers of fact, in performing the solemn duty of selecting the penalty to be imposed, if not the degree of defendant's crime.

At the first trial there was evidence which shows the following (People v. Tuthill (1947), supra, 187 P.2d 16): On December 21, 1946, defendant and Mrs. Beverly, who had been living together as man and wife, separated. Defendant moved from the auto court cabin where they had lived to another cabin at a nearby court. Deceased continued to reside in the cabin where she had lived with defendant. She told defendant that she planned to go to Boston shortly after Christmas.

Deceased and a Mrs. Beavers spent the evening of December 31 in the Knotty Pine Inn, across a highway from the auto court where deceased lived. On the afternoon of the 31st defendant had stopped work at 4:30, drawn his pay, and had several drinks of intoxicating beverages. At 7:30 p. m. he entered the bar of the Knotty Pine Inn, where Mrs. Beverly and Mrs. Beavers were sitting, and asked Mrs. Beverly if he might see her alone. She refused and defendant left the bar. Thereafter he consumed a considerable quantity of intoxicating liquor. Defendant testified that twice during the course of the evening he asked deceased if he might speak with her alone and she refused; that he wished to see her alone in order to give her $100. He further testified that he remembered nothing after about midnight until he was awakened in his own cabin by the police at about 4 a. m. on January 1, 1947.

At about 2 a. m. on January 1 Mrs. Beverly and Mrs. Beavers, accompanied by one George Pickell, left the Knotty Pine and walked to the cabin of deceased. Pickell left the two women at the cabin. The women entered the cabin and found the light inside it burning. Defendant lay asleep on the bed. Deceased shook him and asked him why he was there. Defendant sat up, revealing a rifle on which he had been lying. (This rifle belonged to decedent's son, had often been used by defendant when he was living with deceased and was usually kept hanging on the wall of the cabin, where defendant himself had placed it.) Defendant lifted the gun. Deceased, who had a "pretty high temper," said, "You are not going to shoot me with that gun." She and Mrs. Beavers then left the cabin. Mrs. Beavers pleaded with deceased to leave the vicinity. Deceased, however, stepped back into the doorway of the cabin. According to the testimony of Mrs. Beavers, "I heard a gun fire" and deceased "fell with a thud"; Mrs. Beavers ran toward the Knotty Pine and "I got about to the highway I think, and I looked back and the lights [in the cabin of deceased] were off." Another witness, one Payne, testified that shortly after 2 a. m., as he walked away from the Knotty Pine Inn, he heard a shot, turned, and saw Mrs. Beavers running at about the center of the highway. Mrs Beverly was killed by a single shot which entered her head "approximately 2 inches above and forward of the upper edge of the right ear, and proceeded downward." The bullet, therefore, could not have been shot while deceased stood in the doorway squarely facing defendant and while he was on or near the bed to the left of the doorway, as described by Mrs. Beavers. (Defendant argues, as he did on appeal, that the sound which Mrs. Beavers heard when she saw deceased in the cabin doorway was not a shot; that the shot was fired later, as Mrs. Beavers reached the highway; and that it was the sound of such shot which caused her to turn and see that the light in the cabin was out. As will hereinafter appear, this theory is an important part of defendant's "new defense.")

Persons summoned by Mrs. Beavers came at once from the Knotty Pine Inn to the cabin of deceased. The cabin was dark. One Mrs. McLearn testified that she called to deceased and no one answered; that she then called to defendant and asked that he turn the light on and defendant replied that he could not. He did turn on a light outside the cabin, which was controlled by a wall switch immediately adjacent to the switch which controlled the light inside the cabin. Various persons entered the cabin and found that the light inside could not be controlled by the wall switch because the bulb had been loosened in the socket. Whether the bulb was so loosened by defendant or by deceased does not directly appear. After the light was put on defendant partially lifted the body from the floor, said, "See, there is nothing wrong," and let the body fall. He also said, "Oh, she is all right." Defendant then left the cabin of deceased, carrying the rifle. Two men from the Knotty Pine took the rifle from him; defendant offered no resistance. He went to his own cabin, undressed and was asleep when the police found him at about 4 a. m. About half an hour after the police awakened him, defendant complained to an officer that he had "a pretty bad pain over one ear." He asked the officer if he (the officer) had struck him; the officer replied that he had not; and defendant said, "Somebody along the way has sure given me a nasty clip."

By his application for coram nobis defendant, as previously indicated, presents only one new evidentiary fact, to wit, that at about 12:30 a. m. on January 1, 1947, during the period of his "blackout," he had an altercation with one Joseph Hildreth. According to Hildreth, at that time he and Mrs. Beverly were sitting in a booth at the Knotty Pine Inn; Hildreth "put my arm around her. Thereupon Marvin Tuthill came up to the booth * * * and he made a threatening gesture at me, though he did not hit me. Thereupon I jumped up and took a swing at him, though I certainly did not hit him very hard or hurt him. In the scuffle that followed someone grabbed my arm, and someone else grabbed Marvin and shoved him out of the front door. I could see Marvin outside looking in through the front window a moment later; then I saw no more of him. Fifteen or thirty minutes later I left the Knotty Pine, walked around * * * looking for my dog, and * * * stood for some minutes just outside of cabin 1 which was rented by Mrs. Beverly. * * * It never then entered my head, nor until I later heard of Mrs. Beverly's death, that Marvin was at that moment inside of cabin 1, possibly watching me and angry over the scuffle we had, and possibly thinking I was out looking for him to carry on the fight. It was then between 1 and 2 A.M." According to Donald McLearn, who was present at the time of the altercation, "Marvin took a swing at Joe. Joe jumped up and started to swing at Marvin," but neither "swing" took effect and the two were separated. That the further new fact as to the head injury, if in truth it occurred as related by Hildreth in this proceeding, would have been material at the trial cannot be persuasively disputed. The evidence supporting the jury's determination of the degree of the crime and, presumptively, their selection of the death penalty in preference to life imprisonment, was legally sufficient, as we held on the appeal (People v. Tuthill (1947), supra, 187 P.2d 16) but cannot be said to be overwhelming. The possible importance to this court of substantial evidence of a head injury to defendant as affecting the balancing of the scales when the appeal was before us is indicated by the fact that in our opinion we twice commented upon the lack of such evidence. At page 20 of 187 P.2d, we said: "The record contains no evidence of any head injury at the time of the killing. When defendant was arrested in his own room some hours after the shooting, he complained of a throbbing pain or splitting headache over his right ear. He asked the officer if he had hit him and the officer replied in the negative. That he may have suffered from a headache is not unlikely in view of the events of the night." Again, at page 22 of 187 P.2d, in holding that a clear error in the instructions was not under the circumstances prejudicial, we said: "As above stated the record contains no evidence of any head injury at the time of the killing."

The other "new" facts averred are but cumulative of evidence adduced at the trial. But, defendant says, the *ultimate facts* comprising the defense of which he was assertedly deprived "were totally unknown to anyone at the time of the trial, for the reason that the only living witness thereof, the defendant, has suffered, ever since these ultimate facts occurred, a complete mental aberration and loss of memory as to what transpired at that time. Although much of the circumstantial evidence required to prove these ultimate facts was available at the trial, it was never introduced to prove these ultimate facts on this new defense. * * * This new defense and new ultimate facts present entirely new issues. This defense and facts are as follows: The gun was discharged in defendant's hands as the result of an assault upon him by decedent while defendant was in a half-awakened state, under an apprehension of an attack from Joseph Hildreth (for which reason he had gotten the rifle), as decedent was turning out the light by unscrewing the light bulb, all of which occurred while defendant was waiting in decedent's cabin (where the two had lived together until 10 days prior) in order to give decedent some money for her trip to Boston, to bid her goodbye, and to assure her of his future financial aid to her."

[6] The details of this "new defense" cannot be shown by any direct evidence, for defendant still has no recollection of the shooting. The defense, defendant's counsel earnestly aver, was "discovered through many months of research, correlation and analysis." No doubt many a convicted defendant could, by virtue of his counsel's careful study of the evidence adduced at the trial which resulted in his conviction, with further interviewing of witnesses and examination of the scene of the crime based upon such study, devise a manner of presenting his case which he believes would be more favorably received by a trier of fact than was the presentation of the case at the trial. But it cannot be said that, because such new view of the case is not devised until after final judgment, defendant has been deprived of a valid defense by excusable mistake. The ends of justice would be disserved by allowing to those accused of crime a series of trials so that they could present one by one various theories of defense arrived at after study of the record of the previous trial. From what has been said it is apparent that the "new fact" upon which defendant relies is of the nature of newly discovered evidence pertinent to the issues which were litigated at the basic trial, and that, while it would have been material and possibly beneficial to the defendant on that trial, it is not such a new fact as would have necessarily precluded the entry of the judgment which was rendered. A cause for setting aside the judgment is, therefore, under the previously mentioned rules governing the writ coram nobis, not made out.

[7] While, as above indicated, the failure of defendant to make an adequate showing for a stay of execution would have warranted forthwith dismissal of the appeal, we have recognized the possible inadvertence of counsel under the circumstances related and in the exercise of our discretion have considered the appeal on its merits. Under established process of law this court cannot act upon those arguments on behalf of defendant which tend to show that the punishment to which he has been sentenced is disproportionately severe or would have been affected by the new fact now asserted. Only the Governor of this State is empowered to consider and, if he be so advised, to give effect to, such arguments. (Cal. Const., art. VII, § 1.)

For the reasons above stated the judgment denying defendant's application for the writ of error coram nobis is affirmed (Cr. 4893) and the temporary stay of execution is terminated (Cr. 4807).

GIBSON, C. J., and SHENK, CARTER, TRAYNOR and SPENCE, JJ., concur.

EDMONDS, Justice (concurring).

As in People v. Shorts, Cal.Sup., 197 P.2d 330, the only matter now before this court for decision is the appeal from the order denying Tuthill's application for a writ of error coram nobis. The purpose of the stay of execution has been accomplished and neither the deficiencies in the application for it, nor the reasons why the stay was granted, are now of any consequence.

Upon the questions presented by the appeal, I concur in the order affirming the judgment.

Rehearing denied; EDMONDS and CARTER, JJ., dissenting.

32 Cal.2d 812

KROG v. KROG.

L. A. 20320, 20402.

Supreme Court of California.

Oct. 19, 1948.

Rehearing Denied Nov. 15, 1948.

1. Divorce 🔑295

Though a final decree of divorce contains no provision for support of the children, court may in supplemental proceedings in divorce action order husband to make payments for that purpose. Civ. Code, § 138.

2. Divorce 🔑297

A child's rights to be supported by the father cannot be barred by a property settlement agreement between the parents in connection with a divorce action.

3. Divorce 🔑225, 312½

Property settlement agreement entered into some 19 months prior to birth of child, which was conceived after entry of interlocutory divorce decree, did not bar wife's right to an allowance of attorneys' fees and costs in proceeding for child's support in the divorce suit. Civ.Code, § 138.

4. Divorce 🔑226, 307

Proof of paternity of a child conceived after entry of interlocutory divorce is prerequisite to award of suit money and support pendente lite in the divorce suit.

5. Divorce 🔑195, 311

Where it was adjudged in divorce action that husband was father of child conceived by wife after entry of interlocutory decree, and, though husband was sterile 18 months after conception of child, possibility that sterility was of recent origin was not conclusively excluded, husband's appeal from divorce decree and orders requiring him to pay for support of child, wife's attorneys' fees and costs, and to pay $7,500 to court trustee as security, would not be considered on the merits because of husband's failure to comply with those orders. Civ.Code, § 138.

6. Divorce 🔑184(10), 286, 312.6(8)

Husband's testimony that money received by him had been paid over to his nieces under a precatory trust merely created a conflict in evidence concerning husband's financial ability to comply with court orders in divorce action for support of child, and payment of wife's attorneys' fees and costs, and Supreme Court would not disturb findings in favor of wife.

7. Divorce 🔑195, 311

Supreme Court would not predicate a finding that husband lost ability to comply with orders in divorce action requiring him to pay for support of child and wife's attorneys' fees and costs, merely because of husband's bare assertion that he had been unable to raise any sum.

8. Divorce 🔑195, 311

Where husband has left the state and taken his property with him, wife's motion to stay proceedings on husband's appeal from divorce decree and orders requiring husband to pay for support of child, and wife's attorneys' fees and costs, until husband complies with those orders, is a proper remedy.

◆

Appeal from Superior Court, Los Angeles County; Paul Vallée and Elmer D. Doyle, pro tem., Judges.

Action for divorce by Darinka Krog against Roy Krog. From a judgment granting plaintiff a divorce and from orders requiring defendant to pay plaintiff certain sums of money as child support, medical expenses, attorneys' fees, and costs in the trial court, plus further sums as attorneys' fees and costs on appeal, and that defendant deposit with the court trustees

$7,500 as security, defendant appeals, and the plaintiff moves to stay the appeals until defendant should comply with such orders.

Appeals stayed.

Prior opinion 189 P.2d 81.

Gordon W. Levoy, of Hollywood, for appellant.

Hahn, Ross & Goldstone and E. L. Saunders, all of Los Angeles, for respondent.

SCHAUER, Justice.

This is a motion by plaintiff-respondent to stay proceedings on two consolidated appeals. The motion is made upon the ground that defendant-appellant has not complied with orders of the superior court that he pay to plaintiff certain sums of money as child support, medical expenses, attorneys' fees and costs in the trial court, plus further sums as attorneys' fees and costs on appeal, and that defendant deposit with the court trustee $7,500 as security for sums "now due and to become due."

On January 24, 1945, plaintiff filed her complaint for divorce against defendant. She alleged, among other things, that the parties have no children. On February 28, 1945, an interlocutory decree of divorce in her favor was entered. The decree includes approval of a property settlement agreement between the parties.

On February 18, 1946, plaintiff filed her "Notice of Motion to Vacate or Modify Interlocutory Decree of Divorce to Permit the Plaintiff to Receive Medical, Doctor and Hospital Expenses, Support and Maintenance of Minor Child and Attorney Fees and Costs." The notice of motion was accompanied by plaintiff's affidavit in which she stated that as the result of sexual relationships between the parties subsequent to the granting of the interlocutory decree plaintiff had become pregnant and was expecting the birth in August, 1946, of the child of the parties; that plaintiff was without sufficient funds to pay medical and hospital expenses incidental to the birth of the child or to support the child after birth or to pay attorneys' fees and costs in connection with her motion; and that defendant was able to pay for all such matters. Plaintiff's child was born on August 23, 1946.

In November, 1946, defendant filed his motion for a final decree and an affidavit in which he admitted sexual relations with plaintiff subsequent to the granting of the interlocutory decree but averred that he was sterile and impotent and could not be the father of a child, and also that no reconciliation had taken place between the parties. A seven-day court hearing, commencing November 26, 1946, was held before Judge Elmer D. Doyle, sitting pro tempore, on plaintiff's motion to vacate or modify the interlocutory decree and on defendant's motion for a final decree. Evidence was presented by both parties. The court then ruled, on December 12, 1946, that there had been no reconciliation of the parties but that defendant is the father of plaintiff's child, and ordered him to pay $1,750 attorneys' fees, $75 costs, $300 medical expenses, and $100 monthly, commencing December 15, 1946, for support of the child.

A "Final Judgment of Divorce" was rendered by a judge other than Judge Doyle, and entered, on December 16, 1946. Such judgment makes no mention of the ruling of Judge Doyle on December 12. On January 7, 1947, there were filed Judge Doyle's written findings of fact, conclusions of law and "Judgment or Court Order" to the effect, among other things, that defendant is the father of plaintiff's child and is able to support it and to pay medical expenses, attorneys' fees and court costs; that defendant "has sold, or attempted to hide all of his property prior to the trial of this action"; that defendant's motion for the final decree is granted; that plaintiff have custody of the child; and that defendant pay the sums specified hereinabove as child support, medical expenses, attorneys' fees and costs. Defendant has appealed from such judgment of January 7, 1947, except the portions thereof which grant defendant's motion for the final decree and award custody of the child to plaintiff.

On March 12, 1947, plaintiff filed in the superior court her notice of motion to require defendant to pay her reasonable attorneys' fees and court costs in defending against his appeal from the judgment of January 7 and to deposit with the court trustee sufficient sums to cover any amounts awarded plus additional sums to cover child support "past due" and child support pending the appeal. On April 15, 1947, the court, after hearing on an "Order to show cause re contempt, costs and attorney fees," found defendant "wilfully in contempt of court" and delinquent in payment of $100 per month for child support and $2,065 for medical expenses, attorneys' fees and costs. The court then granted plaintiff's motion for attorneys' fees and costs on appeal and ordered defendant to pay $1,000 as her attorneys' fees on appeal, $20 as costs on appeal, and to deposit $7,500 with the court trustee as security for payment of sums "due and to become due" from defendant. From this order of April 15, 1947, also, defendant has appealed.

Defendant filed with the District Court of Appeal, Second District, Division One, his petition for the writ of certiorari to review the order finding him in contempt. Thereafter, on July 28, 1947, the trial court ordered that its minute order of April 15, 1947, be amended "nunc pro tunc as of April 15, 1947," by adding a finding that defendant "has wilfully and deliberately failed and refused" to make the payments ordered by the January 7, 1947, judgment, although "having the ability so to do." The District Court of Appeal denied defendant's petition for certiorari in August, 1947 (2 Civ. No. 16110) and denied his petition for rehearing. His petition for hearing in the Supreme Court was denied in October, 1947.

On November 26, 1947, plaintiff filed her notice of motion to stay proceedings on both of defendant's appeals until defendant "shall comply with the orders of the Superior Court relating to attorney's fees, court costs, medical expenses, support of the minor child and deposit as security." She avers that she is without funds to pay attorneys' fees and costs and has borrowed money to support the minor child; that defendant has made none of the payments required by the judgment and order from which he appealed; that he is able to make such payments; that defendant "prior to the hearing in December, 1946, sold and disposed of all of his property in * * * California, and that he is not within * * * and resides outside California." This is the motion which is presently before this court.

In support of her motion plaintiff relies upon Borenstein v. Borenstein (1938), 11 Cal.2d 301, 302–303, 79 P.2d 388. In that case respondent wife moved to dismiss an appeal on the ground that appellant husband had not complied with an order of the trial court that he pay her attorneys' fees and costs on appeal. This court stated (p. 302 of 11 Cal.2d p. 388 of 79 P.2d), "There does not appear to be any merit in the present motion. A motion to secure a stay of proceedings until appellant shall comply with the order requiring the payment of attorneys' fees and costs, if made, would afford a proper remedy. Allen v. Superior Court (1901), 133 Cal. 504, 65 P. 977." (See also Winter v. Superior Court (1886), 70 Cal. 295, 11 P. 633, and Farrar v. Farrar (1920), 45 Cal.App. 584, 585–586, 188 P. 289, cited by plaintiff.)

[1-3] Defendant contends that the motion is inappropriate because plaintiff is not entitled to the payments ordered by the trial court. He says, "she cannot claim these [ordered payments] as a wife" because a final decree of divorce was entered on December 16, 1946, prior to entry, on January 7, 1947, of the judgment from which he appeals. However, plaintiff is not seeking the payment of alimony to herself, but rather is attempting to enforce an obligation to support a child which the trial court found to be the legitimate child of the parties and awarded to plaintiff's custody. Consequently we are not on this motion concerned with whether plaintiff was still the wife of defendant at the time of the entry of the judgment from which he appeals. The law is established that, despite the fact that a final decree of divorce contains no provision for support of the children of the parties, the court may in supplemental proceedings in the divorce action order the husband to make payments for that purpose. (See Civ.Code, § 138; Harlan v. Harlan (1908), 154 Cal. 341, 98 P. 32, and cases there discussed; Lewis v. Lewis (1917), 174 Cal. 336, 338, 163 P. 42; Puckett v. Puckett (1943), 21 Cal. 2d

833, 841, 136 P.2d 1; Bernard v. Bernard (1947), 79 Cal.App.2d 353, 358, 179 P.2d 625; 9 Cal.Jur. 801–809; cf. Nelson v. Nelson (1936), 7 Cal.2d 449, 453–454, 60 P.2d 982. Moreover, a child's rights in this respect cannot be barred by agreement between the parents. (Lewis v. Lewis (1917), supra, 174 Cal. 341, 163 P. 42; Karlslyst v. Frazier (1931), 213 Cal. 377, 381, 2 P.2d 362; Chiarodit v. Chiarodit (1933), 218 Cal. 147, 153, 21 P.2d 562; Rosher v. Superior Court (1937), 9 Cal.2d 556, 559, 71 P.2d 918.) It follows that the property settlement agreement, which was entered into some nineteen months prior to birth of the child but which, defendant argues, bars plaintiff's right to an allowance of attorneys' fees and costs in any litigation between the parties, cannot defeat the power of the court to make such allowance in this proceeding for child support. (Lucachevitch v. Lucachevitch (1945), 69 Cal.App.2d 478, 485–486, 159 P.2d 688.)

Defendant next relies upon Schallman v. Haas (1917), 33 Cal.App. 28, 34, 164 P. 336, wherein it was held (as quoted by defendant from 20 Cal.Jur. 421), "Where the defendant denies that he is the father of the child, the trial court pending an appeal from its judgment has no power to order him to pay costs necessary to resist the appeal, counsel fees and the child's maintenance." That case is not controlling here. It was an action by the mother, under section 196a of the Civil Code, for support of the alleged illegitimate child of the parties. After the case was decided section 196a was amended and the trial court now has statutory authority to award suit money and support pendente lite in such a proceeding. (Carbone v. Superior Court (1941), 18 Cal.2d 768, 771, 117 P.2d 872, 136 A.L.R. 1260.)

[4, 5] Whether the proceeding whereby child support is sought is one under section 196a or one such as the instant case, proof of paternity is, of course, prerequisite to the award of suit money and support pendente lite. (Carbone v. Superior Court (1941), supra, 18 Cal.2d 768, 117 P.2d 872, 136 A.L.R. 1260.) Here, defendant urges, this requirement has not been met for he "has produced [at the trial in November and December, 1946] scientific proof, uncontradicted, and by court-appointed impartial scientists, which irrefutably shows that it was impossible for him ever to have caused the conception of any child." The medical testimony establishes that defendant sustained an injury to the scrotum many years before and was sterile at the time the tests were made, eighteen months after the conception of the child. On the basis of these facts it was the opinion of the medical experts that defendant had been sterile for many years as a result of the injury. The possibility that the sterility was of recent origin was not conclusively excluded, however, and plaintiff testified that defendant was the only person with whom she had had intercourse during the period when conception took place. Under such circumstances it is not appropriate, on this motion, to consider the merits of the appeal.

[6, 7] Defendant asserts that he has "been unable to raise this huge security for costs required by the April 15, 1947, Order in the sum of Seventy-five Hundred * * * Dollars, or any sum" and that there is no showing that he has, or at any time had, the ability to comply with the orders requiring him to pay the various sums above mentioned. Therefore, he argues (citing Pugliese v. Pugliese (1927), 200 Cal. 652, 653, 254 P. 266), no cause for staying the proceedings on these appeals has been shown. The record discloses, however, that the findings of ability to pay made on January 7 and April 15, 1947, were based upon evidence of defendant's admitted receipt in June, 1946, of $58,000 upon the sale of certain real property. Defendant's further statement that he had immediately paid such money over "to his nieces in Chicago under a precatory trust" merely created a conflict in the evidence which the trial court resolved in plaintiff's favor and which this court will not disturb. (See In re Hadley (1943), 57 Cal.App.2d 700, 703, 135 P.2d 381.) Nor will this court predicate a finding that defendant has lost the ability to comply with the judgment and order appealed from upon his bare assertion that he has "been unable to raise * * * any sum."

[8] As suggested in Borenstein v. Borenstein (1938), supra, 11 Cal.2d 301, 302, 303, 79 P.2d 388, we are of the view that, at least in cases such as this where the defendant has left the state and has taken his property with him, a motion to stay proceedings until defendant-appellant complies with an order of the trial court for the payment of attorneys' fees and costs on appeal is a proper remedy. We are further of the view that the interest of plaintiff will be adequately protected if the hearing and determination of these appeals are stayed until defendant has complied with the order of April 15, 1947 (L.A. 20320) that defendant pay plaintiff's attorneys' fees and costs on appeal and deposit with the court trustee the sum of $7,500 as security for compliance by him with such orders in the pending litigation as may ultimately be determined to be valid.

For the reasons hereinbefore set forth proceedings on the merits in the two appeals are stayed until defendant complies with the order of April 15, 1947 (in L.A. 20320), for the payment of plaintiff's attorneys' fees and costs on appeal, and deposits the sum of $7,500 as security for compliance by him with such other orders in the pending litigation as may ultimately be determined to be valid.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SPENCE, JJ., concur.

32 Cal.2d 833

WEAVER et al. v. PASADENA TOURNAMENT OF ROSES ASS'N et al.

L. A. 20623.

Supreme Court of California.
Oct. 28, 1948.

1. Courts 🔑121(4)
Parties 🔑11

Action by four plaintiffs, "on behalf of themselves and all others similarly situated", each seeking to recover $100 statutory penalty for wrongful refusal of admission to Rose Bowl football game, was not a "representative suit," since question as to whether any of plaintiffs was wrongfully denied admission could not determine rights of unnamed parties whom plaintiffs claimed to represent, and hence total amount of money demanded was less than the $1,000 jurisdictional amount for superior court and cause was properly transferred to justice's court. Civ.Code, §§ 53, 54; Code Civ.Proc. §§ 382, 393, 396.

See Words and Phrases, Permanent Edition, for all other definitions of "Representative Suit".

2. Parties 🔑10

The statutory provision permitting one or more to sue or defend for benefit of all who have a common or general interest is based upon the doctrine of "virtual representation", which rests upon considerations of necessity and paramount convenience, and was adopted to prevent a failure of justice. Code Civ.Proc. § 382.

See Words and Phrases, Permanent Edition, for all other definitions of "Virtual Representation".

3. Parties 🔑10

While statute providing for representative suits re-enacted long-prevailing equity rule, it applies both to legal and equitable causes of action, since no limitation is contained in its language. Code Civ.Proc. § 382.

4. Parties 🔑11

To maintain a representative suit there must be a well defined community of interest in the questions of law and fact involved as affecting the parties to be represented. Code Civ.Proc. § 382.

5. Parties 🔑11

Generally, a representative suit is proper because it is in behalf of a common or joint interest of an ascertained class in subject matter of the controversy. Code Civ.Proc. § 382.

6. Parties 🔑11

That numerous parties have separate claims against the same person or persons will not alone suffice to sustain a representative suit where there is no community of interest. Code Civ.Proc. § 382.

7. Parties 🔑11

To warrant a representative suit, the represented group need not be so united in interest with the actual plaintiff in the action as to be necessary parties under statute. Code Civ.Proc. § 382.

8. Judgment 🔑677

In a truly representative action, judgment would be res judicata for or against class sought to be represented. Code Civ. Proc. § 382.

9. Judgment 🔑677

Judgment on separate causes of action asserted by four plaintiffs to recover statutory penalty for wrongful refusal of admission to Rose Bowl football game would not be res judicata for or against claims of numerous unnamed and apparently unknown and unascertainable persons who allegedly were likewise denied admission and whom plaintiffs claimed to represent. Civ.Code, §§ 53, 54.

10. Parties 🔑11

Action to recover statutory penalty for wrongful refusal of admission to Rose Bowl football game could not be maintained by four plaintiffs as a representative suit on behalf of themselves and all others similarly situated on ground that their complaint constituted an invitation to such persons as might be interested to join with them in seeking relief arising out of the same transaction or series of transactions. Code Civ. Proc. §§ 378, 382; Civ.Code, §§ 53, 54.

Appeal from Superior Court, Los Angeles County; Allen W. Ashburn, Judge.

Action by Claude Weaver and others, on behalf of themselves and all others similarly situated, against Pasadena Tournament of Roses Association and others to recover statutory penalty under §§ 53, 54 of the Civil Code on ground that they were wrongfully refused admission to the Rose Bowl football game at Pasadena on New Years Day, 1947. From an order transferring cause to justice's court for Pasadena township, plaintiffs appeal.

Order affirmed.

Prior opinion 190 P.2d 626.

Hahn, Ross, Goldstone & Saunders and Nathan Kline, all of Los Angeles, for appellants.

O'Melveny & Myers, Pierce Works, and Deane F. Johnson, all of Los Angeles, and Hahn & Hahn, Edwin F. Hahn, and Louis R. Vincenti, all of Pasadena, for respondents.

SPENCE, Justice.

Four plaintiffs—"on behalf of themselves and all others similarly situated"—brought this action in the Superior Court of Los Angeles County, each seeking to recover the $100 statutory penalty imposed for the wrongful refusal of admission to the Rose Bowl Game at Pasadena on January 1, 1947—a "place of public amusement or entertainment." Civ.Code, secs. 53, 54; Greenberg v. Western Turf Association, 140 Cal. 357, 364, 73 P. 1050. By demurrer and motion to strike, defendants Pasadena Tournament of Roses Association, Associated Students University of California at Los Angeles, and William C. Ackerman, the "Graduate Manager of Athletics" at the university, appeared in challenge of the propriety of plaintiffs' maintenance of this action as a representative suit and the jurisdiction of the superior court to proceed upon that basis. At the hearing on this issue as to the appropriate trial forum for the litigation of plaintiffs' action, defendants prevailed and the court made the following order: "It appearing upon argument of demurrer that this is not and cannot be a representative action, that it involves a money demand for less then $1,000.00, to-wit, statutory penalties in the aggregate amount of $400.00, and that this court is without jurisdiction, this cause is transferred to the Justice's Court for Pasadena Township, and demurrers and motions are placed off calendar." From such order, plaintiffs have appealed.

[1] Careful consideration of the allegations of plaintiffs' complaint compels the conclusion that they have not presented a case properly cognizable as a representative suit, and that in these circumstances the cause was correctly transferred to the justice's court for disposition in view of the

amount of plaintiffs' claims. Code Civ. Proc., secs. 393, 396.

Plaintiffs allege the following factual situation as the premise of their action: "That [in] November * * * 1946, the University of California at Los Angeles was selected * * * to represent [the] Pacific Coast Conference in the annual Rose Bowl football contest on January 1, 1947"; that thereafter "defendants caused advertisements to be published over the radio and in the newspapers announcing a public sale of 'approximately 7500' tickets of admission to the said * * * contest, which said sale was to be conducted on or about December 23, 1946, at the Rose Bowl, Pasadena * * *"; that on the day so fixed, "plaintiffs and other persons presented themselves at the box office" at the designated place, and "while waiting in line * * * were given numbered identification stubs, assuring them of their places in line and an opportunity to each of them to purchase two (2) tickets of admission to said Rose Bowl football contest"; that "approximately 3,350 of [such] stubs were * * * distributed * * * but that after only 1,500 * * * tickets of admission were sold, the box office was closed and it was announced by defendants that all of the available tickets had been sold"; that "defendants [made] a fraudulent and unauthorized disposition of approximately 6,000 of [the] 7,500 tickets of admission reserved for public sale" on the designated day "to other persons by private sale and by gift and not by public sale to those holding the aforesaid identification stubs"; that on "January 1, 1947, * * * plaintiffs and other persons" who held the stubs but who had been denied tickets "presented themselves and their identification stubs at the Rose Bowl, * * * demanded that they be admitted and * * * tendered the fixed admission price * * * but were refused admittance"; that "defendants had ample room and accommodations to receive and admit plaintiffs and other persons holding [the] identification stubs * * * but * * * denied admittance * * * solely by reason of [their] aforesaid fraudulent and unauthorized disposition of the * * * tickets of admission" theretofore advertised as available for public sale. Plaintiffs further allege that "the issues stated in this action and the questions herein to be litigated are of common and general interest to all other persons similarly situated and affect all the other persons in exactly the same manner as these plaintiffs are affected and that such other persons are so numerous, amounting to several hundred individuals, that it is impracticable to bring all of said persons before the court as individual plaintiffs and that, therefore, these plaintiffs sue for themselves and for the benefit of all of the other persons similarly affected." Accordingly, plaintiffs "on behalf of themselves and all others similarly situated pray [for] judgment against defendants in the sum of One Hundred Dollars ($100.00) each * * *."

[2-4] The propriety of representative or class suits has long been recognized in our statutory law as embraced in section 382 of the Code of Civil Procedure, enacted in 1872 and which provides as follows: "Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants; * * * and *when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all.*" (Emphasis added.) The italicized portion of this statute is based upon the doctrine of virtual representation, which, as an exception to the general rule of compulsory joinder of all interested parties, "rests upon considerations of necessity and paramount convenience, and was adopted to prevent a failure of justice." Bernhard v. Wall, 184 Cal. 612, 629, 194 P. 1040, 1048; 20 Cal.Jur., sec. 7, p. 483. Even before the cited statute, as plaintiffs note, this doctrine found expression in this state in such cases as Von Schmidt v. Huntington, 1 Cal. 55, and Gorman v. Russell, 14 Cal. 531, each of which concerned the dissolution of a joint association and the distribution of the company assets, with common interests in a common fund permitting representative or class disposition of the issues before the court in conformity with

general principles of equity responsive to the exigencies of the situation showing that it was impracticable to require the joinder of all the numerous members "interested in the subject matter" of the proceeding, and that their non-participation therein would not affect the full protection of their substantial rights. Pomeroy, Code Remedies, Fifth Edition, sec. 292, p. 444. While the cited statute—typifying the usual provision adopted in the various states—thus re-enacts the long-prevailing equity rule, it applies both to legal and to equitable causes of action, since no restriction or limitation is contained in its language. Pomeroy, Code Remedies, Fifth Edition, sec. 290, p. 441, and cases there cited; see, also, Colt v. Hicks, 97 Ind.App. 177, 179 N.E. 335, 341; Board of Commissioners of Vanderburgh County v. Sanders, 218 Ind. 43, 30 N.E.2d 713, 714, 131 A.L.R. 1048. But in any event and regardless of which of the alternative conditions of the statute is invoked as authorizing a class proceeding, it has been uniformly held that there must be a well-defined "community of interest" in the questions of law and fact involved as affecting the parties to be represented. Pomeroy, Code Remedies, Fifth Edition, sec. 286, p. 436; Noroian v. Bennett, 179 Cal. 806, 809, 179 P. 158; Batman v. Louisville Gas & Electric Co., 187 Ky. 659, 220 S.W. 318, 319; Notes, 114 A.L.R. 1015; see, also, Blume, The "Common Questions" Principle in the Code Provisions for Representative Suits, 30 Mich.L.Rev. 878.

Plaintiffs contend that "all the individuals," whether "named or unnamed," who waited in line but were denied tickets to the Rose Bowl Game "have the same interest in the subject matter and the recovery"; that "the facts necessary to prove the cause of action of any one of them are the same [as those] necessary to prove the cause of action of any one or all of the others"; and that the number of interested individuals, "amounting to several hundred," renders it "impracticable to bring them all before the court." Accordingly, they urge that this action comes within the provisions of either of the statutory conditions sustaining the prosecution of a representative suit, and particularly within the second category. But plaintiffs misconstrue the nature of this litigation. The causes of action of the several plaintiffs and the other unnamed aggrieved individuals are separate and distinct. The question, as to each individual plaintiff, is whether *he* "as a person over the age of twenty-one years" presented himself and demanded admittance to the game, whether *he* tendered the price of the ticket, and whether, as to *him*, the refusal of admission was wrongful under section 53 of the Civil Code, entitling him "to recover * * * his *actual damages*, and one hundred dollars in addition thereto." Civ. Code, sec. 54; emphasis added. Moreover, other independent factors of consideration arise in connection with the respective individual claims by reason of the provision that a "person under the influence of liquor, or who is guilty of boisterous conduct, or [who is] of lewd or immoral character, may be excluded from any such [public] place of amusement." Civ.Code, sec. 53. Thus, a decision favorable or adverse to these plaintiffs—or any one of them—could not determine the rights of any of the unnamed parties whom plaintiffs purport to represent. True, the plaintiffs, and perhaps others who waited in line and were refused tickets of admission, have an interest in a common question of law, that is, whether the statutory recovery is authorized when an operator of a "place of public amusement or entertainment" advertises 7,500 tickets for sale to the general public and then later, after selling only 1,500, closes the box office upon announcing that "all of the available tickets had been sold." But the determination of such question in the present case would still leave to be litigated the right of any other person to recover on his statutory claim in the light of whether *he*, in reliance upon the advertised sale, stood in line, received an identification stub, was denied tickets before the promised 7,500 had been sold, presented himself at the Rose Bowl as a "sober, moral person," demanded admission, tendered the price, and was refused, entitling him "to recover * * * his actual damages" as well as the fixed statutory penalty of $100.

[5] In general, a representative suit is proper because it is in behalf of a common or joint interest of an *ascertained class* in the subject matter of the controversy: The Farmers' & Merchants' National Bank of Los Angeles v. Peterson, 5 Cal.2d 601, 55 P.2d 867, a suit by one creditor for an accounting on a trust fund held under an assignment for the benefit of all creditors of the company; Moore v. Bowes, 8 Cal.2d 162, 64 P.2d 423, an equitable proceeding by some of the stockholders and beneficiaries of a voting trust agreement to remove the trustees; Goes v. Perry, 18 Cal.2d 373, 115 P.2d 441, an attempt to impress a trust upon certain property in behalf of ascertainable beneficiaries; Mitchell v. Pacific Greyhound Lines, Inc., 33 Cal.App.2d 53, 91 P.2d 176, 178, litigation by a court-appointed liquidator to "settle certain questions common to all of the subscribers" of a "reciprocal or interinsurance exchange"; Peterson v. Donelley, 33 Cal.App.2d 133, 91 P.2d 123, 125, an action involving the management of trust property on behalf of "approximately three thousand individual unit holders" constituting the owners of the beneficial interests therein; and Baumann v. Harrison, 46 Cal.App.2d 84, 115 P.2d 530, a foreclosure proceeding on behalf of plaintiff and other bondholders. In the present case there is no ascertainable class, such as the stockholders, bondholders, or creditors of an organization. Rather, there is only a large number of individuals, each of whom may or may not have, or care to assert, a claim against the operators of the 1947 Rose Bowl Game for the alleged wrongful refusal of admission thereto. Each of such claimants must establish separately that he was refused admission, and that such refusal was wrongful under section 53 of the Civil Code. Moreover, each claimant would have the independent right, under section 54 of said code, to litigate the question of his recovery of "actual damages" in addition to the $100 penalty imposed by the statute. While each would be "similarly situated" in that his cause of action arises under the same statute, his recovery would rest on a distinct premise correlative with varying proof as to the facts of his particular case. In such circumstances there is not the necessary "common or general interest" in the subject-matter of the litigation appropriate to the maintenance of a representative action as that type of proceeding has been analyzed in the adjudicated cases. The foregoing considerations suggest the reason why plaintiffs have been unable to cite, and independent research has failed to reveal, a single case in which it has been held that a representative or class suit was a proper or appropriate vehicle for the determination of alleged tort liability of defendants to numerous unnamed and unascertained persons.

Consistent with these observations, the present action resembles in certain aspects such cases as Carey v. Brown, 58 Cal. 180; Ballin v. Los Angeles County Fair, 43 Cal.App.Supp.2d 884, 111 P.2d 753, and Watson v. Santa Carmelita Mutual Water Co., 58 Cal.App.2d 709, 137 P.2d 757, wherein a class suit was deemed improper where the interest of each member of the alleged represented group was several and distinct, rather than collective. Thus in the last-cited case injunctive relief was sought against the collection of assessments by a mutual water company, because of fraudulent representations made separately to plaintiffs and 1,500 other investors. In declaring such relief to be "unwarranted" insofar as the "1500 unnamed shareholders" were concerned, the court observed, 58 Cal.App.2d at page 719, 137 P.2d at page 762: "Plaintiffs allege that they were defrauded by deceitful representations made to them by defendants. Such representations do not necessarily affect the rights of their unnamed companions. Plaintiffs may proceed without let or hindrance against the defendants upon whatsoever grievances they deem themselves to have suffered. In the event of their recovery, the judgment would not transfer any advantages to those unnamed. If they lose in the contest, the 1500 uncomplaining shareholders are still possessed of any claims they may have had against defendants. Plaintiffs' causes of action, if any, against defendants are several and distinct from the rights of the 1500. There is no privity of estate between plaintiffs and the unnamed group. Carey v. Brown, 58 Cal. 180; Ballin v. Los Angeles County Fair, 43 Cal.App.Supp.2d 884, 111 P.2d 753."

[6, 7] So the fact that "numerous parties" have separate and distinct claims against the same person or persons will not alone suffice to sustain a representative suit where there is no community of interest. To hold otherwise would nullify the equitable concept of section 382 of the Code of Civil Procedure as a procedural convenience for the maintenance of representative litigation. Pomeroy, Code Remedies, Fifth Edition, sec. 287, p. 438. However, it cannot be said that a "representative suit" is warranted "only in those cases where the represented group is so united in interest with the actual plaintiff in the action as to make them *necessary parties* under the statute [Code Civ.Proc., sec. 382]." Watson v. Santa Carmelita Mutual Water Co., supra, 58 Cal.App.2d 709, 718, 137 P.2d 757; emphasis added. The statute does not so provide and such interpretation would restrict its appropriate application in cases where "many persons" or "numerous parties," though not necessary ligitants, nevertheless have a "common or general interest" in the subject matter of the controversy as a premise for a class proceeding in the disposition of the merits of their collective claims. The quoted statement from the Watson case was apparently made in pursuance of a similar observation in Carey v. Brown, supra, 58 Cal. 180, 184, wherein the plaintiff as the owner of certain land sought to litigate on behalf of himself and "a large number of other persons who derive[d] their titles from the same source that [he] derive[d] his" a title claim against defendants. In summing up the situation as one not satisfying the test of a representative proceeding, the court pertinently stated 58 Cal. at page 183: "The only question involved in this action is one of title to the land claimed by the plaintiff and the defendants adversely. It does not appear that any one had a common or general interest with the plaintiff in that question. A judgment in his favor would simply quiet his title to land in which no one else had any interest."

Subject to like analysis is the case of Ballin v. Los Angeles County Fair, supra, 43 Cal.App.Supp.2d 884, 111 P.2d 753, 755, wherein the plaintiff, a patron of a licensed horse racing track, sought to recover a nominal amount on the ground that the operators of the track had erroneously computed the "breakage" under the pari-mutuel system of wagering. But in addition to stating such individual cause of action, plaintiff further claimed by his complaint "to represent and sue for numerous other persons who [had] made wagers at defendant's track and against whom defendant [had] made the same error in figuring 'breakage,' and he demand[ed] in their behalf an accounting of all [those] transactions and [sought] to recover for them sums aggregating more than $200,000." After observing that such allegations were "entirely insufficient to show a case in which the law would authorize the bringing of * * * a representative suit by plaintiff or entitle him to an accounting" as correlated with that premise of legal procedure, the court referred, without discussion but as decisive of the point, to "the principles declared in Carey v. Brown, 1881, 58 Cal. 180, 183, 184, construing section 382 of the Code of Civil Procedure, and in cases construing like statutes of other states * * *. (Citing cases.)" Examination of the cited cases from other jurisdictions reveals that they rest on the proposition that there must be a "common or general interest" in the subject matter of the controversy in order to authorize one or more to maintain an action for all, but that they do not purport to require the unity of interest to be that of "necessary parties." As the respective factual considerations prevailed in Carey v. Brown, supra, 58 Cal. 180, and the two succeeding cases citing it on the same point of the essential collective character of a representative action—Ballin v. Los Angeles County Fair, supra, 43 Cal.App.Supp.2d 884, 111 P.2d 753, and Watson v. Santa Carmelita Mutual Water Co., supra, 58 Cal.App.2d 709, 137 P.2d 757—they correctly resolved the issue in question as dependent upon a "common or general interest," but to the extent that they indicate that the represented litigants must meet the test of "necessary parties," they are out of line with the adjudicated cases as well as with the express terms of the statute, and they are hereby disapproved in that particular.

[8-10] In concluding this discussion, there is one further point to be noted. In cases properly falling within the category of representative litigation, the judgment or decree would be res judicata for or against the class sought to be represented. Freeman on Judgments, Fifth Edition, sec. 436, p. 952; Price v. Sixth District Agricultural Ass'n, 201 Cal. 502, 513, 258 P. 387. But that result could not be extended to entirely separate causes of action, such as the four plaintiffs have pleaded here, so as to bind "several hundred individuals" who are not named, and who are, so far as the complaint shows, unknown and unascertainable. Rather, these unknown parties are ascertainable only insofar as each may come forward and individually present proof of all the facts necessary to authorize a recovery in accordance with the merits of his particular case, and judgment in one would by no means be a judgment in any other. Plaintiffs here do not claim to represent an association or protective committee, nor do they present any reasonable basis for ascertaining the members of the alleged class for whom they seek to act in this litigation. Cf. Marolda v. La Piner, 81 Cal.App.2d 742, 743, 185 P.2d 40. In short, plaintiffs' complaint can be regarded as no more than an invitation to such persons as may be interested to join with them in this action in seeking relief "arising out of the same transaction or series of transactions" (Code Civ.Proc., sec. 378), but such situation furnishes no ground for the maintenance of a representative proceeding so as to confer jurisdiction on the superior court to hear and determine plaintiffs' cause.

The order of transfer to the justice's court is affirmed.

SHENK, EDMONDS, CARTER, and TRAYNOR, JJ., concur.

GIBSON, C. J., and SCHAUER, J., concur in the judgment.

---

88 Cal.App.2d 167

JONES v. HEINZE et al.

Cr. 2027.

District Court of Appeal, Third District, California.
Oct. 25, 1948.

Hearing Denied Nov. 22, 1948.

1. Criminal law ⚷641(1)

For a trial judge in a capital case to determine whether there has been a competent and intelligent waiver of counsel by defendant, the trial judge must first ascertain whether defendant clearly understands the nature and effect of his waiver. U.S.C.A.Const. Amend. 6; Const.Cal. art. 1, § 13.

2. Criminal law ⚷641(1)

In a capital case where defendant has not had benefit of advice of counsel, and there is nothing to indicate that he understands the nature of the charge, elements of offense, pleas, and defenses which may be available, or punishments which may be exacted, trial judge does not sufficiently perform his duty if he merely advises defendant that he has a right to counsel. U.S.C.A.Const. Amend. 6; Const.Cal. art. 1, § 13.

3. Habeas corpus ⚷25(1)

The mere fact that it might be difficult or inconvenient to retry murder case after lapse of many years would not justify denial of writ of habeas corpus to correct failure to advise defendant of his constitutional right to have the advice of counsel. U.S.C.A.Const. Amend. 6; Const.Cal. art. 1, § 13.

4. Habeas corpus ⚷25(1)

Where illiterate man who was shot twice during his arrest, was arraigned only six days later in superior court where he appeared without counsel and pleaded guilty to charge of first degree murder without being informed by superior court of his constitutional right to be represented by counsel, and there was grave doubt as to whether there was premeditation in homicide, judgment was void and would be set aside many years later in habeas corpus proceeding. U.S.C.A.Const. Amend. 6; Const.Cal. art. 1, § 13.

Appeal from Supreme Court, Sacramento County.

Proceeding in the matter of the petition of John Jones, petitioner, for a writ of habeas corpus against Robert A. Heinze, and others, respondents, challenging proceedings under which petitioner was sentenced to life imprisonment on charge of murder in first degree.

Judgment of conviction set aside and cause remanded for further proceedings.

C. K. Curtright, of Sacramento, for appellant.

Fred N. Howser, Atty. Gen., and Benjamin B. Knight, Deputy, of Sacramento, Cal., for respondents.

PEEK, Justice.

By habeas corpus petitioner challenges the proceedings under which he was sentenced to life imprisonment on a charge of murder in the first degree. Although various grounds are alleged as a basis for his petition it appears that only one need be considered, to-wit: the failure of the trial court to properly inform him of his constitutional rights. Petitioner's contention in this regard is that he was neither informed of the right nor was he given the opportunity to have the advice of counsel and that he did not waive such right.

The facts disclosed by the meager record before us are that petitioner was arrested on or about June 1, 1924, and on June 3, by a complaint filed in the Justice Court of Oroville Township, was charged with murder in the first degree. During the course of his arrest he was shot twice, once with a revolver or rifle, the bullet passing through his body, and once with a shot gun. A preliminary examination was held on the morning of June 6, and he was held to answer in the Superior Court of that county. The minutes of the preliminary hearing state that the petitioner "was present in court without counsel" and that he had "previously been informed of his legal rights by the court." Later on the same morning he was arraigned in the Superior Court and pleaded guilty to the crime as charged. The pertinent portions of the minutes of the proceedings on arraignment in the Superior Court state that the "defendant was present without counsel and states that he does not desire counsel", that the clerk read the information and gave a copy to the defendant, that the defendant pleaded guilty to the offense charged, and that he waived time for sentencing. The minutes of the proceedings at the time sentence was pronounced the following day likewise show that the defendant "was present without counsel."

The recent decision of the Supreme Court of this state (People v. Chesser, 29 Cal.2d 815, 178 P.2d 761) and of the Supreme Court of the United States (Von Moltke v. Gillies, 332 U.S. 708, 68 S.Ct. 316, 92 L.Ed. 309) which have properly and with clarity focused attention upon the duty cast upon our courts to insure and protect the constitutional guarantees afforded those accused of crime, California Constitution, Article I, Section 13; U. S.Const. 6th Amend., would seem to make unnecessary a detailed statement of the law in regard to its application to the question presented herein. However, counsel for respondent summarily dismisses the question so raised by petitioner with the statement that it is conclusively controlled by the more recent case of Ex parte Tedford, 31 Cal.2d 693, 192 P.2d 3, 4.

It is true that in the Tedford case as in the present the Docket of the Justice Court shows that the defendant was "informed of his legal rights" but there the similarity ends. The minutes of the Superior Court in the Tedford case show that defendant was "instructed 'as to his rights'". In the present case the minutes of the Superior Court are entirely silent in that regard, simply mentioning that "defendant was present without counsel and states he does not desire counsel." Additionally the opinion in the Tedford case states that the transcript of the proceedings on arraignment and plea showed the defendant therein to have been responsive and fully aware of the nature of the proceedings, which the court concluded afforded a substantial basis for the determination that the waiver of his right to counsel was made with intelligence and full conception of the consequences.

In the present case it appears that at the time of his arraignment and plea the petitioner was an illiterate Negro, 37 years of age, who had only reached the second grade in school, who in fact did not learn to read or write until after his confinement in San Quentin, who was under the physical disability and shock of having been shot twice only a few days prior to his appearance, who was wholly ignorant of court procedure and who was charged with a crime containing various degrees—degrees not easily distinguishable, even to one trained in law, and each of which carried with it a different punishment. Quite obviously this is an entirely different situation that was presented in the Tedford case.

[1, 2] Under such circumstances the rule is, as stated in People v. Chesser, supra, that:

"In order for a trial judge to determine whether there has been a competent and intelligent waiver of counsel, he must first ascertain whether the defendant clearly understands the nature and effect of his waiver. In the capital case where the defendant has not had the benefit of advice of counsel, and there is nothing to indicate that he understands the nature of the charge, the elements of the offense, the pleas and defenses which may be available, or the punishments which may be exacted, the trial judge does not sufficiently perform his duty if he merely advises the defendant that he has a right to counsel * * *". 29 Cal.2d at page 822, 178 P.2d at page 765. And that "The trial judge should also take into account the education, experience, mental capacity, and conduct of the accused in determining whether his willingness to waive counsel may be due to lack of ability to comprehend his situation." 29 Cal.2d at page 824, 178 P.2d at page 766. See also Von Moltke v. Gillies, supra, 332 U.S. 708, 68 S.Ct. 316, 92 L.Ed. 309.

The propriety of the application of such rule to the facts of the present case is given added emphasis by the words of the trial judge, who, upon sentencing the petitioner, stated: "That there was and does exist a doubt—a very grave doubt as to whether or not this was done premeditatively and with malice aforethought or whether it was some sudden affray."

Hence, if the evidence before the trial court was such as to raise an apparent doubt as to the degree of the offense committed then the petitioner, without the aid of counsel and through ignorance or bewilderment, may well have pleaded guilty to a charge carrying a greater penalty than the law of of this state exacts for the actual offense committed. Tomkins v. State of Missouri, 328 U.S. 485, 65 S.Ct. 370, 89 L.Ed. 407; People v. Chesser, supra.

In view of the emphatic enunciation of the rule by the Supreme Court of the United States and of this state, it is most difficult to understand the statement made by counsel for respondent that he is apprehensive of a bad precedent which would be established if the writ prayed for were granted; that it would be a travesty upon justice, and a sad commentary upon our criminal jurisprudence if the case were to be retried after the lapse of so many years and that in any event petitioner had "utterly failed to show any reason to justify the extraordinary remedy of habeas corpus."

[3] Surely preservation of the historical guarantees of the Constitution can never establish a dangerous precedent, and a travesty upon justice under the circumstances of this case could result only from the failure of this court to adhere to such fundamental guarantees. The mere fact that it may be difficult or inconvenient to re-try the case after the lapse of so many years cannot justify a denial of the writ to correct the original failure of the trial court in the strict adherence to its mandatory constitutional duty.

[4] Since the judgment is void for the reasons herein set forth, it is set aside and the cause is remanded to the trial court for further proceedings. It is further ordered that if petitioner is unable to employ counsel the court shall appoint counsel to defend him and shall permit petitioner to change his plea if he be so advised.

ADAMS, P. J., and THOMPSON, J., concur.

Hearing denied; SHENK and SPENCE, JJ., concur.

88 Cal.App.2d 251

In re SANDERS.

HOBGOOD et al. v. FLATLEY.

Civ. 3488.

District Court of Appeal
Fourth District, California.
Oct. 28, 1948.

Hearing Denied Dec. 23, 1948.

1. Infants ⊂⊃16

While presumption of intent to abandon a minor left in care of his mother from failure to provide or communicate with him for one year may be overcome by opposing evidence, question whether an intent to abandon has existed for one year is a question of fact for the trial court. Welfare and Institutions Code, § 701(a).

2. Infants ⊂⊃16

Evidence established that mother of a minor child by failure to provide for him or communicate with him for a period of one year had "abandoned" the child so as to justify an order declaring the child free from parental control. Welfare and Institutions Code, § 701(a).

See Words and Phrases, Permanent Edition, for all other definitions of "Abandon".

3. Infants ⊂⊃16

In suit to declare a minor child free from parental control because of abandonment by the mother, findings respecting the mother's health and advice respecting custody were not controlling over other findings respecting abandonment fully supported by evidence. Welfare and Institutions Code, § 701(a).

4. Infants ⊂⊃16

That order declaring a minor child free from custody of mother because of abandonment said nothing about his father who was made a party to action did not invalidate order on ground that father retained sole custody of child where father had been deprived of custody by a court order and sole custody had been given to the mother. Welfare and Institutions Code, § 701(a).

Appeal from Superior Court, Orange County; Franklin G. West, Judge.

In the matter of Robert Le Roy Sanders. Proceeding by Thomas Marcellus Hobgood and others against Juanita Sanders Flatley. From an order declaring Thomas Marcellus Hobgood to be free from the custody and control of Juanita Sanders Flatley, his mother, the mother appeals.

Order affirmed.

Ray H. Overacker, of Huntington Beach, for appellant.

Leroy P. Anderson, of Costa Mesa, and Donald Dungan, of Costa Mesa, for respondents.

BARNARD, Presiding Justice.

This is an appeal by the mother of the minor from an order of the superior court, sitting as a juvenile court, declaring Robert LeRoy Sanders free from her custody and control.

The minor was born May 28, 1937, and was twenty days less than ten years old when this order was made. The parents of the minor were divorced in October, 1938, the custody of the minor and an older sister being given to their paternal grandmother. In October, 1940, an order was entered giving custody of the children to this appellant, and ordering the father to pay her $20 a month for their support. Apparently, this last order was never complied with.

On December 9, 1940, the appellant placed Robert in the home of Mr. and Mrs. Hobgood, the respondents in this proceeding, agreeing to pay them for his board and care. In December, 1940, and January, 1941, she paid them $13.50, but has paid them nothing further. The boy has remained there ever since and, as the court found, the Hobgoods have provided for him with the exception that through legal proceedings against the father they collected from him $100 in 1943 and $850 in 1944. Nothing was paid by any one for more than three years before this order was made.

Between December, 1940, and May, 1942, the appellant, who was working as a waitress in Orange and Los Angeles Counties, called on Robert at the home of the Hobgoods at Costa Mesa on the average of once every three or four months. She was then in poor financial circumstances and in poor health part of the time. On May 2, 1942, she married James Flatley, who was in military service. Until 1944, they lived near Los Angeles and she continued to visit Robert once every three or four months. In October, 1943, her new husband adopted Robert's older sister. In consideration of her former husband's consent to this adoption the appellant signed an instrument by which she agreed to waive her guardianship rights and to "grant" the custody of Robert to her former husband. Before signing, she was advised that this document had no binding legal effect and that the matter of Robert's custody would remain for the determination of the court.

In July, 1944, the appellant went with her husband to New Jersey. She did not then go to see Robert although she had last seen him in March, 1944. In February, 1945, she went to Indiana where she remained until May. From May to October, 1945, she was in Texas with her husband. He was then discharged from military service and they returned to Los Angeles where they still live. From 1940 to November, 1946, the appellant was in ill health the greater part of the time but was able to do her own housework except for brief periods when she was in the hospital.

While she was in New Jersey in 1944, the appellant wrote to the Hobgoods and the child several times. At Christmas in 1944, she wrote a letter to Robert and sent him $1 for a Christmas present. She also sent him a card early in 1945, which was never received, During the remainder of 1945, and during the entire year of 1946, she did not communicate either with Robert or the Hobgoods. In June, 1946, she inquired of a relative and was told that this relative thought the Hobgoods were then living near Perris. She and her husband drove to Perris, inquired of a number of people and looked at some of the mail boxes for the name of Hobgood, but did not find it. No further effort was made to locate the boy until December, 1946, when the appellant phoned to her former husband and was referred to a lawyer who was representing the Hobgoods. She was told by the lawyer that they were temporarily in Whitewater. Having been told that this proceeding was being started, she went to Whitewater in January, 1947, but did not find the Hobgoods as they had gone to Santa Ana.

This proceeding was started on January 23, 1947. An adoption proceeding started by the Hobgoods in January, 1946, is still pending. The court found the facts as above stated, and found that Robert had been left by his mother in the care and custody of the Hobgoods for the period of more than one year without any communication from her and with the intent on her part to abandon him. It was also found that Robert had been so left by his mother without any provision for his support for a period of more than one year. However, it was further found that such failure to provide was not, in itself, sufficient to show an intent to abandon since she had given the custody of him to her former husband by the instrument signed on October 13, 1943. While it is not important here, this latter finding is erroneous since no court action was taken to change the custody and the legal custody and obligation still remained with the appellant, and she admits that she was reminded of this at the time. The father of the minor was made a party to this proceeding and appeared at the hearing. The order provided that the minor be declared free from the custody and control of his mother, and made no reference to the father doubtless because custody and control had previously been taken from him by court order. This appeal followed.

[1] There is little dispute as to what the law is and it would serve no useful purpose to review the cases cited by respective counsel, in which varying sets of circumstances have led to different results. The main question on this appeal is as to whether the evidence sufficiently supports the findings and conclusions that this minor had been left without any communication from his mother for the period of more than one year with the intent on her part to abandon him, and that he is a person who should be declared free from the custody and control of his mother. Section 701(a) of the Welfare and Institutions Code provides that a minor who has been left in the care and custody of another, without any provision for his support or without communication from either or both

of his parents for the period of one year, with the intent on the part of such parent or parents to abandon him, shall be deemed abandoned and declared free from such parental control. That section further provides that such a failure to provide or failure to communicate for the period of one year is presumptive evidence of an intent to abandon. While this presumption may be overcome by opposing evidence the question whether an intent to abandon has existed for a period of a year is a question of fact for the trial court. In re Creely, 70 Cal.App.2d 186, 160 P.2d 870; In re Peterson, 56 Cal.App.2d 791, 133 P.2d 831.

The appellant argues that certain portions of the evidence completely disprove that there was any intention on her part to abandon this minor. It is first contended that this is disproved by the fact that she signed the instrument purporting to give the custody of Robert to her former husband only because she believed it to be ineffective in the absence of a court order. While this instrument was legally ineffective in the absence of a court order, which was never entered, it is very suggestive on the question of her intent. It clearly appears in writing that she was willing to, and did, waive all right to guardianship over the person of the boy, and that she agreed to give custody of him to her former husband in express consideration of his consent to the adoption of the other child. The fact that her former husband did not consummate the matter by securing a court order changing the custody does not affect this clear cut evidence of her intent and purpose in the matter. It may not be assumed that she was acting fraudulently and that, in order to obtain an advantage over her former husband, she signed this instrument while entertaining an intent directly contrary to that expressed therein.

It further appears that early in 1944, before the appellant went east with her husband, Mr. Hobgood spoke to her about his desire to adopt the boy and she replied "You can keep him, but I won't sign any papers." The appellant testified that every time she saw the respondents they would try to talk her into signing the boy over to them, and she refused. While this evidence creates some conflict it is not, in itself, controlling. The same is true of the appellant's testimony that when she asked Mr. Hobgood for Robert he always told her she would have to pay for his back board. Finally, in this connection, evidence that the appellant endeavored to find Robert after she returned to California is relied on. This is sufficiently answered by what the court said in his decision: "Here, we find from January, 1945, to June of 1946, at least, no communication directly or indirectly between the mother and this child, and then only an inquiry from the sister of her former husband as to where the child was, and a trip which didn't seem to be very well conceived, to Perris, to look for mail boxes that might contain the name of the Hobgoods after that lapse of seventeen months, and then at least another six months, or such a matter before anything further was done."

On the other hand, the facts found by the trial court justify a contrary inference with respect to the appellant's intention and, of course, the evidence relating to the situation during the last twelve months preceding the bringing of this proceeding is of primary importance. The appellant has allowed the boy to remain in the respondents' home continuously since December, 1940. She remarried, and shortly thereafter took an active part in having an older child adopted by her new husband. Although her circumstances and condition had substantially changed she not only made no effort to take the boy into her own home but solemnly agreed to give up the custody of him which had been awarded to her by the court. Between 1940 and 1944, while she was living in or near Los Angeles, only a short distance from the respondents' home, she visited the boy only three or four times a year and then only for an hour or two at a time. She went east in 1944 with her husband without visiting the boy, whom she had not seen for four months. During the next year and a half she communicated with the boy only a few times. She returned to California in October, 1945, and for sixteen months did not communicate either with Robert or with the Hobgoods. The two efforts she claims to have made during this time to get in touch with the boy were not very impressive, as the court pointed out. During a period of seven years she paid nothing to the respondents for the support of the child, although she was responsible for his custody all of this time under court order. She seems not to have taken this responsibility very seriously. During the last three years before this order was made nothing was paid for the support of the boy by anybody.

[2] In our opinion, the statutory presumption and the evidence, including the reasonable inferences therefrom, amply sustain the controlling finding in question.

[3] It is further argued that four of the findings do not support the judgment. In these findings it was found that the appellant was advised that the waiver of custody she signed had no legal effect and that the matter of the child's custody would remain for the court to determine; that the appellant had several periods of hospitalization between 1940 and 1946 and was in ill health the greater part of the time; that while she was living in the east in 1944 and 1945 she wrote some letters to her mother requesting her mother to visit the child; and one stating what effort she made to find Robert after she returned to California. The court fully and fairly found all of the facts shown by the testimony but these findings are not controlling over other findings and other evidence which fully support the order made.

[4] Some contention is made that the order appealed from is ineffective as a matter of law because it declared Robert to be free from the custody of his mother but said nothing about his father, who was made a party to the action. It is argued that as a result the father retains the sole custody of Robert. In re Edwards, 208 Cal. 725, 284 P. 916, is relied on in support of the proposition that the findings of abandonment must refer and relate to both parents. In the instant case the father had been deprived of the custody and control of the minor by court order, and sole custody had been given to the appellant. This order had never been changed and it here appeared, as suggested and discussed in the Edwards case, that the custody of this minor had been taken away from the father and given to the parent charged with committing the acts of abandonment. Moreover, through an order to show cause, which was heard jointly with this proceeding, the father had sought to have the custody of Robert awarded to him. This was denied and the order to show cause discharged, the court declaring that he could not, under the showing made, declare the father to be a proper custodian.

The order appealed from is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

---

88 Cal.App.2d 197

RIVERSIDE RANCHO CORPORATION et al. v. COWAN.

Civ. 16459.

District Court of Appeal, Second District,
Division 2, California.
Oct. 26, 1948.

1. Fraud 🔑58(2)

In action by purchasers under contract for sale of hill and arable land for vendor's fraud, evidence sustained finding that vendor knowingly misrepresented number of acres of hill land.

2. Judgment 🔑204

Judgment giving purchasers credit on trust deed note given for large tract of realty for which purchasers had agreed to pay on basis of $1 an acre for hill land and $110 an acre for arable land, on ground that vendor fraudulently represented that tract contained but 500 acres of hill land when it in fact contained 900 acres, was not erroneous on ground that it created a new contract or a new note for difference between principal of note and amount remaining after ordering a credit on the note.

3. Mortgages 🔑82

Where vendor in negotiations leading up to sale of tract of realty for which purchasers agreed to pay on basis of $1 an acre for hill land and $110 an acre for arable land represented that tract contained but 500 acres of hill land when vendor knew that it contained 900 acres, purchasers were entitled to a credit on trust deed note for amount of excess consideration purchasers had agreed to pay because of vendor's fraudulent misrepresentation.

4. Evidence ⚷434(11)

In fraud action by purchasers of large tract of realty for which purchasers had agreed to pay on basis of $1 an acre for hill land and $110 an acre for arable land, on ground that vendor fraudulently represented that tract contained but 500 acres of hill land when it in fact contained 900 acres, parol evidence was admissible to show true consideration agreed on and method of arriving at it.

5. Judgment ⚷204

Where vendor, in negotiations leading up to sale of tract of realty for which purchasers agreed to pay on basis of $1 an acre for hill land and $110 an acre for arable land, represented that tract contained but 500 acres of hill land when vendor knew that it contained 900 acres, court was empowered to do exact justice and to enter judgment ordering a credit on the note for excess consideration which purchasers were induced to pay because of vendor's fraudulent misrepresentations.

6. Corporations ⚷410

Where individual was an officer of and acting in behalf of corporation with corporation's consent in connection with modification of contract for purchase of realty by corporation, no new contract for purchase by individual resulted and corporation's contract was not canceled.

7. Vendor and purchaser ⚷176, 309

Where realty of an undetermined area is sold at an agreed price an acre for number of acres conveyed, purchaser is bound to pay only for amount of land included within tract described at agreed price an acre, and, when he has done so, his debt for purchase money is discharged, and even if it is a sale in gross vendor cannot recover purchase money for any part of the land of which he is unable to give possession, and, as to such part, there is a failure of consideration of mortgage equivalent to a satisfaction pro tanto.

8. Fraud ⚷21

Where purchasers of large tract of realty for which purchasers had agreed to pay on basis of $1 an acre for hill land and $110 an acre for arable land were without knowledge of number of acres of hill land contained in tract, were not familiar with measurements of large areas or versed in topography, and they had been given no reason to doubt vendor's statement that tract contained but 500 acres of hill land, when it in fact contained 900 acres, purchasers were entitled to rely on vendor's misrepresentations.

9. Fraud ⚷21

Where vendor represented in negotiations for sale of large tract of realty for which purchasers agreed to pay on basis of $1 an acre for hill land and $110 an acre for arable land that tract contained but 500 acres of hill land when it in fact contained 900 acres, purchasers were not precluded from relying on vendor's representations as to acreage, so as to be entitled to maintain action based on vendor's fraud, because of alleged fact that purchasers had discovered other alleged fraudulent representations by vendor.

10. Fraud ⚷22(2)

When investigation of vendor's fraudulent representations is prevented by the vendor, the purchaser is entitled to rely on the misrepresentations so as to be entitled to maintain an action based on fraud.

11. Fraud ⚷58(2)

In fraud action by purchasers of large tract of realty for which purchasers had agreed to pay on basis of $1 an acre for hill land and $110 an acre for arable land, on ground that vendor fraudulently represented that tract contained but 500 acres of hill land when it in fact contained 900 acres, evidence sustained finding that tract contained 900 acres of hill land rather than 500 acres.

12. Trial ⚷105(1)

Where there was no objection to evidence and it tended to prove issues, trial court was justified in considering it and in basing findings thereon.

13. Appeal and error ⚿1011(1)

Reviewing court cannot disturb trial court's finding based on conflicting evidence.

14. Estoppel ⚿32(1)

Where vendor on purchasing large tract of realty from original owners accepted the tract on basis of 900 acres of hill land, she was estopped to contend that her representation to purchasers who had agreed to pay on basis of $1 an acre for hill land and $110 an acre for arable land, that tract contained but 500 acres of hill land was not fraudulent.

15. Contracts ⚿236

A modification of a contract can be made only with the consent of all parties to it.

16. Estoppel ⚿32(1)

Where vendor completed escrow and conveyed realty to corporation through corporation's officer, vendor waived contention that after she entered into original contract with corporation for sale of realty she made a new contract with corporation's officer individually.

17. Mortgages ⚿311

Where land was designated by vendor and purchasers in escrow instructions and in other documents as "east tract" and "west tract", and escrow instructions provided that second trust deed should cover only west tract, but escrow agent violated instructions and second trust deed included east tract, court properly ordered incorporation in second trust deed of a release clause deleting description of east tract. Code Civ.Proc., § 580.

18. Appeal and error ⚿1033(9)

Where relief granted was less than that to which plaintiffs were entitled, alleged error in granting such relief was not ground for reversal on defendant's appeal.

◆

Appeal from Superior Court, Los Angeles County; George A. Dockweiler, Judge.

Action for fraud by the Riverside Rancho Corporation and others against E. Stewart Cowan. From a judgment in favor of the plaintiffs, the defendant appeals.

Judgment affirmed.

See also 193 P.2d 480.

Steiner A. Larson and H. Spencer St. Clair, both of Los Angeles, for appellant.

Nathan Newby, Jr., and Newby, Holder & Newby, all of Los Angeles, for respondents.

WILSON, Justice.

This action is based on alleged fraud and misrepresentation of defendant in the sale to plaintiffs of a tract of real property in Riverside County. The price agreed upon was $110 per acre for arable land and $1 per acre for hill land. It is charged that defendant represented that the tract contained 500 acres of hill land, whereas in fact there were approximately 900 acres of such land. A part of the purchase price was paid in cash, the balance being represented by a promissory note secured by a second trust deed for $68,433.99, and the assuming by the purchasers of first trust deeds covering respectively the east and west parts of the tract. The court found in favor of plaintiffs and by its judgment ordered the sum of $44,253.40 to be credited on the second trust deed note. The latter amount represents the difference, computed at the agreed price for the arable and hill land, respectively, between the acreages of each class of land represented by the defendant to be in the tract and the acreages of each class actually conveyed. The method of computation is not questioned. Defendant has appealed from the judgment.

[1] The complaint contains the conventional allegations necessary in complaints for fraud, including an allegation that defendant knew she was misrepresenting the number of acres of hill land. It is not necessary to state the evidence in detail, especially that relating to the negotiations leading to the sale, since it fully supports the findings. However, it should be noted that when the previous owners sold the property to defendant, almost simultaneously with defendant's sale to plaintiffs, the contract recited that the tract contained 900 acres of hill land, and when the indi-

vidual plaintiffs and representatives of the corporate plaintiff were inspecting the property with a view to purchasing it defendant told them that 500 acres were hills. The court made a finding in accordance with such evidence.

[2] Defendant maintains that the judgment creates a new contract between the parties and enables plaintiffs "to circumvent the measure of damages provided by statute for a fraud action" and to obtain a kind of relief given only in other types of actions distinguishable from this case. Such contention must be rejected. The judgment does not create a new contract nor, by ordering a credit on the note, does it create a new note for the difference between the principal of the note and the amount remaining after making the deduction. The action was not brought to reform the contract on the ground of mistake, or on any other ground on which a contract may be reformed, hence the argument and the citations concerning the power of the court in such a case need not be considered. It is an action based (1) on the fraud and misrepresentation of defendant whereby she obtained cash and a note secured by a trust deed and (2) on partial failure of consideration.

[3] Defendant did not sell the land to plaintiffs as an entire tract for a lump sum. The contract specifically called for a certain number of arable acres and for a certain number of acres of hill land at an agreed amount per acre for each respectively. The court found that defendant sold by the acre and plaintiffs purchased by the acre and that the total purchase price was to be determined by the number of acres in each classification. The court found as a fact that defendant knowingly misrepresented the number of acres of hill land as alleged by plaintiffs. In that manner she induced plaintiffs to pay and to become obligated to pay a greater consideration for the property than they would have agreed to pay if she had not misstated the fact. To the extent of the excess amount the promissory note was without consideration and plaintiffs are entitled to credit therefor. If the consideration had been paid in full plaintiffs, on the evidence and the findings contained in the record, would have been entitled to a judgment against defendant for the same amount adjudged to be credited on the note. The contract remains the same after the judgment as before, to wit, a promise to pay. but the amount plaintiffs are required to pay in satisfaction thereof is the true amount which they would have agreed to pay save for defendant's misrepresentation.

This case does not concern a contract which through fraud or mistake fails to express the real intention of the parties, nor is it a case wherein a written contract is sought to be modified by parol evidence. Fraud is alleged, proved and found by the court, not in the execution of the contract but in the inducement consisting in defendant's misstatements, known by her to be untrue when she made them. In defendant's brief she in effect admits the misrepresentation as to the number of acres respectively of arable and hill land. Any other position would be futile in view of the findings which have abundant support in the evidence. She had previously agreed with the persons from whom she was purchasing that she was receiving from them approximately 900 acres of hill land for which she was paying $1 per acre and at the same time represented to plaintiffs that there were only 500 acres of such land. She could not assert mistake or inadvertence on her part. She is not in a position to argue that a court of equity is without power to do justice under the conditions here existing.

[4, 5] The contract brought into question by the complaint is not the promissory note on which credit was ordered to be made but is the original contract whereby plaintiffs agreed to purchase the land, following which the deeds, promissory notes and trust deeds were executed by the respective parties. That contract shows that the parties were contracting on the basis of acreage of two classes and the court so found. Since the true consideration agreed upon and the method of arriving at it are issues vital to the case they may be shown by parol evidence. Field v. Austin, 131 Cal. 379, 382, 383, 63 P. 692; Wholesalers Board of Adjusters v. Nor-

ton, 13 Cal.App.2d 663, 666, 57 P.2d 552. Under the pleadings, the evidence and the findings the court, with its broad jurisdiction in equity, was empowered to do exact justice to the parties and to enter a judgment that would fairly meet the situation. The court's equitable powers will expand to cope with unusual conditions. Bechtel v. Wier, 152 Cal. 443, 446, 93 P. 75, 15 L.R.A.,N.S., 549; Wuest v. Wuest, 53 Cal.App.2d 339, 346, 127 P.2d 934. If, instead of ordering a credit on the note, the court had ordered a money judgment for damages the result would have been the same, since the amount of the judgment would have been offset against the portion of the note remaining unpaid.

[6] Defendant contends that after she entered into the original contract with the corporate plaintiff she made a new contract with one of the individual plaintiffs. This was only a modification of the original contract since the individual was an officer of and acting in behalf of the corporation with its consent. Furthermore, that contract, as well as a letter signed by defendant, provided, as did the first agreement, that the purchase price was to be computed according to the respective arable and hill acreages at the same prices set forth in the original agreement.

[7] When land of an undetermined area is sold at an agreed price per acre for the number of acres conveyed, the purchaser is bound to pay only for the amount of land included within the tract described at the agreed price per acre, and when he has done so his debt for the purchase money is discharged; and even if it is a sale in gross the seller cannot recover purchase money for any part of the land of which he is unable to give possession; as to such part there is a failure of consideration of the mortgage, equivalent to a satisfaction pro tanto. Cords v. Goodwin, 173 Cal. 61, 67, 159 P. 138; McCombs v. Church, 180 Cal. 233, 236, 180 P. 535; Miller v. Moore, 45 Cal.App. 283, 285, 286, 187 P. 763.

[8] Plaintiffs were entitled to rely on defendant's representations as to the arable and hill acreages. The land had not been surveyed by the former owners although it had been in the possession of their family since 1890. They sold it to defendant on the basis of 900 acres of hill land and she in turn represented to plaintiffs that the tract contained only 500 acres of such land. Plaintiffs were justified in accepting defendant's statements as true because (a) they were entirely without knowledge on the subject (Davis v. Butler, 154 Cal. 623, 627, 98 P. 1047; Scott v. Delta Land & Water Co., 57 Cal.App. 320, 324, 207 P. 389; Wolfe v. Severns, 109 Cal.App. 476, 488, 293 P. 156), (b) they are not shown to have been familiar with measurements of large areas or to have been versed in topography, and (c) they had been given no reason to doubt defendant's statements. Shearer v. Cooper, 21 Cal.2d 695, 702, 705, 134 P.2d 764; Denson v. Pressey, 13 Cal.App.2d 472, 476, 477, 57 P.2d 522; Younis v. Hart, 59 Cal.App.2d 99, 104, 105, 138 P.2d 323.

[9, 10] It is a strange defense to rely on other misrepresentations in an effort to avoid the one most strongly urged by plaintiffs. Nevertheless defendant refers in her brief to evidence of other false representations made by her, the untruth of which plaintiffs are asserted to have discovered prior to the closing of this transaction: (1) that a pump house was on the ranch, when in fact it was not; (2) that she had owned the property for a year prior to the negotiations with plaintiffs; (3) that it was necessary to make a down payment of $40,000 to the owners; (4) that she was making no profit on the transaction except possibly a bonus of $5,000. It may be admitted that only the first, if any, of such statements would justify a judgment in favor of plaintiffs if they had relied thereon for relief in this action. Defendant maintains that the discovery of the falsity of these representations put plaintiffs on their guard and that they therefore had no right to rely on her representations as to the acreage. Such facts do not negate plaintiffs' right to credit for the amount of the purchase price for which there was no consideration. Even though the misrepresentations were made as now practically admitted by defendant, plaintiffs should not be compelled to pay for land which they did not receive. Further-

more, the falsity of the representations was not discovered until after the contract of sale had been signed. Conceding that defendant's contention would be applicable if the sale had been in gross, a point which we do not find it necessary to decide, yet, since the sale was at an agreed price per acre for a stated number of acres and the hill acreage was misrepresented, there is a failure of consideration which entitles plaintiffs to recover. Moreover, when plaintiffs attempted to arrive at the number of acres by scaling a map defendant warned that the map was inaccurate and the acreage could not be determined in that manner. She also cautioned plaintiffs not to see or talk to the owners from whom she was purchasing. When investigation is prevented by a vendor the purchaser is entitled to rely on the vendor's statements. Wainscott v. Occidental Building & Loan Ass'n, 98 Cal. 253, 258, 33 P. 88; Vah Dah Dunshee v. Boadway, 119 Cal.App. 678, 686, 7 P.2d 325. The court made a finding, which is sustained by the evidence, that it was impossible to have ascertained the number of acres of arable or hill land by inspection thereof or by scaling the maps. It was also found that defendant's warning that the maps she furnished were misleading and could not be relied on and that it was impossible to secure accurate results by scaling, caused plaintiffs to desist from further efforts to compute the acreage.

The subsequent discovery by plaintiffs of defendant's prior misrepresentations as to matters other than the acreage did not require them to abandon a contract previously entered into nor does it foreclose them of their right to recover or to have credit for the portion of the purchase price for which there was no consideration.

This case is not comparable to those relied on by defendant—one in which it was held that the purchaser of a house and garage who personally inspected the buildings on several occasions before completing the transaction had an opportunity of learning the facts and could not rely on representations as to their condition (Carpenter v. Hamilton, 18 Cal.App.2d 69, 62 P.2d 1397); another where the purchaser inspected a 40 acre tract and made inquiries of a third person as to how much of the land was irrigable. Hackleman v. Lyman, 50 Cal.App. 323, 195 P. 263. The tract here in question contained more than 3,000 acres and by mere inspection by an inexperienced person the number of acres of each class of land could not be ascertained. Obviously Board of Commissioners v. Younger, 29 Cal. 172, affords no comfort to defendant. In that case land was conveyed by metes and bounds definitely describing the property, after which description there were added the words "containing about seventy-two acres." The plaintiff vendor based the action on a miscalling of the number of acres. The court held that the quoted words are indeterminate and uncertain, are not of the essence of the contract, and that insofar as quantity is concerned reliance must be placed entirely on the description by metes and bounds. Furthermore, said the court, plaintiffs as owners had the means of ascertaining the true area of the property and any loss sustained by them was attributable to their own negligence and laches.

[11-13] Defendant's contention that there is no evidence to sustain the finding that the tract contained 2119.06 acres of arable land and 900 acres of hill land is not supported by the record. One of the former owners testified there were approximately 2118 acres of arable land and approximately 890 acres of hill land; after he and his brother had made measurements and calculations they agreed there would be conveyed to defendant 2119.06 acres of arable land and 900 acres of hill land and it should be so recited in their contract of sale, and this was done. While this method of calculation does not approach the standard of accuracy that would be required of an engineer, the evidence was received without objection and the court accepted it. Since there was no objection to the evidence and it tended to prove the issues the trial court was justified in considering it and basing its findings thereon even though it may have been incompetent. West Coast Life Ins. Co. v. Crawford, 58 Cal.App.2d 771, 787, 788, 138 P.2d 384; Holzer v. Read, 216 Cal. 119, 122, 123, 13 P.2d 697. Defendant relies on the evidence of a civil engineer called as a de-

fense witness who made estimates from maps that had been introduced in evidence and expressed the opinion that there were 2279 acres of farm land and 830 acres of hill land. Since he made no survey of the property and his evidence was based on calculations derived from the maps it was of no greater strength than that of the former owners. His estimates of the respective acreages were so slightly different from the number claimed by plaintiffs that it scarcely creates a conflict. The court resolved the conflict, if any, by finding in accordance with the evidence of the former owners. In such case a reviewing court cannot disturb or disregard the finding.

[14] Defendant admitted that in her contract to purchase from the former owners the hill land was estimated at approximately 900 acres, but as evidence of uncertainty of the exact acreage she points to a provision in the contract for an adjustment of the price if there proved to be a shortage or overage of acres. The force of this argument fails completely when it is noted that there is no evidence in the record that any such adjustment was ever made or that she even requested it. Since she accepted the property on the basis of 900 acres of hill land she is estopped to dispute the facts on which plaintiffs base their action and on which the judgment rests.

Defendant asserts that the finding that the second escrow instructions merely modified the first instructions is not supported by the evidence. The first agreement was between the corporate plaintiff and defendant and was signed January 15, 1946, followed by escrow instructions dated January 25. On March 25 escrow instructions between plaintiff Serge Besoyan individually and defendant were signed. Defendant contends that the latter constituted a new contract and was not a modification of the escrow of January 25. This contention is without foundation. The evidence shows and the court found that the instruction of March 25 was not a new contract; that the instructions of January 25 were never canceled or modified except as to the amount of the down payment and except that the corporation consented to receive title from Besoyan, provided the transfer was made without any additional consideration, and that the corporation would assume the encumbrances required to be assumed in order to consummate the purchase from defendant; that the corporation never consented to the substitution of Besoyan in his individual capacity as the purchaser of the property in lieu of the corporation; that the contract of January 15 was not canceled or declared null and void, and a cancellation was not accepted by the corporation; that Besoyan at all times after January 15 intended to secure the vesting of title to the land in plaintiff corporation; that he was an officer of the corporation; that the corporation consented to the conveyance to Besoyan only on the proviso that the property would immediately be transferred to it on the conditions above stated.

[15, 16] A modification of a contract can be made only with the consent of all parties to it. The corporation did not consent to a cancellation of the contract. It did consent to a modification of the escrow instructions of January 25, and since the escrow instructions of March 25 were made only on the conditions above set forth the latter instructions constituted only a modification of the former. The second escrow instructions were entered into by Besoyan, an officer of the corporation, for its benefit and with its consent and did not cancel the first instructions or create a new contract. Defendant is presumed to know the law, hence she knew that as an officer of the corporation Besoyan could not have negotiated in his own behalf without full disclosure to and consent of the corporation. Furthermore, since defendant completed the escrow and conveyed the property to the corporation through Besoyan she waived the question now raised by her and waived all defaults under the contract of January 15 and the escrow of January 25 which she attempted to cancel because of some alleged default of the corporation under that escrow.

[17] Defendant complains that the court erred in ordering the incorporation in the second trust deed of the release clause hereinafter referred to. For the purposes of the transaction the land was

designated by the parties in the escrow instructions and in other documents as the "east tract" and the "west tract." The court found that the escrow instructions provided that the second trust deed which defendant was accepting as security for a part of the purchase price should cover only the west tract and that the escrow agent violated the instructions in that such trust deed included the east tract as well as the west tract; that it was the intention of the parties that the east tract might be used in financing the development of the property to the mutual advantage of the seller as well as of the buyer; that by mistake of plaintiff Besoyan he failed to observe that the east tract was included in the second trust deed when it was executed; that notwithstanding such violation of the escrow instructions plaintiffs, in open court during the trial, offered to waive the reformation of the trust deed by deleting therefrom the description of the east tract, provided defendant and her successors in interest were required by the judgment to release any land described in the second trust deed upon the same terms and conditions as contained in the two first trust deeds that had been executed by defendant to secure an amount owing and unpaid by her to the persons from whom she purchased the land, which release payments were to be credited on the first trust deeds, plus payment to the holder of the second trust deed of the sum of $15 per acre for all arable or farm land so released. The court found that plaintiffs' offer is equitable to all parties and should be incorporated in the judgment.

The court did not err in making such findings or in including the terms thereof in the judgment. By the contract of January 15, 1946, the east tract was not to be encumbered by the second trust deed, and the west tract could be released from such trust deed by the payment of $10 per acre. The violation of the escrow instructions and the basis for the finding is supported by the allegations in the amended complaint to conform to the proof, which the court permitted to be filed, as well as by the evidence. The court was authorized to grant plaintiff any relief consistent with the case and embraced within the issues. Code Civ. Proc., sec. 580. The court exercised its jurisdiction to render a judgment consonant with the facts shown by the evidence, and since the relief is less than that to which plaintiffs are entitled, defendant cannot complain.

[18] The judgment is not prejudicial in the respect above discussed for the reason that the release clause decreed by the court does not redound to defendant's injury. If plaintiffs should exercise the right to demand releases of the property in accordance with the judgment they would be required to pay far more for the release of the arable land than the amount adjudged to be due to defendant on the second trust deed after crediting thereon the amount required by the judgment. The second trust deed secured a note for $68,443.99. The court adjudged that $44,253.40 be credited thereon, leaving a balance owing of $24,190.59. Releases of 2119.06 acres, the amount of arable land found by the court to have been included in the tract, at the rate of $15 per acre would require plaintiffs to pay $31,785.90, or $7,595.31 in excess of the amount remaining unpaid on the second trust deed note after the credit ordered by the court. Even if the finding and judgment were deemed to be erroneous in the respect above discussed the error would not be prejudicial to defendant for the reasons stated and therefore not a ground for reversal. Petroleum Midway Co., Ltd. v. Moynier, 205 Cal. 733, 744, 272 P. 740; Monroe v. Owens, 76 Cal.App.2d 23, 27, 172 P.2d 110; De Arman v. Connelly, 134 Cal.App. 173, 181, 25 P.2d 24.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concur.

88 Cal.App.2d 265

PEOPLE v. WALKER.

Cr. 660.

District Court of Appeal
Fourth District, California.
Oct. 29, 1948.

Rehearing Denied Nov. 16, 1948.

1. Criminal law 🔑507(1)

"Accomplices" include all persons who have been concerned in the commission of an offense, and are liable to prosecution for the identical offense charged against the defendant.

See Words and Phrases, Permanent Edition, for all other definitions of "Accomplice".

2. Criminal law 🔑507(1)

One is an "accomplice" who knowingly, voluntarily and with common intent with the principal offender unites in the commission of the crime.

3. Criminal law 🔑742(2)

Where there was evidence in perversion prosecution that act took place over boy's objection and against his will, that physical force was used by defendant on the boy, that boy resisted, and that at first opportunity boy fled to police station, whether boy was an "accomplice" was for jury. Pen.Code § 288a.

4. Criminal law 🔑1158(4)

Where it was a question for jury whether prosecuting witness was an accomplice, jury's finding would not be disturbed on appeal.

5. Criminal law 🔑780(2)

Where whether prosecuting witness was an accomplice, was a jury question, court properly instructed jury touching the law concerning accomplices and left question whether prosecuting witness was an accomplice to jury. Pen.Code, § 1111.

6. Sodomy 🔑6

Where jury found that prosecuting witness was not an accomplice, no corroboration of prosecuting witness' testimony in sex perversion prosecution was necessary. Pen.Code, §§ 288a, 1111.

7. Sodomy 🔑6

In sex perversion prosecution, evidence was sufficient to corroborate prosecuting witness' testimony. Pen.Code, §§ 288a, 1111.

8. Criminal law 🔑511(1)

Evidence sufficient to corroborate an accomplice may be slight, and when standing by itself entitled to but little consideration. Pen.Code, § 1111.

9. Criminal law 🔑511(7)

An accomplice is sufficiently corroborated by proof of defendant's confession or admission tending to connect defendant with the crime. Pen.Code, § 1111.

10. Criminal law 🔑757(4)

Where question whether prosecuting witness was an accomplice was a fact question in sex perversion prosecution, court properly refused to instruct jury that prosecuting witness was an accomplice. Pen. Code, §§ 288a, 1111.

11. Criminal law 🔑768(1)

In sex perversion prosecution, cautionary instruction should have been given. Pen.Code, § 288a.

12. Criminal law 🔑1173(2)

The circumstances must determine whether failure to give cautionary instruction in sex perversion prosecution constitutes prejudicial error. Pen.Code, § 288a.

13. Criminal law 🔑1162

Before a conviction may be reversed because of error, it must appear from record that error was prejudicial and caused substantial injury and that a different result would have been probable if error had not occurred.

14. Criminal law 🔑824(14)

Where proper instructions were given in sex perversion prosecution as to burden of proof, reasonable doubt, presumption of innocence and law applicable to accomplices, and corroborative evidence was convincing, failure to give unrequested cautionary instruction was not prejudicial error. Pen. Code, § 288a.

15. Criminal law ⚿1170½(2)

Asking defendant in sex perversion prosecution if he had offered a boy other than prosecuting witness five dollars to accompany defendant to hotel room was not prejudicial error, where defendant denied making any such offer and stated that he paid the boy five dollars to drive him to another city, and question was not objected to by defendant's counsel. Pen.Code, § 288a.

16. Criminal law ⚿1171(1)

In sex perversion prosecution, questioning of defendant's character witness whether he had heard of other alleged acts of perversion by defendant was not reversible error where district attorney did not claim that rumors of other perversions were true, there was no showing of bad faith and defendant chose to allow questions and answers to stand and made no request for an admonition to jury to disregard them. Pen.Code, § 288a.

◆

Appeal from Superior Court, Riverside County; Russell S. Waite, Judge.

John Bailey Walker was convicted of sexual perversion, and he appeals from the judgment and an order denying his motion for new trial.

Judgment and order affirmed.

D. L. Di Vecchio, of Los Angeles, and Charles H. Carter, of Elsinore, for appellant.

Fred N. Howser, Atty. Gen., and John F. Hassler, Deputy Atty. Gen., for respondent.

MUSSELL, Justice.

Defendant was convicted after a trial before a jury of a violation of Section 288a of the Penal Code. He appeals from the judgment and from the order denying his motion for new trial.

Kenneth Peel, the prosecuting witness, a boy of the age of 15, lived in Romoland, California, and was a student at the Perris Senior High School. He attended a dance in Riverside on the evening of October 20, 1947, and on his way home stopped at the Bright Spot Cafe in Perris shortly after midnight. There he met the defendant who asked him where he was going and if he wanted anything. He took a hamburger and a cup of coffee offered by the defendant and talked to Lowell Taylor, a boy who sat beside him in the cafe. When Kenneth started to leave, defendant said, "Come up and spend the night with me." Kenneth replied, "No, but I will go up and talk with you a little bit." They went to the defendant's room in the Southern Hotel about a block away. The room was on the second floor in back of the stairs. During the 15 minutes they were in the room defendant "felt of" the boy's sexual organs. Kenneth left and returned to the cafe where he again met Lowell Taylor. Within a few minutes defendant again met the boys and asked them to go up and spend the night with him. The boys said they would not spend the night but would go up and talk with him. The boys went to the hotel bedroom, waited awhile but defendant did not appear and they returned to the cafe and separated. Defendant again met Kenneth and asked him to go up to the hotel room. Defendant was not in the room when Kenneth arrived and the boy read a magazine until he arrived. They then sat on the bed and over the objection of Kenneth the act of sex perversion took place. The experience was painful to the boy and while it was taking place he pushed defendant away, left the hotel and went to the police station and was from there taken to his home. About two days later the prosecuting witness discovered sores on his penis and a doctor was called to make an examination. The physician testified that he examined the boy on October 22, 1947, and found lacerations and abrasions on the boy's private parts which in his opinion "appeared to be done not just within the immediate short time, but possibly a day or so."

The first contention of defendant is that the evidence is not sufficient to support the verdict and that the verdict is contrary to the law and the evidence. This argument is based upon the assumption that the complaining witness, Kenneth Peel, was an accomplice and that there was no corroboration of his testimony sufficient to meet the requirements of Section 1111 of the Penal Code.

[1-9] An "accomplice" has been defined as including all persons who have been concerned in the commission of an offense, and are liable to prosecution for the identical offense charged against the defendant. One is an accomplice who knowingly, voluntarily and with common intent with the principal offender unites in the commission of the crime. People v. Shaw, 17 Cal.2d 778, 799, 112 P.2d 241; People v. Lima, 25 Cal.2d 573, 578, 154 P.2d 698; People v. Westek, 31 Cal.2d 469, 190 P.2d 9. There is evidence in the record that Kenneth Peel did not go to the hotel room for the purpose defendant invited him; that the act took place over the boy's objection and against his will; that physical force was used by the defendant; that the boy resisted and at the first opportunity fled to the police station. Under such circumstances it cannot be said that the prosecuting witness voluntarily and with common intent with defendant united in the commission of the act. It follows that Kenneth Peel was not an accomplice as a matter of law, where, as here, the facts are not in dispute. People v. Coffey, 161 Cal. 433, 436, 119 P. 901, 39 L.R.A., N.S., 704. The court properly instructed the jury touching the law concerning accomplices and left the question whether or not the prosecuting witness was an accomplice for the decision of the jury as a matter of fact. People v. Featherstone, 67 Cal.App.2d 793, 796, 155 P.2d 685. The determination of the fact by the jury will not be disturbed on appeal and no corroboration of the testimony of the prosecuting witness was necessary. People v. Featherstone, supra. Furthermore, if as contended, corroboration was necessary, the record contains sufficient corroboration to connect defendant with the commission of the crime. Such evidence may be slight and when standing by itself entitled to but little consideration. People v. McLean, 84 Cal. 480, 482, 24 P. 32; People v. Martin, 19 Cal.App. 295, 301, 125 P. 919; People v. Andrew, 43 Cal.App.2d 126, 129, 110 P.2d 459. An accomplice is sufficiently corroborated by proof of defendant's confession or admission tending to connect him with the crime. People v. White, 48 Cal.App.2d 90, 94, 119 P.2d 383; People v. Derenzo, 46 Cal.App.2d 411, 415, 115 P.2d 858. In addition to the testimony of the doctor as to the injuries suffered by the prosecuting witness, the operator of the Bright Spot Cafe testified that he saw defendant in his cafe that night in the company of Kenneth Peel and overheard a conversation between them wherein defendant invited the boy to sit down and have a sandwich; that defendant ordered a sandwich and cup of coffee for the boy and thereafter invited him to the hotel room; that Lowell Taylor was in the cafe on the morning in question; that defendant was "in and out" of his cafe "all evening" and that defendant "wasn't gone much over thirty minutes at a time. The witness Taylor testified that the first time he saw defendant was in the Bright Spot Cafe on the night and early morning in question; that thereafter he saw him on the street in front of a feed store and that he had a conversation with him in which defendant told him he could go up and stay in his room and go to bed; that defendant told Peel he could go to the room and defendant would be up later and that he, Taylor, told defendant he would go to the room with Peel until defendant got back. The chief of police of Perris testified as to a conversation with defendant in which the witness asked defendant if Peel had stayed in the hotel room with him on Monday night, October 20, and that defendant stated that Peel did stay with him a while. In our opinion this testimony was amply sufficient to furnish the corroboration, if required.

[10] It is next contended that the court erred in not instructing the jury that Kenneth Peel was an accomplice. As heretofore stated that question was one of fact and was properly submitted to the jury. People v. Featherstone, supra.

[11-13] Defendant argues that the court erred in failing on its own motion to give a cautionary instruction. None was requested by the defendant and while such an instruction should have been given (People v. Putnam, 20 Cal.2d 885, 888, 889, at page 892, 129 P.2d 367, 370), it was said in that case: "The circumstances of the case must determine whether the failure to instruct the jury constitutes prejudicial error." In

People v. Lucas, 16 Cal.2d 178, 182, 105 P.2d 102, 104, 130 A.L.R. 1485, the court said: "The authorities are legion to the effect that before a judgment may be reversed because of error it must appear from the record that it was prejudicial and caused substantial injury and that a different result would have been probable if the error had not occurred. (Citing cases.) In other words, a judgment will not be reversed for errors that do not affect the substantial rights of the parties. (Citing cases.) This principle has application to the refusal to give requested and otherwise proper instructions. (Citing cases.)"

[14] In the instant case the instructions found sufficient in the Lucas case, supra, were given. The jury was told that it must decide all the facts and determine the credibility of the witnesses; that the case should be weighed and considered without regard to sympathy, passion or prejudice; Proper instructions were given as to the burden of proof, reasonable doubt, the presumption of innocence and the law applicable to accomplices. In view of the clear and convincing corroborative evidence and the instructions of the court we cannot say that prejudicial error resulted from the failure to give an unrequested instruction, or that the jury would have found otherwise if the instruction had been given.

[15] It is claimed that the district attorney was guilty of misconduct prejudicial to the rights of defendant in asking him on cross-examination if he had offered one Robert Voyles $5.00 to accompany him to the hotel room. Defendant denied any such offer and stated he paid Voyles $5.00 to drive him to Los Angeles. The question was not objected to by defendant's counsel and in view of the answer we do not think the question constituted prejudicial error.

[16] Finally, it is argued that the district attorney was guilty of prejudicial misconduct in asking character witnesses for the defendant the following questions: 1. Have you heard a report that the defendant offered a young man $5.00 to accompany him to his hotel room during the early part of the morning? 2. Have you heard a report that the defendant had stated that his old lady has gone down on him and he has gone down on his old lady? The only objection made to such questions by defendant's counsel was to the first question, in that the district attorney should have made it more specific.

In People v. Smith, 100 Cal.App. 344, 279 P. 1022, where the defendant was charged with a violation of section 288a of the Penal Code, a character witness for the defense was asked by the prosecutor if he had heard of another act of perversion having been committed by the defendant. The court there held that the question was proper unless it appeared from the record that the district attorney was not acting in good faith. In People v. McDaniel, 59 Cal.App.2d 672, 677, 140 P.2d 88, the rule stated is that, on cross-examination of character witnesses, they may be asked as to specific reports concerning the trait of character involved, if they have a tendency to establish the bad reputation, although they may not be sufficient for that purpose and that there is a vast difference between inquiring about reports, rumors and the like of a character witness and questions as to what the witness knows of defendant. People v. Houser, 85 Cal.App.2d 686, 692, 193 P.2d 937. In the instant case the district attorney did not claim that the rumors were true and there is no showing of bad faith. At the request of defendant the court instructed the jury that such evidence should not be considered by them in determining the guilt or innocence of defendant but that such evidence only went to the weight of the value to be given to such character testimony. Defendant chose to allow the questions and answers to stand, and made no request for an admonition to the jury to disregard them. Under such circumstances here presented there was no prejudicial misconduct sufficient to justify a reversal of the case.

Judgment and order affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

88 Cal.App.2d 221

PEOPLE v. NICHOLS.

Cr. 594.

District Court of Appeal
Fourth District, California.
Oct. 26, 1948.

1. Homicide 🔑253(4)

Evidence that 13-year-old girl killed five-year-old girl by striking her repeatedly on head with rock after victim resisted sex play and threatened to expose accused was insufficient to justify conviction for murder in the first degree on ground of torture resulting in death, in absence of evidence of intention to inflict pain upon victim as punishment or in revenge, and in absence of previous quarrel or ill feeling. Pen.Code § 189.

2. Homicide 🔑22(1)

Statute providing that killing by means of torture constitutes murder in the first degree does not apply to killer who acts in sudden panic brought about by sense of shame and fear of discovery. Pen.Code, § 189.

3. Homicide 🔑22(2)

To constitute murder in the first degree, there must be something more than a malicious or intentional killing, and to meet statutory test there must be a satisfactory showing of deliberate and preconceived intent to kill. Pen.Code, § 189.

4. Homicide 🔑9

Mere specific intent unlawfully to take life is normally an element of second-degree murder though not necessarily the same as the willful, deliberate, and premeditated intent essential to constitute murder in the first degree. Pen.Code, § 189.

5. Homicide 🔑22(2)

Word "deliberate" within first-degree murder statute means something that is unhurried and arrived at as result of careful thought and weighing of considerations including reasons for and against a contemplated action, and means the opposite of hasty, impetuous, or impulsive; and "premeditate" means to think on and revolve in the mind beforehand, to contrive and design previously. Pen.Code, § 189.

See Words and Phrases, Permanent Edition, for all other definitions of "Deliberate" and "Premeditate".

6. Homicide 🔑22(2)

Under the first-degree murder statute, elements of "deliberate" and "premeditated" not only negative idea of hurried thoughtless action in face of unexpected situation, but reasonably imply some opportunity for careful thought and weighing of various considerations as well as presence of some plan or design, though length of time available for deliberation is not the controlling element so much as is extent of the reflection, in which connection age and experience of defendant should be considered. Pen.Code, § 189.

7. Infants 🔑65

Generally in determining responsibility of an infant for crime, law will take into consideration inexperience and probable extent of understanding of children of tender years. Pen.Code, § 26.

8. Homicide 🔑199

While circumstances that killing was committed by 13-year-old girl with mental age of 11, who was mentally and emotionally defective, had natural tendency toward cruelty to animals and was going through period of extreme mental and emotional stress in course of her physical development, were not in themselves controlling in prosecution for first-degree murder, they were to be considered with other facts in determining whether evidence was sufficient to show beyond a reasonable doubt that killing was deliberate and premeditated. Pen.Code, §§ 26, 189.

9. Homicide 🔑253(3), 347

Evidence in murder prosecution established that homicide was murder but not deliberate and premeditated, and hence judgment of conviction of first-degree murder would be reduced to impose penalty prescribed for murder in the second degree. Pen.Code, §§ 189, 1097.

◆

Appeal from Superior Court, Kern County; Norman F. Main, Judge.

Joyce Christine Nichols was convicted of murder in the first degree, and she appeals.

Judgment modified and, as modified, affirmed and remanded with directions.

Philip M. Wagy, of Bakersfield, for appellant.

Fred N. Howser, Atty. Gen., and Elizabeth Miller, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The defendant pleaded guilty to a charge of murder. The court found that it was murder in the first degree, Penal Code, § 189, and this appeal is directed entirely to the contention that the judgment should be modified by reducing it from one of the first to one of the second degree.

The appellant was a girl 13 years old, living with her father and stepmother near Bakersfield. While returning from school on the afternoon of November 17, 1947, she met a little girl aged five years, whom she had never seen before. She took this little girl home with her, where she peeled some potatoes and swept the kitchen floor. No one was at home except her younger brother Jerry, who came in briefly while she was performing these tasks. The appellant then took this little girl to a cave which some boys had dug in a ditch bank, several hundred yards from the Nichols home. This cave consisted of an open pit from which a short tunnel had been dug, connecting it with another pit which had been covered with lumber and dirt.

While in the covered pit the appellant requested the younger child to remove her clothes, which she did. Appellant then attempted to engage the younger child in sex play, inserting her finger in her private parts, which were severely scratched and distended. The younger girl objected to this and threatened to tell her grandmother whereupon the appellant "slapped her around" and pulled her hair. Because the younger child continued to cry and threatened to tell her grandmother the appellant went out and secured a rock which was either in or near the outer pit. When she returned the younger girl was in the short tunnel bending over, with her back to the appellant. The appellant hit her on the back of the head twice with the rock, causing to fall to her knees. At her request the little girl then crawled out to the open pit. She then hit the little girl several times on the head and face with the rock. The little girl then lay still and the appellant dragged her back into the tunnel. The appellant then washed her hands in the canal, went home and changed her clothes which were spotted with blood, spent a normal evening and then went to bed and to sleep.

The body of the little girl was found in the tunnel that evening, and it appears that death had resulted from a fractured skull. The body was discovered by officers who were taken there by some boys, including the appellant's brother, Jerry. Jerry then reported to his father that he had seen the dead girl with the appellant that afternoon. The appellant was awakened by her father whereupon she admitted to him that she had struck the little girl with a rock but told him nothing about the sex play.

Two long talks were had by the officers with the appellant on November 19 and another on November 20, all of which were taken down in shorthand. In the first of these, she told most of the facts stated above but omitted all reference to any attempted sex play. She said she did not know why she hit the little girl, that she was not mad at her, and that she did not know why she wanted her to take her clothes off. When asked: "Did you play with her" she replied "No I don't do things like that."

At the second conversation, later the same day, she said she did not know why she hit the little girl and that she got no thrill out of doing it. When asked when she first decided to do that, she replied: "It just came up like that." She said that she did not have this in mind when she took the little girl to the cave or when she told her to take off her clothes; that she did not know why she wanted her to do that and got no pleasure from it; that she started slapping her and pulling her hair immediately afterward and then hit her; that after slapping her she went and got a rock; that this is when she decided to hit her; that she had never seen her or played with her before; that the little girl did not move after she hit her the last time; that she then dragged her back into the tunnel; that she did not know whether or not she was dead; and that she did not sleep good that night. When asked if during that time she did not think she was "committing some kind of trouble" she replied; "I just did it like that." She was then asked: "In other words, a feeling came over you and you couldn't help yourself, is that right?" She replied: "Yes."

In the third conversation the next day, the appellant said that she had not played with the little girl's private parts; that right after the little girl took her clothes off she slapped her and started pulling her hair; that the little girl started "bawling" and said she was going to tell her grandmother; and that she did not decide to kill her then. She was then asked: "Did you ever decide to kill her, or did you do it without deciding?" She replied: "I never did decide, it just came in like that and I went outside and got a rock and hit her in the head." She then said that she hit her several times "and she was dead"; that "I got afraid. I didn't even mean to kill her * * * I just meant to take her to play house and stuff like that"; that she did not mean to "slap her around" before they went out there; and that "I had no reason at all. I wasn't mad at her or anything, that is the first time I ever saw her."

At this point one of the officers told the appellant that he did not believe her story and there was no use of her continuing with it, that he knew she played with her own private parts because two doctors had examined her and doctors could tell about this. The appellant then admitted that this was true, that she had taken the little girl out there with the idea of playing with her and that she had put her finger in the little girl's private parts. She then said that when she did this the little girl began to cry and said she would tell her grandmother and she started "slapping her around"; that "she still said she was going to tell"; that she got the rock because she did not want her to tell her grandmother; that she hit her six times, the last two times in the face; that when she took the little girl to the cave she had it in mind to have her take off her clothes and play with her; that when her father questioned her she told him she had killed the little girl but did not tell him she had "played" with her; that she had previously denied the sex part to the officers; and that this was the first time she had told anybody about it. When asked why she got the rock, she replied: "I just saw that out there." She then said that when she saw that the little girl was dead she got scared and started running.

The appellant was sent to the Camarillo Hospital. After ninety days' observation the hospital doctors reported that she had "an educational age" about two years under her actual age, and that a very early brain damage was indicated; that she had a sadistic tendency with animals; that the episode here in question "may have been in part provoked by increased sex tension preceding her first menstrual period, which occurred within a week after the crime was committed"; and that "She is borderline mentally defective and has emotional and personality deviations of such a serious nature as to jeopardize successful social relationships at the present time. Hereditary, constitutional and environmental factors have all contributed to the development of her pathological reactions, which culminated in the fatal beating of a five year old girl who resisted patient's attempts to engage her in sex play. Patient did not premeditate the murder, nor intend to kill the child, but became terrified by the younger child's screams and beat her trying to scare her into silence. When she realized the child was dead, she concealed the body with exceptional lack of emotional concern, proceeded about her usual evening routine, showing no evidence of remorse, guilt or apprehension over the possibility of being detected." The report closed with a statement that "She is too dull mentally to benefit from individual psychotherapy" and a recommendation that for the present she be confined in a certain girl's institution.

The juvenile court concluded that the defendant was not a proper subject for further proceedings therein, and after a preliminary hearing she was bound over to the superior court. She was there charged with murder and her present counsel, appointed by the court, has ably represented her through all stages of the proceedings. A plea of guilty was entered and the court took evidence for the purpose of determining the degree of the crime. The only evidence material to this question consisted of the various statements made by the appellant, evidence as to the condition of the deceased's body, and the doctors' reports. The court mentioned the repeated hitting of the deceased with this rock, remarked that "This took some conscious doing on the part of the defendant," and felt compelled to hold that the evidence disclosed that it was first degree murder whether viewed from the standpoint of torture or from the standpoint of deliberation or premeditation. Judgment was entered accordingly, and this appeal followed.

It is first contended that the evidence does not, beyond a reasonable ground of doubt, justify the finding of a killing by means of torture. It is argued that the evidence indicates no intention to inflict pain for its own sake upon the victim but rather, as regards any specific intent, indicates an intention to silence the victim by beating her. The respondent argues that the appellant by one statement admitted that she intended to beat the little girl when she took her out onto the desert and that this, with the fact that she did beat her and that death ensued, is sufficient to establish that the murder was perpetrated by means of torture, citing People v. Murphy, 1 Cal.2d 37, 32 P.2d 635 and People v. Cardoza, 57 Cal.App.2d 489, 134 P.2d 877.

The statement relied on was made at the close of the second interview above mentioned. When she was asked when she first felt "like you were going to hurt her" the record shows the following:

"A. We got to the desert. We were going around to her house and I saw the desert and it just came to me like that.

"Q. That you would take her out and beat her up? A. Yes."

The statement relied on is merely an affirmative reply to a leading question. It was made at a time when the appellant was concealing the real reason for her attack on the little girl. The officers were then trying to learn the real reason. It clearly appears that the officers did not believe that there was no real reason, or believe that she had decided in advance to take the little girl out and beat her up. That this was not true clearly appeared the next day when the appellant admitted the real reason for the attack. It then appeared beyond any reasonable doubt that an intention to make the attack was not formed in advance but that it came up suddenly and unexpectedly because of the victim's outcries and threats to tell.

The cases relied on in this connection are not controlling here. In People v. Murphy, supra [1 Cal.2d 37, 32 P.2d 636], there were not only multiple injuries inflicted by a belt buckle and fists but "other treatment of a sordid and shocking nature," which is not described in the opinion. Without going into detail the court stated that the defendant deliberately and intentionally used brutal and shocking means in subjecting the deceased to a severe and unprovoked beating. In People v. Cardoza, supra, after prolonged ill feeling the defendant unmercifully beat his wife with an axe handle and then let her suffer several hours before calling a doctor. The circumstances clearly show that he was vindictive and that he desired to make her suffer in revenge or as a punishment for what he thought she had done.

[1, 2] In the instant case, there is nothing to indicate any intention to inflict pain upon the victim as a punishment or in revenge, as commonly understood or as intended by the statute. There had been no previous quarrel or ill feeling and the beating occurred as a result of the appellant's sudden and instinctive idea to prevent the victim from telling what had occurred. In our opinion, the torture provision of the statute was not intended to cover such a situation as this. People v. Bender, 27 Cal. 2d 164, 163 P.2d 8, 16. In that case, the court said: "The killer who, heedless of the suffering of his victim, in hot anger and with a specific intent of killing, inflicts the severe pain which may be assumed to attend strangulation, has not in contempla-

tion of the law the same intent as one who strangles with the intention that his victim shall suffer." We think the same is true where the killer acts in sudden panic brought about by a sense of shame and fear of discovery. The torture provision of the statute was intended to cover a different sort of situation.

The next question is whether the evidence is sufficient to justify a finding that this killing was deliberate and premeditated. The appellant argues that assuming a specific intent to kill here appears, this is not in itself sufficient to constitute the deliberation and premeditation contemplated by the statute; that the time element and the distances were extremely short; that there was no previous ill will or design to kill or preparation to that end; that the intent to injure or kill was suddenly inspired by the threat of the deceased to tell of appellant's misconduct; that this induced fear, shame, rage or a combination of all three in the mind of appellant which led to her savage attack; and that this cannot be said to have been deliberate or premeditated, within the meaning of the statute. The respondent gives but brief attention to this question, arguing that direct evidence to establish these elements is not required, and that deliberation and premeditation may be inferred from the surrounding facts and circumstances. It is argued that a deliberate and a premeditated purpose on the part of the appellant to kill this little girl, in order to prevent her from telling her grandmother about the abuse to which she had been subjected, could properly be inferred by the court from the facts as shown by the record, and that this evidence is sufficient to support the finding of first degree murder.

[3-5] It has long been held that in order to constitute murder in the first degree there must be something more than a malicious or intentional killing, and in order to meet the statutory test for first degree murder there must be a satisfactory showing of a deliberate and preconceived intent to kill. People v. Holt, 25 Cal.2d 59, 153 P.2d 21. In People v. Bender, 27 Cal.2d 164, 163 P.2d 8, it is pointed out that the mere specific intent unlawfully to take life is normally an element of second degree murder also, and that such specific intent, obviously, is not necessarily the same as the "willful, deliberate and premeditated" intent which is essential to constitute murder in the first degree. Also, that "deliberate" means something that is unhurried and arrived at as a result of careful thought and the weighing of considerations, including the reasons for and against a contemplated action; that it means just the opposite of hasty, impetuous or impulsive; and that "premeditate" means "To think on, and revolve in the mind, beforehand; to contrive and design previously."

[6] The elements of "deliberate" and "premeditated" not only negative the idea of hurried thoughtless action in the face of an unexpected situation, but must be said to reasonably imply some opportunity for careful thought and for the weighing of various considerations as well as the presence of some plan or design. Of course, the length of time available for deliberation cannot be the controlling element. This would vary with different individuals and with differing circumstances. It would seem obvious that the age and experience of the defendant should be considered in this connection. "The true test is not the duration of time as much as it is the extent of the reflection." People v. Thomas, 25 Cal.2d 880, 156 P.2d 7, 18.

[7, 8] Where an adult is involved, the application of these rules and principles to particular facts and circumstances is frequently difficult and the question a close one. We have here the added circumstance that this crime was committed by a 13-year-old girl, with a mental age of 11, who was mentally and emotionally defective, who had a natural tendency toward cruelty to animals, and who was then going through a period of extreme mental and emotional stress. In our opinion, these are a part of the surrounding circumstances which should not be overlooked. Aside from the other elements mentioned, it is the general policy of the law to take into consideration the inexperience and probable extent of understanding of children of tender years. This

is recognized in negligence cases. Hoyt v. Rosenberg, 80 Cal.App.2d 500, 182 P.2d 234, 173 A.L.R. 883. Section 26 of the Penal Code, in stating who are capable of committing crimes, excepts children under the age of 14, in the absence of clear proof that at the time of committing the act charged they knew of its wrongfulness. While the age and condition of this appellant are not, in themselves, controlling here they are a part of the general circumstances which must be considered with other facts in determining whether the evidence is sufficient to show beyond a reasonable doubt that this killing was deliberate and premeditated, within the meaning of the statute.

[9] The evidence here clearly shows that the appellant did not plan or intend this killing in advance; that the killing resulted from her attempt to meet a situation which unexpectedly developed; that she acted from a sense of shame and with the idea of protecting herself; that she had no real realization of the enormity of her offense; and that there was no deliberation or premeditation within the meaning of the statute. It can be said here as was said in People v. Bender, supra: "There is no substantial evidence from which it reasonably can be inferred that defendant either formed or carried out the intent to kill deliberately, and with premeditation, in the ordinary meaning of those words." Paraphrasing what was further said in People v. Bender, supra, the conclusion that this defendant arrived at or carried out the intention to kill as the result of a concurrence of deliberation and premeditation could rest only on conjecture and surmise. Overwhelmingly opposed to such conjecture or surmise, and consistently evidenced by every circumstance, is a clear picture presented by the evidence of a sudden and unexpected development, with a feeling of shame and a fear of discovery, which was followed immediately by a violent killing in a desperate and frantic effort to protect herself by preventing a report of her misconduct. When all of the facts are given their fullest possible effect a reasonable ground of doubt, with respect to the degree of the crime, still remains, and under those circumstances she could be convicted of the lower degree only. Penal Code, Sec. 1097.

The judgment is modified by reducing it to murder in the second degree and, as so modified, is affirmed. The cause is remanded with directions to pronounce judgment accordingly.

GRIFFIN and MUSSELL, JJ., concur.

---

88 Cal.App.2d 184

YOUNG v. BANK OF CALIFORNIA et al.

Civ. 13778.

District Court of Appeal, First District, Division 2, California.

Oct. 26, 1948.

Hearing Denied Dec. 23, 1948.

1. Estoppel 🔑55

An "estoppel" is an equitable defense when a party has deliberately led another to believe that a particular thing is true and to act upon such belief to his detriment, but there can be no estoppel when party against whom defense is invoked has plainly caused the other to believe that particular thing relied on is not true and that he acts at his own peril. Code Civ.Proc. § 1962, subd. 3.

See Words and Phrases, Permanent Edition, for all other definitions of "Estoppel".

2. Brokers 🔑43(1)

Where broker was expressly told by mortgagee's agent that mortgagee never gave an exclusive contract nor one in writing, agent's assurance that broker's commission would be paid notwithstanding absence of written contract did not estop mortgagor or mortgagee from invoking the statute of frauds as a bar to action by broker to recover commissions on sale of realty. Civ. Code, § 1624, subd. 5; Code Civ.Proc. § 1962, subd. 3.

3. Brokers 🔑43(1)

Where broker performed no services of benefit to mortgagor or mortgagee in sale of realty, for which he had no written contract, he was not entitled to commissions, notwithstanding statute of frauds, on ground of unjust enrichment. Civ.Code, § 1624, subd. 5.

4. **Brokers** ⚿43(1)

Recovery of broker's commissions on sale of orchard, in absence of written contract, was barred by statute of frauds as to compensation for sale of growing crops as well as for sale of the land, since growing crops are a part of the realty until severed and sale constituted one transaction, even though purchase price was segregated between the land and growing crops to comply with Federal regulations governing payment of income taxes on capital gains as distinguished from income. Civ. Code, § 1624, subd. 5.

◆

Appeal from Superior Court, San Francisco County; Edw. F. Murphy, Judge.

Action by Frederick J. Young against The Bank of California, a corporation, and another to recover commissions as a real estate broker. From a judgment of nonsuit, plaintiff appeals.

Judgment affirmed.

Carl E. Day, of San Francisco, for appellant.

Pillsbury, Madison & Sutro, Maurice D. L. Fuller, Francis N. Marshall, Samuel L. Wright and Wm. S. Boyd, Jr., all of San Francisco, for respondent, Bank of California.

Boccardo & Williams, of San Jose, for respondent Colusa Development Co.

NOURSE, Presiding Justice.

Plaintiff appeals from an order of nonsuit to his action for commissions as a real estate broker. The order was granted on the ground that the cause of action fell within the statute of frauds. Civil Code, sec. 1624, sub. 5.

The defendant Colusa Development Company owned the "O'Sullivan Orchard" located in Colusa County in which the defendant bank was beneficiary under a deed of trust. One Martin, who was not a licensed broker, learned that the land was for sale and informed the secretary of the corporation that he knew someone who might be interested. Martin then told plaintiff Young that one Di Napoli might be interested and Martin gave this information to Moores, an officer of the defendant bank. Martin brought Di Napoli (the subsequent buyer) to Moores and at the same time introduced him to plaintiff. Young asked for an exclusive contract in writing but was told that the bank never gave an exclusive contract, nor one in writing. He testified that Moores then assured him that his commission was safe and would be paid notwithstanding the absence of a written contract.

When Di Napoli met Moores he said he was interested but that he would insist on purchasing the property separately—$57,500 for the crop and $67,500 for the land, in order to comply with the federal regulations covering the payment of income taxes on capital gains as distinguished from income. Some time later he took his own broker to Colusa and completed the purchase without any aid from plaintiff. The regular commission was paid to the latter broker at the time of the sale. Plaintiff tried on several occasions to contact Di Napoli but the latter avoided him.

Appellant combats the bar of the statute of frauds on these two grounds: (1) that respondents are estopped to raise the bar, and (2) full performance by appellant and acceptance of the benefits by respondents. Appellant also contends that he should at least be compensated for the sale of the personalty as that did not come under the bar of the statute.

[1,2] (1) An estoppel is an equitable defense when a party has deliberately led another to believe that a particular thing is true and to act upon such belief to his detriment. C.C.P. 1962, sub. 3. There can be no estoppel when the party against whom the defense is invoked has plainly caused the other to believe that the "particular thing" relied on is not true and that he acts at his own risk. Here the undisputed evidence is that appellant was told

by the agent of the bank that the owner would under no circumstances give him a written contract or an exclusive agency. The appellant relies on the agent's statement: "There's nobody else working on this property at the present time, and it seems to me you can go ahead. * * * you are safe enough, you are protected enough on it." If this language is sufficient to invoke an estoppel in face of the statute of frauds then any oral contract for the sale of realty permits recovery of a commission. The definite purpose of these statutes is to require such contracts to be made in writing with a duly licensed broker and to hold that an owner is estopped to rely on the law merely because he has made an oral contract contrary to the law would simply abrogate the statute. The same question was before us in White v. Hirschman, 54 Cal.App.2d 573, 574, 129 P.2d 430, 431, where an appeal from an order sustaining a demurrer to a complaint pleading the same facts as a ground for estoppel we said that "The conduct of the defendants pleaded here has no greater weight than if repeated oral promises were made to pay under the same contract." On the facts our case is even stronger than the White case. There the broker relied on the repeated oral express promises to pay a commission; there is here an express refusal to consummate any contract, written or oral, hence he relies on an implied oral contract to pay notwithstanding the statute of frauds. In accord with the White case are Hicks v. Post, 154 Cal. 22, 96 P. 878; Morrill v. Barneson, 30 Cal. App.2d 598, 600, 86 P.2d 924; Sweeley v. Gordon, 47 Cal.App.2d 381, 384, 118 P.2d 14; Herzog v. Blatt, 80 Cal.App.2d 340, 343, 180 P.2d 30; Seymour v. Oelrichs, 156 Cal. 782, 106 P. 88, 134 Am.St.Rep. 154; Notten v. Mensing, 3 Cal.2d 469, 45 P.2d 198; Le Blond v. Wolfe, 83 Cal.App.2d 282, 188 P. 2d 278, and similar cases upon which appellant relies are not in point. Those cases rest on the accepted doctrine that the prerequisite of the plea of estoppel is fraud. Wilson v. Bailey, 8 Cal.2d 416, at page 422, 65 P.2d 770, 772, reaffirms the language of Seymour v. Oelrichs, supra, as follows: "'The right of courts of equity to hold a person estopped to assert the statute of frauds, where such assertion would amount to practicing a fraud, cannot be disputed. It is based upon the principle "thoroughly established in equity, and applying in every transaction where the statute is invoked, that the statute of frauds, having been enacted for the purpose of preventing fraud, shall not be made the instrument of shielding, protecting or aiding the party who relies upon it in the perpetration of a fraud or in the consumation of a fraudulent scheme." 2 Pom.Eq.Jur. § 921.'"

This principle has no application here. The undisputed evidence is that the respondents' agent refused to give appellant any contract written or oral. The "promise" found in appellant's testimony meant nothing more than if appellant procured a buyer and completed a sale he should be fully compensated for his efforts.

[3] (2) Hence there is no case of unjust enrichment—a principle that runs through many of the cases cited. This applies only when the broker performs some service for the benefit of the principal under the belief that he will be fairly compensated for his service notwithstanding the statute of frauds. But where, as here, the broker performs no service of benefit to the principal it cannot be said that the latter has been "unduly enriched" by the broker's activities.

[4] Appellant contends that he should at least be compensated for the sale of the growing crops. The sale was one transaction. The purchase price was segregated between the land and the growing crops merely to meet the federal regulations regarding income taxes—to show whether the purchase price of the crops should be treated as capital gains or income. But growing crops under our decisions are a part of the realty until severed just as growing timber is part of the land. Sears v. Ackerman, 138 Cal. 583, 72 P. 171; List v. Sandell, 42 Cal.App.2d 505, 507, 109 P. 2d 376. It is undisputed that throughout all the dealings the parties herein treated the sale of the land and crops as one transaction and there is nothing in the record indicating that any one of them would have considered the sale of one without the other. There is no basis upon which appellant can

make a segregation of the sale of the crops from the sale of the land and his case must stand or fall upon the basis of a single transaction covering the entire property.

Judgment affirmed.

GOODELL and DOOLING, JJ., concur.

Hearing denied; CARTER, J., dissenting.

88 Cal.App.2d 171

ENGASSER et ux. v. JONES et ux.

Civ. 3820.

District Court of Appeal, Fourth District,
Division 3, California.
Oct. 25, 1948.

1. Frauds, statute of 🔑158(4)

Evidence was sufficient to show that defendants entered into specific oral agreement to sell property to plaintiffs, and that such agreement was sufficiently partly performed to lift agreement out of statute of frauds, and that defendants failed to perform within prescribed period. Civ.Code, § 1624, subd. 4.

2. Frauds, statute of 🔑125(1)
Specific performance 🔑41

An oral contract for sale of realty or of interest therein is invalid under statute of frauds, but specific performance will be compelled by court of equity where there has been part performance of such contract. Civ.Code, § 1624, subd. 4.

3. Specific performance 🔑128(2)

In purchasers' action for specific performance of oral agreement to sell realty, vendors who are unable to specifically perform such agreement, which has been lifted out of statute of frauds by purchasers' part performance, are liable for return of principal paid by purchasers, and court having obtained jurisdiction of subject matter can grant purchasers monetary relief which in an action at law would be by way of damages for breach of contract. Civ.Code §§ 1624, subd. 4, 3306.

4. Vendor and purchaser 🔑351(3)

Appreciation in value of realty between date of agreement to sell and date of vendors' breach without fault of purchasers determines element of damages to which purchasers are entitled for bad faith of vendors, and purchasers cannot recover such damages where value of property on date of vendors' breach is less than purchase price. Civ.Code, § 3306.

5. Vendor and purchaser 🔑343(4), 352

Vendor's bad faith which will entitle purchaser to damages for vendor's failure to perform contract for sale of realty is question of fact, and vendor is chargeable with such bad faith where vendor without just cause or excuse refuses to perform the contract or where through his own negligence he has put it out of his power to perform, but this is not true of one who contracts to convey but is unable to do so notwithstanding his best efforts. Civ.Code, § 3306.

6. Appeal and error 🔑931(3)

In absence of trial court's finding that vendors not performing contract for sale of realty acted in bad faith, judgment awarding damages to purchasers was not supported by findings or evidence, and such finding would not be assumed on appeal from such judgment. Civ.Code, §§ 3306, 3358.

◆

Appeal from Superior Court, Riverside County; Wm. D. Dehy, Judge Assigned.

Action for specific performance of claimed oral agreement to sell realty by Neal M. Engasser and Arbella E. Engasser, husband and wife against Thomas L. Jones and Ada Jones, husband and wife. The defendants filed a cross-complaint. From a portion of the judgment, the defendants appeal.

Reversed and remanded.

Shafer & Grimm, of Los Angeles, for appellants.

Alva D. McGuire, of Riverside, for respondents.

GRIFFIN, Justice.

Plaintiffs instituted this action against defendants to compel specific performance of a claimed oral agreement to sell certain real property located at Nuevo, in Riverside County. It is alleged that plaintiffs paid defendants $1000 on account of the purchase price, were let into possession of the property, and still occupy it under an oral agreement; that defendants refused to perform their part of the agreement; and pray that if specific performance cannot be enforced that judgment be awarded in favor of plaintiffs against defendants for such damages as they have sustained by reason of the breach of the agreement. The claimed agreement also involved the sale of one share of stock of the Nuevo Water Company as a part of the same transaction.

Defendants answered and claimed that on July 7, 1945, they did "orally agree to enter into a written agreement to transfer such interest as they had in the property", but only by way of "quitclaim deed". They alleged that no agreement was ever reduced to writing and signed by the parties; that defendants offered to deliver such a quitclaim deed to plaintiffs upon the execution of a written agreement but that plaintiffs refused to accept any form of deed except a grant deed. Defendants likewise claimed that plaintiffs have therefore defaulted under their agreement and that defendants are thereby excused from performance. They admitted payment of $1000 on account of the down payment and two payments of $35 per month plus interest, amounting to $95. In their amended answer they contended that the oral agreement to sell the real property was invalid and unenforceable under the provisions of sec. 1624, subdivision 4 of the Civil Code. They pray that plaintiffs take nothing under their complaint. By way of cross-complaint they seek possession of the property, damages in the sum of $5000 for wrongfully withholding it and $1000 as the value of rents.

Defendants apparently, by a quitclaim deed from an heir to the Boyer Estate, acquired an old 9-room house known as the "haunted house". They advertised it for sale in a Los Angeles paper, priced at $3500, with $800 down payment. Plaintiffs answered the advertisement and visited the property. At that time plaintiffs claimed that defendants orally agreed to sell the property at $3500 with a $1000 down payment and payments of $35 per month plus interest; that defendants agreed to go into escrow and furnish clear title to the property. Plaintiffs made some investigation as to defendants' claimed title and they state that defendant Mr. Jones told them that he had paid an attorney $25 on account to clear up his title to the property and that he should have it ready by this time and that he would call on the attorney and obtain the necessary papers; that thereafter they all went to an escrow office in Compton, where plaintiffs had money in another escrow, and they were told that the title company could not issue a certificate of title based on the quitclaim deed; that since defendants had only a quitclaim deed they should see an attorney to draw an agreement of sale, allowing defendants time in which to clear the title; that defendant Jones suggested a period of two months in which he could finish clearing his title; that defendants were then paid $1000 out of their escrow account; that they went to one attorney who drew up some kind of an agreement but which proved to be unsatisfactory; that defendants put plaintiffs in possession of the ranch under the oral agreement; that they had paid drayage charges for moving from Compton, and had purchased some of defendants' tenant's furniture in the house to appease the tenant and to effect an early occupancy of the premises by them; that another written agreement was tentatively drawn by another attorney which they claimed was not in accordance with the terms of the oral agreement, and a third agreement was to be drawn up by an attorney for plaintiffs which would provide for a warranty deed. This did not please defendants. No quiet title action was ever filed. Plaintiffs made no payments under the oral agreement after the first two. They said that defendants' excuse for not going through with the deal was that defendants said they had received a better offer of $5000 for the property.

Defendants claim they never agreed to deliver anything but a quitclaim deed and state that plaintiffs agreed to bring the quiet title action and that defendants would pay up to $75 on the cost thereof; that they offered to return the $1000 down payment on condition that plaintiffs would vacate the premises but that plaintiffs refused. This action followed.

An inheritance tax appraiser testified that the reasonable market value of the property on February 13, 1947, 8 days before trial of the action, was only $2850.

The court found generally that on July 17, 1945, plaintiffs entered into an oral agreement by which they agreed to buy and defendants agreed to sell the real property described for $3500, $1000 to be paid out of escrow; that defendants informed plaintiffs that they had only a quitclaim deed but that they were initiating legal proceedings through an attorney to clear up the title; that on July 18th the parties met at the bank for the purpose of opening an escrow but the escrow officer informed them that an agreement should first be drawn up by an attorney and executed by the parties; that thereafter defendants caused two agreements to be prepared by attorneys selected by them; that neither of these agreements were satisfactory to plaintiffs because not drawn according to plaintiffs' understanding of the terms of the oral agreement respecting the clearing of the title to the property; that no further written contract or agreement was prepared or tendered to the other by either party; that plaintiffs went into possession with the consent and approval of defendants on July 26, 1945; that the reasonable monthly rental value of the property is $40; that the reasonable value of the premises is $2850, and that the price agreed to be paid to the defendants was $3500; that plaintiffs expended $43.50 in moving and occupying the premises; that by reason of this occupancy with the consent of the defendants and the payment by the plaintiffs to the defendants of the sum of $1000 on the purchase price and consideration, the transaction was thereby taken out of the statute of frauds; that by reason of the failure of the parties to consummate the transaction defendants are entitled to the reasonable rental value of the premises from July 26, 1945. From these findings the court concluded that specific performance of the verbal contract between the parties cannot be enforced; that the plaintiffs are entitled to recover $1000 paid on the purchase price, plus interest from August 4, 1945, in the amount of $110.83; that plaintiffs are entitled to recover $650 damages, the difference between the price agreed to be paid by the plaintiffs to the defendants (i. e. $3500) and the reasonable value of the premises on February 13, 1947, (i. e. $2850), plus the sum of $43.50 incurred in going into possession thereof (totaling $693.50); that the defendants are entitled to recover from plaintiffs on their cross-complaint $770.00, the rental value of the premises at the rate of $40 per month from July 26, 1945, less the sum of $95.00, payments made under the oral contract, leaving a balance of $675; that the total sum of $1804.33 awarded plaintiffs be offset by $675 awarded defendants and that plaintiffs have judgment against defendants for the difference, in the sum of $1129.33; and that defendants are entitled to immediate restitution. Judgment was entered accordingly. Defendants appeal from that portion of the judgment in favor of plaintiffs and against defendants.

The evidence sufficiently supports the finding that plaintiffs were put into possession of the property under the oral agreement of sale. The sale price was definitely fixed at $3500, with $1000 down and payments of $35 per month plus interest. Defendant agreed to furnish a quitclaim deed and to perfect his title to the property within a certain prescribed period. Plaintiffs expended money in moving onto the property, furnished the house, made arrangements for the purchase of water rights and privileges and had exclusive control of the property, all with the consent and knowledge of defendants. They accepted plaintiffs' $1000 down payment and two monthly payments under the oral agreement to purchase.

[1] It appears to us that under the evidence, there is sufficient support for the finding that there was a specific oral agreement to buy and sell real property; that there was part performance; that defendants failed and refused to perform their part of its provisions within the time prescribed; and that by reason of the circumstances related, such oral agreement was taken out of the operation of the statute of frauds.

[2] In Hill v. Den, 121 Cal. 42, 53 P. 642, the general rule is stated to be that an oral contract for the sale of real property, or of an interest therein, is invalid under the statute of frauds; but where there has been a part performance thereof, its specific performance will be compelled by a court of equity. See, also, Calanchini v. Branstetter, 84 Cal. 249, 24 P. 149; Trout v. Ogilvie, 41 Cal.App. 167, 174, 182 P. 333; Forrester v. Flores, 64 Cal. 24, 28 P. 107.

[3] Defendants, not being able to specifically perform according to the oral agreement, as found by the court, plaintiffs were, under the pleadings and under sec. 3306 of the Civil Code, entitled to the return of the principal paid. That section further provides that "in case of bad faith" plaintiff may recover, in addition thereto, the difference between the price agreed to be paid and the value of the estate agreed to be conveyed at the time of the breach and the expenses properly incurred in preparing to enter upon the land. Where, through no fault of the plaintiff, specific performance cannot be decreed, the court having obtained jurisdiction of the subject matter, properly within its cognizance, may grant monetary relief which in an action at law would be by way of damages. Morrison v. Land, 169 Cal. 580, 147 P. 259; Messer v. Hibernia Savings & Loan Society, 149 Cal. 122, 84 P. 835. The compensation is to be adjusted according to the rules obtaining with regard to the measure of damages for the breach of a contract in an action at law. Messer v. Hibernia Savings & Loan Society, supra; McCowen v. Pew, 147 Cal. 299, 81 P. 958; 23 Cal.Jur. 511, sec. 67.

[4] The date of the claimed breach of the contract to convey is not disclosed by the record. If February 13, 1947, eight days before the trial, may be considered as the date of its breach, then the only evidence on the subject of value at that time was produced by plaintiffs. By that testimony it is shown that the property had a value of $2850. This was $650 less than the amount agreed to be paid. Under these circumstances plaintiffs could not claim that they suffered any damage by the refusal of defendants to convey the property at that time. It is the appreciation in value between the date of the agreement and the time of its breach that determines this element of damage. Morgan v. Stearns, 40 Cal. 434; 25 Cal.Jur. p. 815, sec. 265; Kiger v. McCarthy Co., 10 Cal.App. 308, 101 P. 928; Nelson v. Fernando Nelson & Sons, 5 Cal.2d 511, 517, 55 P.2d 859; Wolfson v. Haddan, 110 Cal.App. 573, 294 P. 772; Civ. Code Sec. 3358.

[5] Many authorities hold that the question of "bad faith" is a factual one. Hamaker v. Bryan, 178 Cal. 128, 172 P. 391; 25 Cal.Jur. p. 817, sec. 265. It has likewise been held that a vendor is chargeable with bad faith, within the meaning of sec. 3306 of the Civil Code where, without just cause or excuse, he refuses to perform the contract, or where, through his own negligence, he has put it out of his power to perform. But this is not true of one who contracts to convey but is unable to do so, notwithstanding his best efforts. Johnson v. Schimpf, 197 Cal. 43, 239 P. 401; Clark v. Yocum, 116 Cal. 515, 48 P. 498; Shaw v. Union Escrow & Realty Co., 53 Cal.App. 66, 200 P. 25.

[6] While there is evidence in the instant case that defendant refused to deliver title because he could then receive $5000 for the property, there was no finding of "bad faith" by the trial court and he may not assume it on this appeal. Therefore, the judgment awarding plaintiffs damage is not supported by the findings or by the evidence. Whether the trial court properly awarded defendants judgment against the plaintiffs on their cross-complaint for claimed rental value of the premises is not questioned on this appeal. See Cornblith v. Valentine, 211 Cal. 243, 294 P. 1065.

The portion of the judgment relating to damages is reversed and the cause remanded for a new trial on that issue, including the question of bad faith, and for the purpose of entering judgment not inconsistent with the conclusions here reached.

BARNARD, P. J., and MUSSELL, J., concur.

88 Cal.App.2d 258

BROWN v. ARBUCKLE.

Civ. 3738.

District Court of Appeal
Fourth District, California.
Oct. 28, 1948.
Rehearing Denied Nov. 19, 1948.
Hearing Denied Dec. 23, 1948.

1. Nuisance 🔑3(7)

Establishment and operation of an undertaking business in a purely residential section under circumstances causing a depressed feeling to the families in the immediate neighborhood, and depreciating the value of their property constitutes a "nuisance".

See Words and Phrases, Permanent Edition, for all other definitions of "Nuisance".

2. Nuisance 🔑23(1)

Under agreement between lot owners in vicinity of and including property of defendant seeking to maintain a mortuary thereon which was recorded prior to defendant's purchase of property, which agreement contained restrictive building covenants of which defendant had notice and finding that establishment of mortuary would greatly reduce sale and rental value of plaintiff's property and greatly interfere with comfortable enjoyment thereof and cause plaintiff and his family to suffer physical disturbances, injunction restraining defendant from establishing and maintaining the mortuary was proper.

3. Appeal and error 🔑878(1)

Where judgment was in favor of plaintiff and he did not appeal from judgment or any part of it, complaint by plaintiff of trial court's ruling could not be considered on appeal.

Appeal from Superior Court, Kern County; W. L. Bradshaw, Judge.

Suit for injunction by Guy W. Brown against N. B. Arbuckle to restrain defendant from establishing and maintaining a mortuary on property owned by him. From the judgment the defendant appeals.

Affirmed.

Siemon, Maas & Siemon, of Bakersfield, for appellant.

S. B. Gill, of Bakersfield, for respondent.

MUSSELL, Justice.

This is an appeal by the defendant from a judgment enjoining and restraining him from establishing and maintaining a mortuary and funeral parlor on property owned by him in the town of Oildale, California. In the amended complaint for an injunction it is alleged that defendant is the owner of Lots 1 and 2 in Block 4 of Oildale Annex and plaintiff owns Lots 3 and 4 adjoining; that on or about December 19, 1947, defendant commenced the construction and erection of a mortuary and funeral parlor upon his premises; that plaintiff's property, upon which he resides with his family, is situated in the residential portion of Oildale and is suitable and valuable only for residential purposes; that in the operation of the mortuary and funeral parlor human bodies will be received, embalmed and kept for burial; that autopsies will be held and funeral ceremonies conducted; that large numbers of people will come and go and assemble for such purposes; that ambulances will call at said funeral parlor at all times of the day and night to deliver dead human bodies; that the operation of the mortuary and funeral parlor immediately adjacent to plaintiff's property, with its constant reminder of mortality and attendant circumstances, will create a depressive atmosphere which will affect the mental attitude of plaintiff and the members of his family with consequent physical disorders; that the quiet use and enjoyment of plaintiff's residential property will thereby be impaired; that the true value of plaintiff's property as a home, as a place of repose and comfort will thereby be greatly diminished and that the normal operation of the mortuary and funeral parlor will interfere with and obstruct the normal and free passage of traffic along the streets in the vicinity and adjacent to plaintiff's property. It is also alleged that the owners of certain lots in the Oildale Annex, including the lots of plaintiff and defendant, entered into an agreement in writing which contains covenants restricting the use of said lots to private residences or dwelling houses and forbidding the use of these lots for the erection of any business buildings; that this agreement was recorded in the office of the Recorder of Kern County in December, 1939; that defendant purchased his property with knowledge of the terms of this agreement and has commenced the construction of a mortuary and funeral parlor thereon in violation of the terms of the agreement to plaintiff's damage.

It was stipulated at the trial that defendant's funeral parlor would not be a nuisance per se, and that there are no zoning or other restrictive ordinances affecting the property.

Plaintiff Brown testified that the repeated sight of visitors to the funeral parlor, showing signs and evidences of bereavement, would be a source of mental irritation. He testified, as did his wife, that they used their back yard constantly in the summer as a place to eat, have picnics, lunches and parties for their friends; that the proximity of the funeral parlor, with its constant reminder of death, would have a dampening effect on this type of entertainment, and would in all probability cause their friends to refrain from visiting them. Defendant testified that the main entrance for visitors to the mortuary would be on Wilson Street immediately adjacent to plaintiff's property and in view of his family and neighbors from their homes in the 400 Block on that street; that he intended to have a large neon advertising sign over the entrance to the mortuary on Wilson Street. There was testimony by a physician that the establishment of a mortuary next to plaintiff's home could and would reasonably cause mental strain on the respondent and his family and neighbors, so as to reasonably result in direct physical or functional upsets and disturbances. There was testimony that the sale and rental value of plaintiff's real property would be reduced between 10 and 12 per cent by the establishment of the mortuary. There are no business establishments in the block in which defendant's property is located and within a radius of several blocks the character of the neighborhood is primarily and largely residential.

The court found that the establishment of a mortuary and funeral parlor upon defendant's premises would be a constant mental irritant to plaintiff and members of his family which would reasonably cause the plaintiff and his family to suffer certain physical disturbances, would interfere greatly with the plaintiff and his family's comfort and enjoyment of his property and would reduce the sale and rental value thereof; that the immediate neighborhood within a radius of more than one block of defendant's property is used exclusively for residential purposes, and for a radius of several blocks is primarily and substantially residential. The court concluded that the restrictions in the agreement between the lot owners were not binding upon the defendant and that the establishment and maintenance of a mortuary and funeral parlor upon defendant's property would create a nuisance in fact in an exclusively residential area and that defendant should be enjoined from establishing it.

The question to be determined is whether the establishment and operation of a mortuary or funeral parlor in a residential area as here shown can constitute a nuisance enjoinable in equity.

[1] While some courts hold that an undertaking parlor or funeral home in a residential district is not a nuisance, the more recent trend of authority is clearly to the contrary. Bevington v. Otte, 1937, 223 Iowa 509, 273 N.W. 98.

In an annotation in 87 A.L.R. 1061, it is said:

> "The greater weight of recent authority is to the effect that the establishment and operation of an undertaking business in a purely residential section, under circumstances which would cause a depressed feeling to the families in the immediate neighborhood, and a constant reminder of death, appreciably impairing their happiness, or weakening their power to resist disease, and depreciating the value of their property, constitutes a nuisance."

This statement is supported by the citation of authorities from Alabama, Arkansas, Indiana, Kansas, Maryland, Michigan, Missouri, New York, North Dakota, Oklahoma, Texas, Virginia and Washington. Bevington v. Otte, supra. In this case the court quotes the language in Tureman v. Ketterlin, 304 Mo. 221, 263 S.W. 202, 204, 43 A.L.R. 1155, as follows:

> "An undertaking establishment is not a nuisance per se. The business of preparing dead bodies for burial is not only lawful but indispensable. It may become a nuisance, however, from the manner in which it is conducted or because of the place at which it is maintained, and it is very generally held to be such when it intrudes itself into a strictly residential district. Beisel v. Crosby, 104 Neb. 643, 178 N.W. 272; Densmore v. Evergreen Camp, 61 Wash. 230, 112 P. 255, 31 L.R.A.,N.S., 608, Ann. Cas.1912B, 1206; Saier v. Joy, 198 Mich. 295, 164 N.W. 507, L.R.A.1918A, 825; Meagher v. Kessler, 147 Minn. 182, 179 N.W. 732; Osborn v. City of Shreveport, 143 La. 932, 79 So. 542, 3 A.L.R. 955; Goodrich v. Starrett, 108 Wash. 437, 184 P. 220; Cunningham v. Miller, 178 Wis. 22, 189 N.W. 531, 23 A.L.R. 739. The essential ground of such holding is that the maintenance of an undertaking establishment in a residence district tends to destroy the comfort, well-being, and the property rights of the owners of homes therein."

In Cooley on Torts (4th Ed.1932), Vol. 3, P. 180, sec. 435, it is said:

> "The inherent nature of an undertaking establishment is such that, if located in a residential district, it will inevitably create an atmosphere detrimental to the use and enjoyment of residence property, produce material annoyance and inconvenience to the occupants of adjacent dwellings, and render them physically uncomfortable, and in the absence of a strong showing of public necessity, its location in such a district should not be permitted over the protest of those who would be materially injured thereby."

In Arthur v. Virkler, 1932, 144 Misc. 483, 258 N.Y.S. 886, the court after reviewing many cases held that the moving of an undertaking establishment into the midst of a residential district was an illegal encroachment upon plaintiffs' property rights and a nuisance which equity will abate.

The Supreme Court of Georgia (1938) in McGowan v. May, 186 Ga. 79, 196 S. E. 705, is in accord with the statement in 87 A.L.R. 1061.

Where, in an area of eight city blocks, there were about 75 residences and the only commercial places were two small grocery stores and a delicatessen shop the court held that the area was essentially residential in character so as to entitle the owner and occupant of a residence therein to an injunction against the establishment of a funeral home on an adjoining lot. Davis v. Holmes, 1940, 189 Misc. 554, 198 So. 25.

In Smith v. Fairchild, 1942, 193 Misc. 536, 10 So.2d 172, the Supreme Court of Mississippi affirmed the modern weight of authority rule and held that the maintenance of an undertaking and embalming establishment in a residential district must inevitably operate to decrease substantially property values, destroy the comfort and happiness of people residing in the immediate vicinity, and is an unwarrantable invasion of the rights of others, and constitutes a nuisance.

The Supreme Court of Missouri (Clutter v. Blankenship, 1940, 346 Mo. 961, 144 S.W. 2d 119,) in holding that the establishment of a funeral home in a purely residential district constituted a nuisance referred to the California case of Dean v. Powell, Undertaking Co., 55 Cal.App. 545, 203 P. 1015, as supporting a contrary contention but held that a majority of adjudications by other courts are in accord with the Missouri cases, and that the trend of later decisions point in that direction, citing White v. Luquire Funeral Home, 221 Ala. 440, 129 So. 84; Fentress v. Sicard, 181 Ark. 173, 25 S.W.2d 18; Harris v. Sutton, 168 Ga. 565, 148 S.E. 403; Haan v. Heath, 161 Wash. 128, 296 P. 816, in effect overruling Rea v. Tacoma Mausoleum Ass'n, 103 Wash. 429, 174 P. 961, 1 A.L.R. 541; Beisel v. Crosby, supra; Albright v. Crim, 97 Ind.App. 388, 185 N.E. 304; Weinmann v. Miles, 134 Kan. 107, 4 P.2d 437; Dillon v. Moran, 237 Mich. 130, 211 N.W. 67; Arthur v. Virkler, supra; King v. Guerra, Tex.Civ.App., 1 S.W.2d 373; Bragg v. Ives, 149 Va. 482, 140 S.E. 656; Other cases to the same effect are Kundinger v. Bagnasco, 1941, 298 Mich. 15, 298 N.W. 386; Fraser v. Fred Parker Funeral Home, 1942, 201 S.C. 88, 21 S.E.2d 577; Reiser v. Osborn, 1944, 114 Ind.App. 617, 53 N.E.2d 545; Meldahl v. Holberg, 1927, 55 N.D. 523, 214 N.W. 802, and Fink v. Smith, 1934, 140 Kan. 345, 36 P.2d 976.

[2] In the instant case there was an agreement between lot owners in the vicinity of and including defendant's property, which was recorded prior to the defendant's purchase of it, and the agreement contained restrictive building covenants of which defendant had notice. This agreement was evidence of the character of the neighborhood and the evident desire of property owners therein to maintain their properties for residence purposes only.

The trial court found that the establishment of a mortuary and funeral parlor on defendant's property would greatly reduce the sale and rental value of plaintiff's property; that such an establishment would interfere greatly with the comfortable enjoyment of his property and would be a constant mental irritant to the plaintiff and members of his family and would cause them to suffer physical disturbances.

We are in accord with these findings. A mortuary and funeral parlor as a constant reminder of death has a depressing effect upon most people. Funerals, hearses, coffins, the keeping of dead bodies on the premises, the coming and going of bereaved persons, are conducive to depression and sorrow and deprive a home of the comfort and repose to which its owners are entitled. Especially is this true when such an establishment is located adjacent to and in full view of plaintiff's property. Medical testimony was received to the effect that the mental strain caused thereby would reasonably result in direct physical disturbances.

Our attention has been directed to the case of Dean v. Powell Undertaking Co., 55 Cal.App. 545, 203 P. 1015, as contrary to the rule announced in the cases herein cited. In the Dean case the decision was based solely upon the pleadings and general findings. The Court correctly found that a nuisance per se did not exist. However, there was nothing in the evidence or findings to show that the undertaking establishment was a nuisance in fact. The evidence is not set forth and it was merely assumed that a few general findings were as paraphrased in the opinion. The holding of funerals was not involved. However, the court distinguished that case from the case of Beisel v. Crosby, supra, saying that the Supreme Court of Nebraska was considering a set of facts that was altogether peculiar and different from the case there involved. The facts of the Nebraska case were extensively set forth and appear to be much more similar to the instant case than those apparently involved in the Dean case. In the instant case the court found that the establishment of a mortuary and funeral parlor would constitute a nuisance in fact, and found facts showing physical as well as mental injury to plaintiff and the members of his family. This finding was supported by some substantial evidence. The question was one of fact for the trial court and under the circumstances we do not regard the Dean case as controlling here.

[3] The plaintiff contends that the court erred in ruling that the building restrictions contained in the agreement of certain lot owners in Oildale Annex were not binding on the defendant. It becomes unnecessary to determine this question. Judgment was in favor of plaintiff based on the second count of the complaint and has been affirmed on appeal. The plaintiff did not appeal from the judgment or any part of it. Under such circumstances the point cannot be urged by plaintiff on this appeal. Miller v. More, 170 Cal. 557, 150 P. 775; Griffin v. City of Los Angles, 134 Cal.App. 763, 26 P.2d 655.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

88 Cal.App.2d 271

DALZELL v. LOS ANGELES COUNTY et al.

Civ. 16206.

District Court of Appeal, Second District, Division 3, California.

Oct. 30, 1948.

Rehearing Denied Nov. 19, 1948.

Hearing Denied Dec. 27, 1948.

1. Automobiles ⟹306(4)

Evidence established that open storm drain inlet at highway intersection, close to pavement of both highways and without guard post or rail or other protective device at one end thereof, was a dangerous condition of highway, for injuries resulting from which county would be liable under statute. Gen.Laws, Act 5619, § 2.

2. Automobiles ⟹310

Trial court's finding that injuries sustained by motorist were caused by his negligence in that he so carelessly managed automobile that as a direct and proximate result thereof he drove it into open storm drain at highway intersection implied a finding of contributory negligence of motorist precluding recovery against county for his injuries. Gen.Laws, Act. 5619, § 2.

3. Automobiles ⟹306(8)

Evidence sustained finding that plaintiff in driving automobile into open storm drain inlet at highway intersection during a dense fog was contributorily negligent so as to preclude recovery against county for resulting injury. Gen.Laws, Act. 5619, § 2.

4. Automobiles ⟹285

A motorist driving in fog is required to exercise the degree of care to be expected of an ordinarily prudent person under the same or similar circumstances and, if, from his position in driver's seat, he cannot see where he is about to drive, he must ascertain his surrounding conditions in some other manner.

◆

Appeal from Superior Court, Los Angeles County; Ingall W. Bull, Judge.

Action by W. C. Dalzell against the County of Los Angeles, etc., and others, to recover for injuries sustained by plaintiff when he drove his automobile into an open storm drain during a dense fog. Judgment for defendants, and plaintiff appeals.

Judgment affirmed.

W. C. Dalzell, in pro. per.

Harold W. Kennedy, County Counsel, and Ernest Purdum, Deputy County Counsel, both of Los Angeles, for respondents.

WOOD, Justice.

This is an action to recover damages for injuries sustained by plaintiff when he drove his automobile into an open storm drain during a dense fog. Judgment was for defendants. The trial court found that there was no dangerous or defective condition of the highway where plaintiff was injured; and that any injury sustained by plaintiff was caused by his own fault in that he so negligently managed his automobile that as a direct and proximate result thereof he drove it into a storm drain. The court stated, in the conclusions of law, that the injury described in plaintiff's complaint was caused by his own contributory negligence. Plaintiff appeals from the judgment.

The accident occurred on November 19, 1943, about 5:45 a.m., near the northwest corner of the intersection af Paloma Street and Sierra Madre Boulevard in Los Angeles County. Paloma Street extends east and west, and Sierra Madre Boulevard extends north and south. Paloma Street is about 45 feet wide at the east entrance to the intersection and about 40 feet wide at the west entrance thereof, is paved with macadam, and has no marked traffic lanes. Sierra Madre Boulevard is about 150 feet wide at the north entrance to the intersection and about 125 feet wide at the south entrance thereof. In the center of that boulevard there is a railway right-of-way about 70 feet wide, and in the right-of-way there are two railway tracks. On each side of the right-of-way there is a paved highway about 40 feet wide. The right-of-way is not paved north and south of the intersection but it is paved in the intersection. The surface of the right-of-way within the intersection is level with the pavement in the intersection, and the "parking" or unimproved surface of the right-of-way north of the intersection is several inches higher than the adjoining highway pavement. An underground storm drain or culvert extends across Sierra Madre Boulevard near the north line of the intersection. At the west side of Sierra Madre Boulevard, there is an open rectangular concrete inlet to the culvert. At the east side of the boulevard there is an open rectangular concrete outlet to the culvert. The concrete inlet (on the west side of the boulevard) is about 6 feet wide and 4 feet deep at its east end where it adjoins the culvert, and about 8 feet wide at its west end, and is about 10 feet long. There is a berm or raised shoulder on the west side of Sierra Madre Boulevard and north of the intersection. It is about 1 foot wide and about 8 inches high at the outer edge. It extends several feet north from Paloma Street and is about 1 foot from the southeast corner of the storm drain inlet and about 10 feet from the northeast corner of the inlet. There was dry grass in the triangular area between the berm of the pavement and the east end of the inlet. A white post, approximately 1 foot in diameter and 3½ feet in height, adjoins the southeast corner of the inlet, and a similar post adjoins the southwest corner of the inlet. The pavement of the intersection and Paloma Street is about 1 foot from these posts. At the time of the accident, there was no post or other protective device at the east end of the inlet, or at the northeast corner or the north side of the inlet.

Plaintiff testified that he left his home about 5:15 a.m. on the day of the accident and went in his automobile to a pasture about ½ mile east of Sierra Madre Boulevard where he milked a cow; that he encountered very little fog on his way to the pasture; that he left the pasture to return home about 5:40 a.m.; that it was "pitch dark" at that time, and a heavy fog had drifted into the area; that he proceeded west on Paloma Street; that he was driving very slowly on account of the fog and also because he had an open bucket of milk in the back of his automobile; that he followed the north edge of the pavement on Paloma Street until he came to the storm drain outlet on the northeast corner of the intersection; that he then "followed the angle of the northeast storm drain," started across the east half of the intersection, and ran against the "parking in the middle of the street [the railway right-of-way] approximately 10 or 15 feet north of the line where Paloma Street crosses" the tracks; that after "straightening up," he turned southerly and followed the "parking in the middle of the street" to its southern edge, then turned westerly and followed the southern edge of said "parking" to the point where "it curves off to the north"; that from that point he had nothing to guide him, and he drove westerly as straight as he could; that he reached the point east of the storm drain inlet where there was dry grass between the pavement and the east end of the inlet and, before he realized what had happened or where he was, the right wheels of his automobile "rode" on the north wall of the storm drain inlet and his automobile turned over on its left side and fell into the inlet; and that during all of this time his automobile headlights were on. He testified further that he milked the cow twice daily, and that from April, 1943, to November 19, 1943 (the day of the accident), he had driven across the intersection four times each day; that the first time he had driven in fog across the intersection was the day of the accident; that he was familiar in general with the physical arrangement of the intersection, but he was not familiar with the exact directions of the north line of the street.

It was stipulated by the parties that a Mr. Morse would testify that he was driving west on Paloma Street about 5:45 a.m. on the day of the accident; that there was a very heavy fog at the intersection at that time; that he noticed an automobile in the "storm drain," and found plaintiff trying to get out of the automobile which was on its left side in the storm drain inlet; and that he (the witness) took the plaintiff home.

[1] Plaintiff contends that the open storm drain inlet constituted a defective and dangerous condition within the meaning of section 2 of Act 5619 of the General Laws of California, Stats. 1923, ch. 328, p. 675. Under that section a county is liable for injuries resulting from the dangerous or defective condition of highways in cases

where the governing board of the county had notice of such condition. It was stipulated at the trial that the storm drain was in the same condition on the day of the accident that it was when it was built by the county and that the governing body of the county had notice of the condition. At the close of the testimony on behalf of plaintiff, the plaintiff suggested that the trial judge view the scene of the accident. The judge then said: "When we have concluded the evidence I think we will probably go out there and take a look at it." The record does not show whether the judge viewed the scene of the accident, and since the statement of the judge as to whether he would view the scene was uncertain, it will not be assumed that he did view it. The photographs and the map of the scene of the accident, which were received as exhibits, and the other evidence regarding the description of the highway and the storm drain, show that the storm drain inlet was a dangerous condition of the highway. The evidence does not support the finding that it was not a dangerous or defective condition. The storm drain inlet, as above shown, was close to the pavement of both highways and there was no guard post or rail or other protective device at the east end of the inlet.

[2-4] As above stated, the trial court found that any injury sustained by plaintiff was caused by the negligence of the plaintiff himself in that he so carelessly managed his automobile that as a direct and proximate result thereof he drove it into the storm drain. Although the court did not expressly state in that finding that plaintiff was guilty of contributory negligence, such a finding necessarily included a finding that negligence on the part of plaintiff directly and proximately contributed to the injury. There was substantial evidence to support a finding of contributory negligence on the part of plaintiff. As above shown the plaintiff had driven across the intersection four times a day for a period of about seven months previous to the accident and he was familiar with the physical arrangement of the intersection. He was aware that he was proceeding near the south edge of the storm drain outlet (east of the intersection) before he started into the intersection, and apparently it was his intention, in order to keep off the south side of Paloma Street, to cross the intersection by proceeding straight ahead in line with his starting position (near the edge of the storm drain outlet) and thereby to keep as near as possible to the north line of the intersection. Before he had gone half way across the intersection, and at the time he ran against the raised part of the railway right-of-way, he knew that he had veered far from his intended course, and that he was out of the intersection and north of it several feet. He returned to the intersection, from his position against the right-of-way, by "following" the raised edge of the unimproved part of the right-of-way. Then, he crossed the railway tracks and continued to cross the intersection, "following" the raised edge of the right-of-way until it curved to the north. Then, in endeavoring to cross the remainder of the intersection, when he "had no guide whatsoever," he took no precautionary measure other than to drive "as near straight" as he could. In other words, it appears that he attempted to drive across the last part of the intersection, relying solely on his alleged ability to drive straight in fog. As above shown, he had just experienced failure in the first part of the intersection when he relied solely on his ability to drive straight. If, from his position in the driver's seat, he could not see where he was about to drive, it was his duty to ascertain the surrounding conditions in some other manner. In the case of Keene v. Pacific Northwest Traction Co., 153 Wash. 310, at page 313, 279 P. 756, 757, the court said: "There was, it is true, a fog at the time which more or less obscured his vision, but this, instead of excusing him from exercising care and caution, rather added to his duty in that respect. If he could not see whether or not he was entering a zone of danger in venturing onto the railway track, it was his duty to take some other means of ascertaining the fact. He could not * * * take a chance on escaping injury, and, failing to escape, charge his delinquency to another." In driving an automobile in fog, the driver is required to exercise a degree of care that is to be expected of an ordinarily prudent person un-

der the same or similar circumstances. In the case of Salera v. Schroeder, 183 Minn. 478, at page 480, 237 N.W. 180, wherein the defendant was driving in fog, the court said: "Extreme caution was required by the circumstance of the moment — a degree of caution commensurate to the danger, which was great. * * * It is but ordinary prudence to exercise a high degree of care in the presence of imminent danger, when casualty is apt to come unless much care is exerted to avoid it." In Devoto v. United Auto Transportation Co., 128 Wash. 604, at pages 609, 610, 223 P. 1050, 1052, it was said: "[T]hat in driving through a fog bank each driver must do so in a careful and prudent manner, with due regard for the safety of others, and what is careful and prudent under the particular conditions shown will usually be a question for the jury."

In determining whether plaintiff herein was negligent, some of the questions of fact related to (1) how far plaintiff could see in the fog, (2) whether he should have seen the white posts on the south side of the storm drain inlet, (3) what rate of speed he was traveling, and (4) whether, in driving over the raised shoulder or 8-inch berm and the dry grass on the west side of Sierra Madre Boulevard, he should have become aware that he was driving off the highway. His statement that he was "following" the edge of the right-of-way indicates that he could see that edge (which was beyond the right side of his automobile), and therefore that he could see in the fog for a distance of several feet. On the other hand, his statement that since he "had no guide whatsoever" (after he had passed the edge of the right-of-way) and that he drove westerly as straight as he could indicates that the fog was so dense that he could not see any distance in it. His statement that he drove as straight as he could implies that he was looking ahead while he was trying to drive straight. Since the white posts, which were about 3½ feet high and 1 foot in diameter, adjoined the south side of the inlet, it is reasonable to assume that the posts were within the area covered by the headlights of his automobile as he approached the east end of the inlet. If he looked ahead while he was driving straight, it might reasonably have been concluded that he should have seen the posts which were a warning of danger. It appears, however, from plaintiff's brief that he did not look ahead while he was trying to drive straight. In his brief he states as follows: "Further, plaintiff necessarily was closely watching to the northwest for reappearance of street north side lines and obviously was not and should not at that time look directly west or southwest to locate such posts. If a post had been so placed at the northeast corner of the storm drain plaintiff would have seen it. * * *" It is also to be noted, as above stated, that the northeast corner of the drain was about 6 feet from the post at the southeast corner of the drain. The raised shoulder or berm at the west side of Sierra Madre Boulevard was 8 inches high and about 1 foot wide. If plaintiff drove very slowly (about 5 miles per hour as stated in his brief) when his automobile went over such a ridge on the highway, it might reasonably have been concluded that he should have known that he was off the highway which he had traversed so frequently for several months. Also, if plaintiff drove slowly when the right wheels of his automobile traveled upon dry grass for a distance of 10 feet after crossing the berm, it might reasonably have been concluded that he should have known that he was off the highway. Also, the trial court was confronted with the matter of trying to reconcile testimony as to slow speed with testimony that plaintiff, before he realized where he was, had gone over the berm and the dry grass, and that the right wheels of the automobile "rode" on the north wall of the inlet and the automobile fell on its left side into the hole. It is not clear how a slow-moving automobile could proceed so far over the open 6-foot-wide hole that its right wheels could be upon the north wall before the automobile fell. Whether or not there was contributory negligence on the part of plaintiff was a question of fact for the trial court, and, as above stated, the evidence was sufficient to support such finding.

The judgment is affirmed.

SHINN, P. J., and VALLEE, J., concur.

88 Cal.App.2d 192

BARRABEE et al. v. CRESCENTA MUT. WATER CO. et al.

Civ. 16364.

District Court of Appeal, Second District,
Division 2, California.

Oct. 26, 1948.

Hearing Denied Dec. 23, 1948.

1. Master and servant 🔑315

Where water company employed independent contractor to drill water well on company's land, any liability of company for damages resulting from permitting water and subsoil from drilling operations to flow over public street must be predicated on ground either that company was a joint tort-feasor or was liable under doctrine of respondeat superior.

2. Master and servant 🔑318(1)

Where water company, having employed independent contractor to drill water well on company's land was not in control of any part of the work, though having some supervision over drilling of the well, company was not liable as joint tort-feasor for any negligence of contractor in permitting water and subsoil from drilling operations to flow over public street.

3. Judgment 🔑632, 678(1)

Generally res judicata applies only between parties to original judgment or their privies, but, in a tort action, lack of privity in former action does not prevent an estoppel, where defendant's liability is predicated upon the culpability of another who was the immediate actor and who was exonerated in an action against him by the same plaintiff for the same act.

4. Judgment 🔑696

Where independent contractor, being sued for injuries to motorist and damage to his automobile caused by alleged negligence of contractor in permitting water and subsoil from its well-drilling operations to flow across public street, denied liability and alleged contributory negligence of motorist, in subsequent action against contractor's employer to recover for same injuries and property damage, judgment exonerating contractor was res judicata as to negligence in allowing subsoil to flow across street, negligence in failing to remove it, and contributory negligence of motorist.

5. Judgment 🔑696

A judgment in favor of one of several alleged tort-feasors is a bar to subsequent action against the others who were not parties to prior action, if liability of the latter is solely derivative because of doctrine of respondeat superior.

6. Master and servant 🔑315

Where owner employs an independent contractor, ordinarily the rule of respondeat superior does not apply and owner is not liable for negligence of contractor.

7. Master and servant 🔑317

One who has obtained permission to excavate in a public street and has employed an independent contractor to do the work is liable for a dangerous condition created in the street by negligence of contractor.

8. Master and servant 🔑319

Where danger and peril inhere in the very nature of work being done by independent contractor, contractor's employer is liable for any injuries to others resulting from or occasioned by such danger.

9. Master and servant 🔑323

Where landowner, prohibited by statute from excavating or obstructing a public street without a permit, employs an independent contractor to do work without a permit involving such excavation or obstruction, owner is liable therefor, since he has created a nuisance per se.

10. Master and servant 🔑315

Where water company employed an independent contractor to drill a water well on company's land, company was not liable under rule of respondeat superior for any negligence of contractor in permitting water and subsoil from drilling operations to flow over a public street.

◆

Appeal from Superior Court, Los Angeles County; Ingall W. Bull, Judge.

Action by Thomas R. Barrabee, a minor, etc., and others against Crescenta Mutual Water Company, a corporation, and others for injuries and damage to automobile allegedly resulting from negligence of defendants. From a judgment in favor of defendants entered upon a directed verdict, plaintiffs appeal.

Judgment affirmed.

Samuel P. Young, of Los Angeles, for appellants.

Forrest A. Betts, Walter Ely, and William J. Currer, Jr., all of Los Angeles, for respondents.

WILSON, Justice.

This is an action for damages for personal injuries alleged to have been suffered by plaintiff and damage to his automobile resulting from an accident purporting to have been caused by defendant's negligence.

From a judgment in favor of defendant entered upon a directed verdict plaintiff appeals.

The facts which are not disputed are that defendant employed the Barber-Bridge Drilling Corp., Ltd., an independent contractor, to drill a water well on defendant's property; that the contractor dug a sump hole to receive the excess water, sand, gravel and mud occasioned by this operation but nevertheless a certain amount of water and subsoil flowed across Honolulu Avenue; that on the night of the accident plaintiff was driving his car in a westerly direction on Honolulu Avenue at a speed of about 35 miles an hour when his car skidded, went out of control and collided with a tree, causing the injuries complained of. Rain had begun to fall just prior to the accident, which occurred about 8:00 P.M. There were no lights or barriers at the place where the subsoil had flowed across Honolulu Avenue.

The record discloses that on June 14, 1945, plaintiff filed an action for damages against this defendant and the Barber-Bridge Drilling Corp., Ltd., the allegations in the complaint being substantially the same as in this action. Both defendants answered denying liability and as an affirmative defense alleging contributory negligence on the part of plaintiff. Prior to trial plaintiff dismissed the suit as to defendant Crescenta Mutual Water Company. The action against the Barber-Bridge corporation was tried to a jury, resulting in a verdict in favor of the defendant.

The present action was filed April 23, 1946. At the time of trial the judgment in the first action had become final. Defendant in its answer denied liability, alleged contributory negligence and pleaded res judicata. When plaintiff had presented evidence and rested, defendant moved for a directed verdict upon four grounds, one of them being that a judgment in favor of the independent contractor in the prior action is res judicata of the present action. The motion was granted and the court in its instructions to the jury indicated that its reason for directing them to bring in a verdict for defendant was, among others, that the matter was res judicata. The court did not specifically mention the other grounds for a directed verdict.

[1] It is conceded that defendant employed an independent contractor to drill the well and that it was in connection with this operation that the water, sand, gravel and mud were permitted to flow across Honolulu Avenue. Any liability on the part of defendant must, therefore, be predicated upon one of two grounds: (1) That defendant is a joint tort feasor or (2) that defendant is liable under the doctrine of respondeat superior.

[2] 1. *Defendant's liability as a joint tort feasor.* It is admitted that the work of drilling the well was being performed by the Barber-Bridge corporation as an independent contractor. Hence the condition complained of must have been caused by that corporation which allowed the subsoil to flow across the street. Plaintiffs contend that defendant is jointly liable with the Barber-Bridge corporation because of its supervision over the work of the independent contractor and cites La Malfa v. Piombo Bros., 70 Cal.App.2d 840, 161 P.2d 964, 968. That case may be differentiated upon its facts. Plaintiff sued for damages to its truck. The defendant was in possession and control of the private road upon which the trucks of the independent contractor, as well as other vehicles, were operating and upon which the accident occurred. The court stated that the general principle that

a person is not liable for the negligence of an independent contractor would not apply if the "defendants were in possession and control of the private roads and negligently permitted operations to be continued thereon as a result of which a person of ordinary prudence could foresee that a collision such as actually occurred was likely to ensue." In the instant case there is no contention that the defendant was in control of any part of the work. Even though it be true that defendant had some supervision over the drilling of the well, that is immaterial if, in fact, the Barber-Bridge corporation was acting as an independent contractor. The only possible negligence on the part of defendant would be its failure to remove the condition or its failure to warn motorists of its existence by the use of lights or barriers.

[3] Generally the principle of res judicata applies only between parties to the original judgment or their privies. But in a tort action lack of privity in the former action does not prevent an estoppel where defendant's liability is predicated upon the culpability of another who was the immediate actor and who was exonerated in an action against him by the same plaintiff for the same act. Duell v. Metro-Goldwyn-Mayer Corp., 128 Cal.App. 376, 383, 17 P. 2d 781; Bank of Orland v. Stanton, 135 Cal. 593, 596, 67 P. 1035; Bradley v. Rosenthal, 154 Cal. 420, 425, 97 P. 875, 129 Am. St.Rep. 171; Triano v. F. E. Booth & Co., Inc., 120 Cal.App. 345, 347, 8 P.2d 174. The situation is analogous to that of principal and agent. Triano v. F. E. Booth & Co., Inc., supra.

[4] In the action against the Barber-Bridge corporation, which resulted in a verdict and judgment for the defendant, there was an implied finding that there was no negligence on the part of the defendant in allowing the subsoil to flow across the street; also, there was an implied finding that the plaintiff was contributorily negligent. The immediate actor having been exonerated, defendant in this action cannot be held liable for the same act, since the issues with respect to (1) negligence in allowing the subsoil to flow across the street, (2) negligence in failing to remove it, and (3) the contributory negligence of plaintiff are res judicata.

[5-10] 2. *Defendant's liability under the doctrine of respondeat superior.* Plaintiff admits the law to be that a judgment in favor of one of several alleged tort feasors is a bar to an action against the others who were not parties in the prior action if the liability of the latter is solely derivative because of the doctrine of respondeat superior. Ordinarily, where an owner employs an independent contractor, the rule of respondeat superior does not apply and he is not liable for the negligence of the contractor. Boswell v. Laird, 8 Cal. 469, 495, 68 Am.Dec. 345; Barton v. McDonald, 81 Cal. 265, 267, 22 P. 855; Robbins v. Hercules Gasoline Co., 80 Cal.App. 271, 273, 251 P. 697. Plaintiff, however, relies upon the exception to this rule that one who employs an independent contractor is responsible for a dangerous condition created in the public streets by the negligence of the contractor. The cases supporting this exception fall into three classes: (1) Those in which the defendant has obtained permission to excavate the streets; in such cases the principle which places liability on the defendant is the latter's duty and obligation under his contract with the municipality which permitted him to tear up the street, to do the work with due care, the consequences of which the defendant could not shift by an attempted delegation of duty (Colgrove v. Smith, 102 Cal. 220, 224, 36 P. 411, 27 L.R.A. 590; Luce v. Holloway, 156 Cal. 162, 164, 165, 103 P. 886; Kirk v. Santa Barbara Ice Co., 157 Cal. 591, 593, 108 P. 509); (2) those in which danger and peril inhere in the very nature of the work and where, therefore, it would be unjust that the responsibility for injury resulting from or occasioned by such danger should be passed on to the contractor (Williams v. Fresno Canal & Irr. Co., 96 Cal. 14, 16, 30 P. 961, 31 Am.St.Rep. 172); (3) those in which an owner is prohibited by statute from excavating or obstructing a public street without a permit and if he acts in violation of law he has created a nuisance per se. Colgrove v. Smith, supra; Luce v. Holloway, supra. The instant case does not fall within any of the above mentioned classes. The general rule therefore

applies and the liability, if any, falls upon the independent contractor.

Under either theory advanced by plaintiff the doctrine of res judicata applies. Having determined this question, it is not necessary to decide whether the verdict and judgment are supported upon the other grounds included in defendant's motion for a directed verdict.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.

Hearing denied; CARTER, J., dissenting.

88 Cal.App.2d 188

PEOPLE v. BYRD.

Cr. 2546.

District Court of Appeal, First District,
Division 2, California.
Oct. 26, 1948.

Rehearing Denied Nov. 10, 1948.
Hearing Denied Nov. 22, 1948.

1. Incest 🔑16

Cases of incest must be tried with the utmost fairness and impartiality in order that the defendant may receive a fair trial and errors committed whether by prosecution or by court in course of trial which ordinarily might be considered trivial and as of no material consequence from a standpoint of adverse effect upon rights of a defendant may become of great importance.

2. Criminal law 🔑655(1)

Trial judge should be careful not to throw the weight of his judicial position into a case either for or against a defendant.

3. Criminal law 🔑656(6), 1035(1), 1166½ (12)

Where defendant charged with incest on cross-examination admitted he had been convicted of burglary in Baltimore but denied he was guilty and trial judge asked "is the statement that you never committed the crime just as truthful as the—you never committed the crime of which you were convicted in Baltimore, is it equally true? Are these just as false as the other burglary?" Defendant suffered prejudicial error, and the error could be urged despite failure to object in trial court.

Appeal from Superior Court, Monterey County; H. G. Jorgensen, Judge.

Ernest W. Byrd was convicted of incest and he appeals.

Reversed.

Ernest W. Byrd, pro se.

Fred N. Howser, Atty. Gen., and Dave K. Lener, Deputy Atty. Gen., for respondent.

DOOLING, Justice.

The defendant was convicted by a jury of the crime of incest, and he presents this appeal from the judgment in pro per. The complaining witness was his fifteen year old daughter. The sordid details of the daughter's testimony need not be enlarged upon but, as so often happens in such cases, the testimony of the daughter concerning the alleged offense was not substantially corroborated by any other witness and was flatly contradicted by the appellant. The daughter had fallen in love with a Filipino whom she desired to marry and the appellant had had the Filipino arrested charging him with the possession of a pistol in violation of the law forbidding the possession of firearms by aliens. The daughter's accusation against the father followed closely on the arrest of her lover and it was appellant's theory on the trial that his daughter's accusation against him was motivated by her resentment at his action in having her lover arrested. The daughter recanted her accusation against appellant in two letters written to the authorities and then again changed her story and testified against him on the trial. That such accusations are not infrequently fabricated by minors the experience of any trial judge will attest.

[1] A reading of the record makes it very clear that the case was extremely close, depending upon the resolution of the conflicting testimony of the defendant and his fifteen year old daughter, and the decision of the jury was almost wholly de-

pendent upon the result of its weighing the conflicting stories of these two witnesses. The courts have frequently remarked that in cases of this nature the very accusation arouses feelings of revulsion and animosity which impose upon the trial judge the highest standards of fairness in the conduct of the trial. It will suffice to quote the following from People v. Long, 63 Cal.App.2d 679, 686, 687, 147 P.2d 659, 663:

"It is well understood that cases of this type must be tried with the utmost fairness and impartiality in order that the defendant may receive a fair trial. Accusations such as were made by defendant's stepdaughter of themselves arouse feelings of animosity and prejudice against the accused, and the testimony of the accuser in such cases frequently is, and in this case it certainly was, of such a nature as to depict the defendant as a depraved individual. In People v. Adams, 1939, 14 Cal. 2d 154, at pages 167, 168, 93 P.2d 146, at page 152, it was said: 'In such a situation, the only defense available, ordinarily, to the accused is his own denial of any asserted misconduct, together with evidence of a former good reputation; otherwise, he is utterly defenseless and at the mercy of a jury which probably is very much prejudiced. * * * It is because of the recognized existence of the ease with which convictions of men, even those of unblemished reputation, may be secured in cases of the instant kind that courts are at pains to insist upon fair trials in all respects being accorded to the accused. Errors committed either by the prosecution or by the court in the course of the trial, which ordinarily might be considered trivial and as of no material consequence from a standpoint of adverse effect upon the rights of a defendant, may become of great importance when committed in a case of the character of that here involved.' And in People v. Putnam, 1942, 20 Cal.2d 885, at page 891, 129 P.2d 367, at page 370, it was said: 'It has long been recognized that there is no class of prosecutions "attended with so much danger, or which afford so ample an opportunity for the free play of malice or private vengeance," (Citing) People v. Benson, supra, 1856, 6 Cal. 221, 65 Am. Dec. 506; See People v. Lucas, supra, 1940, 16 Cal.2d 178, 105 P.2d 102, 130 A.L.R. 1485; People v. Adams, supra; People v. Baldwin, 1897, 117 Cal. 244, 49 P. 186; and People v. Vaughan, supra, 1933, 131 Cal.App. 265, 21 P.2d 438.' Our courts have many times quoted People v. Benson, supra, to the same effect."

[2] On the defendant's cross-examination he was asked if he had ever been convicted of a felony. He answered that he had been convicted of burglary in Baltimore, "but it was under circumstances that I wasn't guilty of it." The trial judge interjected himself into the cross-examination to ask: "Is the statement that you never committed the crime just as true as the—you never committed the crime of which you were convicted in Baltimore, is it equally true? Are these just as false as the other burglary?" From the form of the question the jury could only infer that the trial judge was not only questioning the truth of the defendant's testimony concerning the burglary conviction but the truth of his denial of the commission of the crime for which he was on trial as well. "Jurors rely with great confidence on the fairness of judges, and upon the correctness of their views expressed during trials. For this reason, and too strong emphasis cannot be laid on the admonition, a judge should be careful not to throw the weight of his judicial position into a case, either for or against a defendant." People v. Mahoney, 201 Cal. 618, 626, 627, 258 P. 607, 610.

[3] Our courts have many times reversed convictions in criminal cases because of intimations by the trial judge during the taking of testimony that the defendant or his witnesses was not believed by the judge. See People v. Mahoney, supra, 201 Cal. 618, 621–627, 258 P. 607; People v. Boggess, 194 Cal. 212, 239, 240, 228 P. 448; People v. Bowers, 79 Cal. 415, 417, 21 P. 752; People v. McNeer, 8 Cal. App.2d 676, 681, 47 P.2d 813; People v. Singh, 78 Cal.App. 488, 248 P. 986; People v. Conboy, 15 Cal.App. 97, 113 P. 703; People v. Long, supra, 63 Cal.App.2d 679, 682–686, 147 P.2d 659. The conduct of the trial judge in the case before us was not comparable in degree to that considered by the courts in any of the cited cases, but

the task of an appellate court must in every such case be to weigh the intimation of the judge of his lack of credence in the testimony against the facts of the particular case and to determine whether under all the circumstances the defendant has suffered prejudice in the minds of the jury. In view of the closeness of this case, the fact that the defendant was forced to rely exclusively on his own testimony, and the repugnance which the very nature of the charge would arouse in the minds of any jury of normal men and women we are satisfied that the defendant suffered prejudicial error. The case is not unlike that considered by the Colorado Supreme Court in Laycock v. People, 66 Colo. 441, 182 P. 880. We quote from 182 P. at pages 880, 881:

"The court asked defendant, while he was upon the witness stand as a witness in his own behalf, the following questions:

"'By the Court: Q. Mr. Laycock, what is your explanation of why you happen to be here now as a defendant in this case? A. Why, I believe it is due to excitement, or something like that, or a mistake. Q. Do you mean to tell these jurors your wife and your step-daughter are trying to frame up a case on you?'

"These questions might be unobjectionable, or not reversible error, had they come from the district attorney; but, coming from the court, they were prejudicial. They tended to induce in the minds of the jury a belief that, in the court's opinion, defendant was guilty. With the witnesses so closely pitted against one another, it is hard to say what influence, coming from the bench, these questions may have had upon the minds of the jury; but that they were prejudicial to the defendant there can be no doubt. The jury may have believed the defendant's story, or, if the whole evidence on the trial raised a reasonable doubt in their minds as to his guilt, it was their duty to give him the benefit of the doubt and acquit him. Such questions propounded from the bench may have had a deciding weight against the defendant."

While no objection was made to this question when asked by the court this in our judgment is one of those cases in which the damage was irreparable once the question was asked and hence the error may be urged on appeal despite the failure to object in the trial court. See People v. Singh, supra, 78 Cal.App. 488, 495, 496, 248 P. 986; People v. Freitas, 34 Cal.App. 2d 684, 688, 94 P.2d 397.

If the appellant is guilty a second jury will doubtless convict him. If he is innocent he has been irreparably injured unless he is granted a new trial.

The judgment is reversed and the defendant is remanded for a new trial.

NOURSE, P. J., and GOODELL, J., concur.

88 Cal.App.2d 107

LUIS et al. v. CAVIN et al.

Civ. 7441.

District Court of Appeal, Third District, California.

Oct. 20, 1948.

Hearing Denied Dec. 16, 1948.

1. Appeal and error 🔑930(1)

District Court of Appeal would view evidence in light most favorable to judgment.

2. Automobiles 🔑244(14)

Where first truck driver stopped in underpass because load over prescribed height limit struck overhead structure, and did not place flares required by statute, and second and third trucks entering underpass behind first truck reduced speed, and turned left to avoid collision, whereupon fourth truck, unable to stop, crashed into rear of third truck, and plaintiff's decedent entered underpass later and struck fourth truck, evidence sustained finding that driver of first truck was negligent. Vehicle Code, §§ 590, 699.

3. Appeal and error 🔑989

Where verdict is attacked as being unsupported by evidence, appellate court can only determine whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by jury.

4. Appeal and error 🔑996

When two or more inferences can reasonably be deduced from the facts, reviewing court cannot substitute its deductions for those of trial court.

5. Automobiles 🔑242(7)

In action for death of plaintiffs' decedent caused by injuries sustained in automobile accident, plaintiffs were not required to prove that the negligence of defendant was the sole proximate cause of the fatal injuries.

6. Automobiles 🔑173(4)

A truck driver, by leaving his truck stopped in underpass when load over prescribed height limit struck overhead structure, rather than backing truck out of underpass, was guilty of a continuing negligence, and could not, by reliance upon presumption that others would use due care in operation of their trucks, excuse himself for death resulting from injuries received by plaintiffs' decedent, when motorist, entering underpass from rear of defendant's truck, struck another truck which had collided with two other trucks which had reduced speed and turned to left to avoid collision with defendant's truck, and which had stopped in underpass. Vehicle Code, § 699.

7. Automobiles 🔑201(9)

In action for death resulting from injuries received when motorist entered underpass and collided with truck which had collided with two other trucks which had reduced speed and turned to left to avoid collision with defendant's truck which had stopped in underpass, failure of driver of truck with which decedent collided to remove his truck from underpass was not an intervening act relieving defendant of consequences of negligence in failing to place flares and in leaving truck in underpass while endeavoring to reduce height of load, rather than backing out of underpass. Vehicle Code, §§ 590, 699.

8. Automobiles 🔑201(9)

In action for death resulting from injuries received when motorist entered underpass and collided with truck which had collided with two other trucks which had reduced speed and turned to left to avoid collision with defendant's truck which had stopped in underpass, failure of driver of second truck entering underpass to give a hand signal that he was slowing down was not an intervening act relieving defendant of consequences of negligence in failing to place flares, and in leaving truck in underpass while endeavoring to reduce height of load, rather than backing out of underpass. Vehicle Code, §§ 590, 699.

9. Evidence 🔑219(3)

Generally evidence of a compromise settlement by a defendant with a codefendant for damages arising out of tort is incompetent as an admission against interest.

10. Trial 🔑127
Witnesses 🔑372(2)

In action for death of decedent resulting from injuries received by decedent in an automobile accident, evidence of a compromise agreement between defendants and a codefendant was competent on cross-examination of codefendant receiving the settlement to show possible bias or prejudice of codefendant, as against objection that question introduced element of insurance into the case. Code Civ.Proc. § 2055.

11. Trial 🔑108½

In action for death resulting from injuries received by plaintiffs' decedent in automobile accident, plaintiffs' counsel on voir dire examination could ask a prospective juror whether prospective juror was an insurance agent.

12. Trial 🔑108½

In action for death resulting from injuries received by decedent in automobile accident, where prospective juror on voir dire examination in effect requested dismissal because he was an insurance agent, reply of trial judge that prospective juror might be dismissed, but that judge couldn't dismiss juror, was not prejudicial misconduct as suggesting possibility that defendants were insured.

13. Trial 🔑260(1)

Where instructions given by trial court fully and fairly instructed on matters covered by defendants' requested instructions, refusal of defendants' requested instructions, was not error.

14. Trial 🔑260(1)

A party is not entitled to have jury instructed in any particular phraseology, and may not complain on ground that his requested instructions are refused if the court, of its own motion or otherwise, correctly announces the substance of the law applicable.

15. Appeal and error 🔑1032(3)

Appellants had burden of affirmatively showing wherein appellants sustained prejudice by failure of trial court to give the specific instructions requested by appellants, before judgment could be reversed. Const. art. 6, § 4½.

16. Death 🔑42

Although wife by property settlement agreement had waived her right to inherit from husband, she remained his wife until entry of final divorce decree, and at time of husband's death, after entry of interlocutory divorce decree and before entry of final divorce decree, wife was an "heir" of decedent, and was a necessary party to action for death of husband not brought by personal representatives of husband on behalf of heirs. Code Civ.Proc. § 377.

See Words and Phrases, Permanent Edition, for all other definitions of "Heir".

17. Death 🔑42

Where death action is brought by heirs and not by personal representatives of decedent on behalf of heirs, all heirs must join. Code Civ.Proc. § 377.

18. Death 🔑95(1)

Damages recoverable by heirs for death of a decedent are limited to the pecuniary loss suffered by heirs as result of death. Code Civ.Proc. § 377.

19. Death 🔑95(1, 3)

The pecuniary loss which heirs may recover for death of decedent may consist of either the loss of a presently enforceable right or the deprivation of possible future benefits. Code Civ.Proc. § 377.

20. Death 🔑95(3)

A waiver by wife in property settlement agreement of right to support and alimony, and of right to inherit, did not preclude wife from recovering pecuniary loss sustained by her by death of husband before interlocutory divorce decree became final. Code Civ.Proc. § 377.

21. Executors and administrators 🔑51

Damages recovered by heirs for death of decedent do not become a part of the decedent's estate, and are not distributed to the heirs from the estate. Code.Civ.Proc. § 377.

22. Death 🔑18(1)

Where property settlement agreement provided for monthly payments to wife, and for husband to furnish necessary clothing and medical care for infant child of the parties upon demand of wife, wife suffered a pecuniary loss by death of husband entitling her as an heir to recover damages for death of husband occurring before interlocutory divorce decree became final. Code Civ.Proc. § 377; Civ.Code, § 196.

23. Divorce 🔑156

The fundamental policy in relation to interlocutory divorce decrees is to postpone as long as possible the final disruption of the marriage, and to afford an interval wherein the spouses can effect a reconciliation and maintain the marriage relationship.

24. Marriage 🔑1

The law favors the marriage relationship.

25. Death 🔑103(4)

Under evidence that, after entry of interlocutory divorce decree, husband had sought reconciliation with wife, and that wife eventually intended to grant reconciliation, whether wife suffered a pecuniary loss as result of husband's death before entry of final divorce decree for which she would be entitled to recover damages as an heir was for jury, notwithstanding entry of interlocutory divorce decree and fact that wife and her husband were living apart at time of husband's death. Code Civ.Proc. § 377.

THOMPSON, J., dissenting.

◆

Appeal from Superior Court, Merced County; R. R. Sischo, Judge.

Action by John Reginald Luis, a minor, by his guardian ad litem, Angelina E. Luis, and by Angelina E. Luis individually, against Orlo C. Cavin, Lumber & Supply Company, a corporation, Joseph Silva, Jr., Jack R. McKenzie, and others, for damages sustained in automobile accident. From an adverse judgment, named defendants appeal.

Affirmed.

See also 191 P.2d 527.

Chester O. Hansen, John Said and Ray W. Hays, all of Fresno, for appellants.

C. Ray Robinson and Russell F. King, both of Merced, for respondents.

PEEK, Justice.

Frank Luis died as the result of injuries received in an automobile accident which occurred in a railroad underpass on highway 99 immediately north of the city of Livingston. An action for damages was instituted by his wife individually, and as guardian ad litem of their five year old son.

The complaint alleged that Luis was fatally injured as a result of the concurring negligence of the appellant Silva, who was then operating a truck in the course and scope of his employment for the appellant Lumber & Supply Company, a corporation, sometimes referred to as the Lumber Company, and appellant McKenzie who was then operating a truck in the course and scope of his employment for appellant Cavin, and the defendants Morrow and Vierra, who were operating their own vehicles. The appellants' answers admitted the agencies as alleged but denied the allegations of their negligence and pleaded contributory negligence of the decedent as a special defense.

At the conclusion of the trial a non-suit was granted in favor of the defendant Vierra, and the jury returned a verdict in favor of defendant Morrow and a verdict in favor of the plaintiffs. Appellants' motion for judgment notwithstanding the verdict was denied and their motion for a new trial was conditionally granted unless appellants should waive all sums in excess of $25,000. Plaintiffs filed such a waiver and judgment was entered accordingly. Thereupon defendants Cavin and McKenzie filed a joint notice of appeal as did defendants Lumber & Supply Company and Silva.

[1] The evidence, viewed as we must in the light most favorable to the judgment, may be summarized as follows:

On the evening of the accident, Silva, who admittedly was acting in the course and scope of his employment for the Lumber Company, was driving its truck from Dos Palos to Modesto. Immediately north of the city of Livingston the highway descends to the underpass in a sweeping curve to the left, continues on the level for a short distance and ascends out of the underpass in a sweeping curve to the right. At this point a concrete curbing 12 inches high and 7 feet wide divides the highway into four 12 foot lanes—two for north bound traffic and two for south bound traffic. The Lumber Company truck was loaded with a rice harvester which extended above the maximum height permitted by law, of which provision Silva admittedly was aware. Upon attempting to drive through the underpass the top of the harvester struck the overhead structure, causing the truck to stop in the outside or right hand lane for north bound traffic.

Although Silva testified that he and his helper placed three flares—the first 100 feet to the front, the second 100 feet to the rear, and the third on the left side of the truck, his testimony was directly contradicted by a written statement given by the defendant Morrow to a highway patrolman immediately after the accident and by a passenger in the Luis car, and indirectly contradicted by the defendant Vierra. According to Silva, to avoid the inconvenience of backing the truck out of the underpass he left it there for approximately 15 or 20 minutes while he attempted to make adjustments in order that he could proceed through the underpass.

While the truck was so stopped the defendants Vierra, Morrow and McKenzie respectively entered the underpass from the south or rear of the truck and in the outer of the two north bound lanes. Vierra was approximately 100 feet from the truck when he first noticed it and to avoid a collision was compelled to slow down and turn into the inside lane. Defendant Morrow likewise did not see the truck until he was approximately 100 feet away. He too turned into the inside lane and reduced his speed. Defendant McKenzie, being unable to stop the truck he was driving, crashed into the rear of the Morrow car, and then veered to the right striking the rear of the Vierra pick-up truck. The Morrow car came to rest in the north bound inside lane with its left wheels on the center curbing while the Vierra pick-up and the truck driven by McKenzie came to a stop, one behind the other, in the outside north bound lane. Approximately 15 minutes thereafter the decedent Luis entered the underpass from the south, struck the Cavin truck which had not been moved from where it had come to a stop in the outside north bound lane, and sustained fatal injuries. By that time the Lumber Company truck had been moved out of the underpass, the other vehicles remaining as indicated.

[2-4] It is unnecessary to dwell at length upon the first contention made by appellant Silva and the Lumber Company which is directed at the question of the alleged violation of the maximum height provisions contained in section 699 of the Vehicle Code. Even assuming for the purposes of this discussion that the truck and its load, the harvester, were "implements of husbandry incidentally operated or moved over a highway" so as to come within the exemptions of that section, nevertheless other acts of negligence by the defendant Silva still remain. Substantial, though conflicting, evidence, which appellants have failed to consider or mention in their brief, shows that Silva did not place flares as required by section 590 of the Vehicle Code, and in addition the undisputed evidence is that he left the truck in the underpass for 15 to 20 minutes while he endeavored to find a way to reduce the height of his load, which was of itself sufficient to sustain the implied finding of the jury that Silva was negligent. As stated by the court in that portion of the opinion so frequently quoted from Crawford v. Southern Pacific Company, 3 Cal.2d 427, 45 P.2d 183, 184: "It is an elementary, but often overlooked, principle of law, that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court."

The next contention of these appellants is that whether or not they were negligent in operating a truck with a load of excess height, in failing to place flares or in failing to remove their truck promptly from the highway, such acts were not proximate causes of the accident. Their contention is that the negligence of appellant McKenzie, driver of the Cavin butane truck, in failing to remove his truck promptly from the underpass was such an intervening cause as to break the chain of causation. They further contend that the chain of causation was also broken by the act of the defendant Vierra in failing to give a hand signal that he was slowing down, by the excess speed of the defendant McKenzie in the operation of the truck driven by him, thereby preventing him from stopping as quickly as he should, and by the decedent Luis in driving his car at an excessive speed.

[5, 6] Plaintiffs were not required to prove that the alleged negligence of the defendant Silva was the sole proximate cause of the fatal injury. Herron v. Smith Bros., 116 Cal.App. 518, 2 P.2d 1012. All that was necessary was a showing by substantial evidence that either one or all of such acts were negligent, and obviously as they were, then his acts were a primary and proximate cause of the events which followed. Also it may be said that by permitting his truck to remain in the underpass

he was guilty of a continuing negligence and he may not excuse himself, as he has attempted to do, by reliance upon the presumption that others will exercise due care in the operation of the vehicles under their control. Inai v. Ede, 42 Cal.App.2d 521, 109 P.2d 400.

[7, 8] Gauging his conduct in the light of all the surrounding circumstances, his admitted knowledge of the highway curving as it did in entering and leaving the underpass, the truck carrying a harvester, the top of which was 17 feet high, and over the prescribed height limit, the failure to place flares and the failure to move the truck, we cannot say as a matter of law that the jury was not justified in finding as it did. Silva as a reasonably prudent man may be held to have foreseen that as a part of the risk of such negligent conduct other vehicles might collide in attempting to pass his truck so parked on the highway. Therefore it cannot be said that the failure of defendant McKenzie to remove his truck was such an intervening act that it relieved defendant Silva of the consequences of his own negligence. Mosley v. Arden Farms Co., 26 Cal.2d 213, 157 P.2d 372, 158 A.L.R. 872. Nor was the alleged negligence of Vierra and Morrow an intervening act relieving Silva of the consequences of his own negligence, since as stated in the case last cited "what occurred was reasonably foreseeable, and should have been anticipated." 26 Cal.2d 218, 157 P.2d 374. As to the alleged contributory negligence of the decedent constituting an intervening act it is sufficient to state that the verdict implies that the jury, upon proper instructions, did not find as a matter of fact that the decedent was so negligent.

Appellants next contend that the trial court erred in admitting over objection evidence of a compromise settlement by appellants with their co-defendant Morrow, thereby introducing the question of insurance into the case. Contrary to the statement made by counsel for appellants in their briefs, it appears from the record that Morrow was not called as plaintiffs' own witness but was called as an adverse party and cross-examined under the provisions of section 2055 of the Code of Civil Procedure. During the course of such examination Morrow was asked whether or not the property damage to his car was paid for by the defendant Cavin. Over the objection of counsel for said defendant Cavin, the witness testified that "Some insurance company paid off the damage on the car and hospital bill and doctor bill and all expenses it cost me." The question, according to the record, was asked solely for the purpose of disclosing possible bias and prejudice of the witness and the court restricted it to that issue.

[9, 10] It is true generally, as appellants contend, that evidence of a compromise settlement by a defendant with a co-defendant for damages arising out of the same tort is incompetent and improper as an admission against interest. But it is also true that evidence of such a compromise agreement is competent and proper cross-examination of the co-defendant receiving the settlement to show bias or prejudice when confined to such purpose. Bluemel v. Kroizy, 114 Cal.App. 205, 299 P. 756; People v. Ellena, 67 Cal.App. 683, 691, 228 P. 389. Therefore the trial court properly admitted the evidence so attacked by appellants.

[11, 12] These appellants further contend that the trial court committed prejudicial error in suggesting there was a possibility the defendants were covered by insurance. The record shows that a prospective juror on his voir dire examination addressed the trial judge as follows: "I don't think it is customary for either the defense or the plaintiff to allow insurance agents to sit upon a panel of this type due to the nature of our business, and if that is true why it might possibly be that I could be dismissed." To which the judge replied: "I suspect that there is a possibility that you may be, but I am not in a position to do that." The essence of appellants' contention is that the effect of the foregoing exchange was to suggest to the jury the possibility that the defendants were covered by insurance. The reply of the trial judge to the juror was assigned as prejudicial misconduct but appellants did not request a formal instruction that the question of insurance was not to be considered nor did they request that the

jury be admonished to disregard such remark. Inasmuch as plaintiffs' counsel properly could have asked the prospective juror whether or not he was an insurance agent (Gladstone v. Fortier, 22 Cal.App.2d 1, 70 P.2d 255) there would appear to be no basis for objection to the same information voluntarily given by the prospective juror.

[13] Appellant Silva and Lumber Company next contend that the trial court committed error in refusing certain instructions offered by them in regard to the questions of proximate cause and the burden of proof on the issues of negligence and proximate cause.

An examination of all of the instructions given by the trial court reveals that the jury was fully and fairly instructed on all of the issues presented including the matters covered by appellants' requested instructions.

[14] The well settled rule is that it is not error for a court to refuse a requested instruction if the subject matter thereof is substantially incorporated in the instructions given. A party is not entitled to have the jury instructed in any particular phraseology, and may not complain on the ground that his requested instructions are refused if the court, of its own motion or otherwise, correctly announces the substance of the law applicable to the case. Huston v. Schohr, 63 Cal.App.2d 267, 277, 146 P.2d 730.

[15] Furthermore it is elementary that appellants had the burden of affirmatively showing wherein they sustained prejudice by the failure of the court to give the specific instruction requested by them and that in the absence of such showing this court cannot reverse the judgment. Sec. 4½, Art. VI Const.

The last attack upon the judgment, and one in which all appellants join, is that because of the provisions of a property settlement agreement previously entered into between the plaintiff wife and the decedent which was incorporatd in an interlocutory decree of divorce, the plaintiff lacked the capacity to bring this action and that even if plaintiff had the capacity to sue she did not, as a matter of law, sustain any legally compensable loss and consequently the following instructions given by the court at the request of the plaintiffs were improper:

"If, under the Court's instructions, you find that the plaintiffs, John Reginald Luis and his mother, Angelina E. Luis, are entitled to a verdict against any defendant or defendants for the death of Frank George Luis, you will award them such sum as, under all the circumstances of the case, may be just compensation for the pecuniary loss they have suffered by reason of the death of Frank George Luis.

"In determining that loss, you may consider the financial support, if any, that plaintiffs were reasonably certain to have received from the earnings and services of Frank George Luis. You may consider also what pecuniary loss, if any, plaintiffs have suffered, and will suffer in the future with reasonable certainty, by being deprived of the comfort, society and protection of the deceased Frank George Luis.

"In weighing these matters, you may consider the age of the deceased Frank George Luis and of the plaintiffs, the state of health and physical condition of deceased and of plaintiffs as it existed at the time of the death and immediately prior thereto, their station in life, their respective expectancies of life as shown by the evidence, and all other facts in evidence that throw light upon the question of pecuniary loss.

"With respect to the matter of life expectancy, you must keep this point in mind: the prospective period of time that will be of concern to you if you decide for the plaintiffs is only the shorter of the two life expectancies, that of the said plaintiff or that of the deceased Frank George Luis, because manifestly one could derive pecuniary benefit from the life of the other only for the period that both would have lived.

"If you find that plaintiffs are entitled to a verdict, you may consider as evidence in arriving at the amount of damages, if any, that the expectancy of a man 27 years old is 37.43 and that the life expectancy of a woman 25 years old is 38.81 years.

"However, life expectancy shown by the mortality tables is merely an estimate of the probable average remaining length of life of all persons in our country of a given age, and that estimate is based on not a complete but only a limited record of experience. Therefore the inference that may be drawn from the tables applies only to one who has the average health and exposure to danger of people of that age. Thus, in connection with this evidence, you should consider all other evidence bearing on the same issue, such as that pertaining to the occupation, health, habits and activity of the person whose life expectancy is in question. * * *

"I instruct you that a divorce does not become final until twelve months after the interlocutory decree of divorce has been granted and that a reconciliation within such twelve months will nullify and invalidate such divorce proceedings.

"I further instruct you that the right of John Reginald Luis to support by his father is not affected by an interlocutory decree or a final decree of divorce granted to either parent."

Inasmuch as the record reveals that the third instruction attacked by appellants was not given as stated in their briefs, but to the contrary was "Refused" by the trial court, such refusal would appear to negative the need for further comment by this court.

The particular provisions of the property settlement agreement which appellants rely upon in support of this contention are those wherein the plaintiff wife waived her right to inherit from the decedent's estate either by will or under the laws of intestate succession, and her right to support, alimony, and maintenance. However, the agreement further provided that the decedent would pay to the plaintiff wife $25 per month for the support of the child, and in addition, upon demand by her, would pay for all necessary clothing and medical care for their child.

[16, 17] In support of their contention appellants first argue that by reason of said waivers the plaintiff wife was not an heir and hence she lacked capacity to sue under the provisions of section 377 of the Code of Civil Procedure, which section authorizes the maintenance of such an action by the "heirs or personal representatives" of the deceased. Although by said waivers she precluded her right to inherit from the estate of her husband it is the well established rule that until the entry of a final decree of divorce she remained the wife of the decedent and therefore at the time of his death her status was still that of an heir As an heir the plaintiff wife not only had the capacity to sue and was therefore a proper party plaintiff but was in fact a necessary party plaintiff since all of the heirs are required to join when the action is brought by the heirs and not by the personal representatives of the decedent on behalf of the heirs. In re Estate of Riccomi 185 Cal. 458, 197 P. 97, 14 A.L.R. 509; Salmon v. Rathjens, 152 Cal. 290, 92 P. 733; Bowen v. Kizirian, 105 Cal.App. 286, 287 P. 570.

[18, 19] Appellants further contend that even if the plaintiff wife had the capacity to sue, she did not, as a matter of law, suffer any compensable detriment for which damages can be awarded and therefore the foregoing instructions were improper. In support of this contention appellants again refer to the waiver provisions of the property settlement agreement. With such contention we cannot agree. The cases interpreting Code of Civil Procedure section 377 have established the rule that the damages recoverable by the heirs are limited to the pecuniary loss sustained by them as a result of the decedent's death. Such loss may consist of either the loss of a present legally enforceable right or the deprivation of possible future benefits. Bowen v. Kizirian, supra; Rickards v. Noonan, 40 Cal.App.2d 266, 104 P.2d 839.

[20, 21] The right to support and alimony are present rights and a waiver which is limited by its terms to such rights cannot, in the absence of any showing to the contrary, be extended to deprive a person of possible future benefits which are a proper element of pecuniary loss. In this respect the case is analogous to Rickards v. Noonan, supra, wherein the widow recovered damages despite the fact that an interlocutory decree of divorce had been entered which made no provision for her support or alimony. The legal effect of such an omission can be no different than where as here the wife had entered into an agreement in which

she waived such rights. London Guarantee & Accident Co., Ltd., v. Ind. Acc. Comm., 181 Cal. 460, 184 P. 864. Nor did the waiver of her right to inherit affect her right to damages for whatever pecuniary loss she might have suffered by reason of the unlawful death of her husband for the further reason that the damages, when recovered, do not become a part of the decedent's estate and are not distributed to the heirs from the estate. Redfield v. Oakland Consol. St. Ry. Co., 110 Cal. 277, 42 P. 822, 1063.

Since the plaintiff wife was not barred, as a matter of law, from proving the pecuniary loss, if any, sustained by her, the only issue remaining is whether or not there was any evidence justifying an award of damages to her, for if there was it was properly considered by the jury under appropriate instructions.

[22] As mentioned, the property settlement provided for monthly payments of $25 to the plaintiff wife by the decedent husband who, in addition, agreed to furnish necessary clothing and medical care for the child upon demand by the plaintiff. By reason of the death of the father the plaintiff wife now has the responsibility and financial burden of supporting their infant child, Civ. Code, sec. 196, and in discharging this duty she no longer will receive the foregoing aid from the decedent. Viewed realistically, such deprivation constitutes substantial pecuniary loss.

[23-25] In addition, the record shows that after the entry of the interlocutory decree the decedent had sought reconciliation with his wife; that they had discussed the matter at least two or three times a week since their separation and that she eventually intended to grant such a reconciliation but that it had not been actually effected prior to his death. The wrongful death of the husband has deprived the plaintiff wife of a possible future reconciliation with the attendant benefits of his comfort and society. But appellants contend that because of the entry of the interlocutory decree and the fact that the plaintiff wife and decedent were living separate and apart at the time of his death that she did not thereby sustain any loss of his comfort and society. In so contending appellants ignore the fundamental policy of the law in relation to the interlocutory decree (Rickards v. Noonan, supra), namely, that of postponing as long as possible the final disruption of the marriage and thereby affording an interval wherein the spouses have an opportunity to effect a reconciliation and maintain their marriage relationship which the law always favored. Olson v. Superior Court, 175 Cal. 250, 165 P. 706, 1 A.L.R. 1589. In view of this policy we cannot hold that plaintiff wife did not, as a matter of law, sustain pecuniary loss as a result of the deprivation of the possible comfort and society of the deceased as a consequence of the entry of the interlocutory decree.

The judgment is affirmed.

ADAMS, P. J., concurs.

THOMPSON, Justice.

I dissent.

The majority opinion affirms a joint judgment of $25,000 rendered in favor of the surviving wife, individually, and the guardian ad litem of an infant child, in a suit for damages for the wrongful death of her husband as the result of an automobile casualty. The jury was erroneously instructed to consider elements of damages to be awarded to the wife, individually, which she had specifically waived by the terms of a property settlement agreement which was in full force. It is impossible to determine what portion of the joint judgment represents the unauthorized award to the wife.

The evidence is undisputed that the spouses were living separate and apart at the time of the accident. A complete settlement of property rights was previously executed in writing and remained in full force. The only reservation which it contained was the husband's agreement to pay his wife $25 per month *for the care of the child,* and to furnish it with necessary clothing and medical aid. An interlocutory decree of divorce was rendered two months before the accident occurred. The decree included the entire property settlement agreement and directed its enforcement. No reconciliation was effected. With the exception previously mentioned, the wife had waived all property rights on account of her husband's death. The evidence does not support the judgment in that regard. For a more complete statement of the facts and issues I refer to our original opinion filed in this case (Luis v. Cavin, — Cal. App.2d —, 191 P.2d 527), from which a rehearing was granted.

In view of the binding force of the property settlement agreement, I am convinced the jury was erroneously instructed, in effect, that, in awarding damages to the wife, as distinguished from the damages to which the child was entitled, it should take into consideration her loss of "financial *support* * * * from the *earnings and services* of Frank George Luis", and the "pecuniary loss" she would sustain "and will suffer in the future * * * by being deprived of the *comfort, society and protection* of the deceased." The jury was also told it should consider her expectancy of life of 38.81 years according to the mortality tables, since she was then "a woman 25 years old", and that, since "a divorce does not become final until twelve months after the interlocutory decree has been granted * * * a reconciliation" within that period of time "will nullify and invalidate such divorce proceedings." The clear inference to be drawn from the last mentioned instruction is that since a reconciliation might have been consummated if the husband had not been killed in the automobile accident, the jury could disregard the waiver of property rights by the wife in the settlement agreement on the assumption that it thereby became ineffectual and void. That construction of the contract is in direct conflict with the law as it should be applied to the undisputed facts of this case. The spouses had not become reconciled. They had not resumed marital obligations and relations. The only evidence regarding reconciliation was that the spouses had discussed a possible reconciliation in the future and that the wife said it was her intention "to *eventually* grant that reconciliation." A reconciliation became impossible on account of the husband's death. It follows that the property settlement agreement remained in full force, and that the jury was erroneously instructed in that regard.

I do not question the right of the wife to maintain the action in her own behalf and as guardian ad litem of the minor, under Section 377 of the Code of Civil Procedure. But it was nevertheless necessary for her to prove she had suffered personal detriment on account of her husband's death for which she had a legal right to recover compensation. Civil Code, sec. 3281. The jury should have been instructed that her right to recover damages in her personal behalf was limited to the stipulated $25 per month and for all necessary clothing and medical care for the benefit of the minor child.

The written property settlement agreement was a contract which the spouses were authorized by statute to make. Civil Code, secs. 158, 159; In re Davis, 106 Cal. 453, 455, 39 P. 756. That agreement could be canceled, altered or extinguished only by written consent of the parties, or by an executed oral agreement. Civil Code, secs. 1698, 1700. An oral agreement for reconciliation of spouses who are living separate and apart will have the effect of annulling and rescinding a former written property settlement agreement only when the oral consent thereto has been fully executed *by an actual resumption of marital relations and legal obligations.* In re Davis, supra; London Guarantee & Accident Co., Ltd. v. Ind. Acc. Comm., 181 Cal. 460, 465, 184 P. 864; In re Estate of Hurley, 28 Cal.App.2d 584, 589, 83 P.2d 61; Peters v. Peters, 16 Cal.App.2d 383, 386, 60 P.2d 313; Jones v. Lamont, 118 Cal. 499, 50 P. 766, 62 Am.St. Rep. 251; In re Estate of Boeson, 201 Cal. 36, 42, 255 P. 800; Brown v. Brown, 170 Cal. 1, 7, 147 P. 1168; In re Estate of Martin, 166 Cal. 399, 402, 137 P. 2; Lazar v. Superior Court, 16 Cal.2d 617, 107 P.2d 249; Mundt v. Connecticut General Life Ins. Co., 35 Cal.App.2d 416, 418, 95 P.2d 966; In re Estate of Ruiz, 53 Cal.App.2d 363, 127 P.2d 945; Rickards v. Noonan, 40 Cal.App.2d 266, 271, 104 P.2d 839; 35 A.L. R. 1529, note.

The property settlement agreement having been approved, adopted and directed to be enforced by the terms of the interlocutory decree, and the agreement never having been modified or rescinded by reconciliation or otherwise, it remained in full force and conclusively determined the property rights and obligations of the spouses. London Guarantee & Accident Co., v. Industrial Acc. Comm., supra.

The case of Rickards v. Noonan, supra, [40 Cal.App.2d 266, 104 P.2d 840] cited in the majority opinion, and relied upon by the respondents in support of the judgment, is clearly distinguishable from the facts of this case. In that action there was no property settlement agreement, as there was in the present case. The spouses had lived separate and apart prior to the death of the husband which occurred as the result of an automobile accident. There was satisfactory evidence of a complete reconciliation. The wife's testimony was that "There was a reconciliation between us." It appeared that he associated with his wife, paid her money and a portion of her debts, and that they engaged in sexual relations. The court specifically found that she was his wife "at the time of his death." It is true that they had not "yet moved together" into their own home. But the delay in so doing was explained by evidence that he was living with his father who was partially dependent upon him, and to whom he was paying $12.50 per week; that the husband "had many bills to pay and he 'wanted to get on his feet first' so that their resumed married life would not again fail." Upon that evidence the court determined that a reconciliation of the spouses was actually consummated. No such evidence of reconciliation was adduced in the present suit. Mrs. Luis did not even testify that she and her husband had been reconciled. All that she said was that he had proposed a reconciliation, and that it was her intention to "*eventually* grant that reconciliation."

In the London Guarantee & Accident Co. case, supra, an order of the Industrial Accident Commission, awarding the surviving wife compensation on account of the husband's death, was reversed on appeal. The spouses had been separated and an interlocutory decree of divorce was rendered in favor of the wife, but no order for alimony or maintenance was provided for. There was no property settlement agreement between the spouses in that case. The question of a reconciliation was not involved. The Supreme Court said [181 Cal. 460, 184 P. 867]: "An interlocutory judgment of divorce is therefore, so far as it determines the rights of the parties, a contract between them. It is temporary and provisional in its nature, it is true, but it settles the rights of the parties for the time being, and until some action, proceeding, or motion is begun to change the status, and some order is made thereon which has that effect, *or until they become reconciled and resume marital relations,* in which event their mutual obligations are, for the time being at least, restored." (Italics added.)

The court held in that case that, because there was no reconciliation of the spouses, and the interlocutory decree of divorce had settled all rights and obligations of the spouses the surviving widow was not entitled to compensation on account of his death.

In Re Estate of Dargie, 162 Cal. 51, 121 P. 320, 321, an order for family allowance to the widow of the decedent was affirmed on appeal. The wife had obtained an interlocutory decree of divorce, but the final decree had not been rendered. It was held that she was still his wife at the time of his death, and that she was therefore entitled to family allowance. But in that case there was a complete consummation of their reconciliation. The court said in that regard: "The parties afterward became reconciled *and lived together as husband and wife.*" There was no property settlement agreement in that case. Those facts distinguish that case from the present one.

Other cases cited and relied upon by respondents may be likewise distinguished.

While it is true that the property settlement agreement provided for payment to the wife of $25 per month "for the care of the said minor" together with "necessary clothing and medical care to the said minor child", I assume that necessary maintenance of the child was a detriment compensated by the jury in its award to the child, pursuant to the instructions which were given to the jury. If the widow was also individually allowed an award for the same purpose, it would be duplicate compensation for the same element, and therefore unwarranted and illegal.

For the reasons that it is impossible to determine what portion of the joint judgment was awarded to the wife individually, and that the instructions with relation to the wife's damages and the effect of the property settlement agreement are erroneous, misleading and prejudicial, I am convinced the judgment should be reversed.

Hearing denied; SCHAUER, J., dissenting.

---

88 Cal.App.2d 178

PEOPLE v. MASTRANTUONO.

Cr. 592.

District Court of Appeal, Fourth District, California.

Oct. 25, 1948.

Hearing Denied Nov. 22, 1948.

1. Criminal law 🔑1159(2)

A judgment of conviction will not be reversed on ground that prosecuting witness' testimony was inherently improbable, though it contained glaring inconsistencies and contradictions, unless it was so clearly false and unbelievable that reasonable minds could not differ or facts asserted were physicially impossible.

2. Criminal law 🔑260(11), 1159(2, 4)

Determination of witnesses' credibility and weight of their evidence is province of jury or trial judge only.

3. Criminal law 🔑260(11), 1159(2)

A reviewing court's judgment should not be substituted for that of jury or trial judge on fact questions, if verdict or judgment thereof was supported by any credible evidence, unless verdict was apparently result of passion or prejudice.

4. Rape 🔑52(1)

Evidence supported conviction of statutory rape.

5. Sodomy 🔑6

Evidence supported conviction of sodomy. Pen.Code, § 288a.

6. Criminal law 🔑739(2)

Whether defendant established alibi is fact question for jury.

7. Criminal law 🔑1159(1)

The District Court of Appeal will not disturb jury's fact findings on appeal from conviction.

8. Criminal law 🔑1159(2)

An appellate court cannot retry case and make inferences from facts proved, but, on appeal from conviction, is limited to deciding whether, on face of evidence, sufficient facts could not have been found to warrant inference of defendant's guilt.

9. Criminal law 🔑1159(4)

Appellate court will not disturb jury's finding of defendant's guilt of sodomy on ground that complaining witness was accomplice, whose testimony was not corroborated, where such question was submitted to jury by proper instruction, there was testimony that defendant forced complaining witness to commit act charged, and facts were disputed. Pen.Code, §§ 288a, 1111.

10. Criminal law 🔑511(2)

Evidence corroborating accomplice's testimony need not connect defendant with commission of crime charged beyond reasonable doubt, but evidence of such connection may be slight and entitled to but little consideration when standing by itself. Pen.Code, § 1111.

11. Criminal law 🔑511(7)

An accomplice's testimony is sufficiently corroborated by proof of defendant's confession or admission tending to connect him with crime charged. Pen.Code, § 1111.

12. Criminal law 🔑511(7)

In prosecution for sodomy, testimony as to defendant's statements and admissions to police officers and another sufficiently corroborated complaining witness' testimony as to defendant's commission of crime charged, if such witness was an accomplice. Pen.Code, §§ 288a, 1111.

◆

Appeal from Superior Court, Fresno County; T. R. Thomson, Judge.

Frank Mastrantuono was convicted of statutory rape and sodomy, and he appeals.

Affirmed.

Allen L. Martin and Lester N. Gonser, both of Fresno, for appellant.

Fred N. Howser, Atty. Gen., and Howard S. Goldin, Deputy Atty. Gen., for respondent.

MUSSELL, Justice.

Defendant having been convicted of statutory rape and violation of Section 288a of the Penal Code, appeals from the judgment of conviction and from the order denying his motion for new trial. His contention is that the verdicts of the jury are not supported by the evidence.

The information contained six counts: Count One charged statutory rape; Count Two: Violation of Section 288a of the Penal Code; Count Three: Violation of Section 286; Count Four: Violation of Section 288a; Count Five: Violation of Section 286, and Count Six: Violation of Section 288 of the same Code. During the trial, on motion of the District Attorney, the court ordered that Count Two of the information be dismissed. The jury returned verdicts finding the defendant guilty on Counts One and Four, and not guilty as to Counts Three, Five and Six.

June Blank, also known as June Dunigan, the complaining witness named in count one of the information, testified that she was 17 years of age and not the wife of defendant; that she had been employed by the defendant at the Marigold Inn and the Right Spot in the City of Fresno; that some time early in May, 1947, at the request of the defendant, she and one Jay Goodall went to defendant's house; that defendant there gave her three drinks of whiskey and about four or five bottles of beer; that after drinking, defendant took her into a bedroom and there asked her to perform an act of sexual intercourse with him; that upon her refusal defendant left the room and Jay Goodall came in and made a similar request which she refused; that she then asked to be taken home and was taken in defendant's car to Roeding Park in Fresno County; that there the defendant again made the same request and a like answer was returned; that Jay Goodall, who was then in the front got into the back of the car; that defendant then, after her persistent refusal to submit to him, slapped her, twisted her arm and while Jay Goodall was holding her an act of sexual intercourse took place with the defendant; that she left the car to walk home but was overtaken and after being told that she would be taken home, she again entered the car; that when she got in defendant again asked her to engage in another act of intercourse but she refused to submit and was taken home arriving at about 11:30 p.m.; that on the day following this occurrence she ceased to work for defendant and one or two days later reported the incident to the police. On cross-examination Miss Dunigan admitted that her sexual experience with defendant was not her first and that her contrary statement at the preliminary examination was made because she had been ashamed to say otherwise. At the preliminary she admitted that she might have been "pretty tight" but here stated that she had not been drunk and had been fully aware of every thing that had transpired.

Appellant testified in his own behalf and stated that June Dunigan had worked for him; that he and Jay Goodall had taken her to his home and that he had asked her to have intercourse with him there; that he had taken her in his car to Roeding Park with Jay Goodall and there had asked Miss Dunigan to engage in sexual intercourse. However, he denied having had such intercourse with her.

Jay Goodall as a witness for the defense testified that he had been present in defendant's car during the drive to the park and that both he and defendant had asked Miss Dunigan to engage in sexual intercourse; that defendant did not leave the front seat of the car and that he did not see defendant have an act of sexual intercourse with June Dunigan. In a statement made to the police shortly after the occasion he denied having been in the car and denied knowing Miss Dunigan. On cross-examination he admitted having lied to the police.

Defendant contends that the testimony of June Dunigan is so grossly unbelievable that it must be discarded as a matter of law.

[1-3] In People v. O'Moore, 83 Cal.App. 2d 586, 598, 189 P.2d 554, 562, it is said: "A judgment of conviction will not be reversed on the ground that the testimony of the prosecuting witness is inherently improbable, even though it may contain 'glaring inconsistencies and contradictions', unless it is so clearly false and unbelievable that reasonable minds may not differ in that regard, or that the facts asserted are physically impossible. It is the sole province of the jury or the trial judge to determine the credibility of witnesses and the weight to be given to their evidence. The judgment of a reviewing court should not be substituted for that of the jury or trial judge when there is any credible evidence to support the verdict or judgment, unless it is apparent that the verdict is the result of passion or prejudice. (Citing cases.)"

[4] We conclude that the testimony of Miss Dunigan is not inherently improbable and that the facts related by her are not physically impossible. It was within the province of the jury to pass upon the credibility of the witnesses and the weight to be given to their testimony. The testimony of Jay Goodall merely creates a conflict in the testimony. The record amply supports the conviction of defendant on count one of the information.

[5] As to count four of the information, namely, the count charging a violation of section 288a of the Penal Code, Myrtle Hay, the complaining witness testified she was 23 years of age, a resident of the city of Fresno and had formerly worked for defendant at the Marigold Inn and the Right Spot Cafe; that at about 2 a. m. on February 5, 1947, defendant asked to take her home after work; that instead of taking her directly home he drove out into the country and stopped the car; that she then asked defendant if he was going to take her home and he replied, "No, not until I get through with you"; that he then forced her to take part in the commission of the act of sex perversion described in section 288*a* of the Penal Code; that she became nauseated and defendant took her home and told her not to say anything to any one about what had occurred; that she returned to her home about 3:30 a. m. on Monday, February 5, 1947, and did not tell any one what had occurred until after July 12, 1947, when defendant fired her from the job. A member of the Police Department of Fresno testified that he had heard the defendant make a statement (which we will not quote here) indicating that he had taught the complaining witness acts of sex perversion. Another police officer was present and heard the statement of defendant. A friend of defendant testified that he had known defendant all his life; had gone out with Myrtle Hay and that defendant had told him not to kiss Miss Hay since she had performed an act of sex perversion with him. Defendant testified that he knew Miss Hay, who was a former employee. He admitted having had normal sexual relations with her in October, 1946, but denied he had committed the act of sex perversion and denied having made the statements testified to by the officers.

Ruth Scott, a witness for defendant, testified that she had been an employee of defendant in February, 1947; that two or three days prior to defendant's birthday on February 8, 1947, she met him at about 10 p. m. and had gone with him to his home, remaining there until about 4 a. m. the next day. Defendant testified that he spent the night of February 5, 1947, at his home with Miss Scott and that he had not seen Myrtle Hay that night.

There was credible evidence upon which the jury could and did find that the defendant was guilty of the crime charged in count four of the information. The jury when weighing the evidence determined the conflict in the testimony and found against the defendant.

[6, 7] Defendant's contention that an alibi was established also presented a question of fact for the jury to decide and this court will not disturb these findings on appeal. People v. Murieta, 1 Cal.App.2d 727, 37 P.2d 158; People v. Pianezzi, 42 Cal. App.2d 270, 277, 278, 108 P.2d 685; People v. McCoy, 25 Cal.2d 177, 184, 153 P.2d 315.

[8] As was said in People v. Ohman, 67 Cal.App.2d 467, at page 474, 154 P.2d 463, 466: "It is not within the province of an appellate tribunal to retry the case and to make inferences from the facts proved. That function belongs to the trial court. The appellate court is limited to deciding only whether upon the face of the evidence it can justly be held that sufficient facts could not have been found to warrant the inference of guilt. People v. Newland, 15 Cal.2d 678, 104 P.2d 778."

[9-12] It is finally contended that Myrtle Hay was an accomplice whose testimony was not corroborated within the meaning of section 1111 of the Penal Code. The jury was properly instructed as to the law pertaining to accomplices and that it was for the jury to determine from all the testimony and the circumstances shown by the evidence whether or not any witness was an accomplice as defined in the instructions. People v. Coffey, 161 Cal. 433, 436, 119 P. 901, 39 L.R.A., N.S., 704. There was testimony to the effect that defendant forced the complaining witness to commit the act of sex perversion. The jury found the defendant guilty and we assume that they determined that the prosecutrix was not an accomplice as defined in the court's instructions. Under these circumstances we will not disturb the finding of the jury where the facts are in dispute. People v. Coffey, supra. Moreover there is sufficient corroboration of the testimony of the witness within the meaning of section 1111 of the Penal Code. It is not necessary that the corroborative evidence shall connect the defendant with the commission of the crime beyond a reasonable doubt. People v. Collier, 111 Cal.App. 215, 229, 295 P. 898; People v. Looney, 9 Cal.App.2d 335, 337, 49 P.2d 889. Evidence tending to connect a defendant with the commission of a crime may be slight, and when standing by itself entitled to but little consideration. People v. McLean, 84 Cal. 480, 482, 24 P. 32; People v. Martin, 19 Cal.App. 295, 301, 125 P. 919; People v. Andrew, 43 Cal.App.2d 126, 129, 110 P.2d 459. An accomplice is sufficiently corroborated by proof of defendant's confession or admission tending to connect him with the crime. People v. Armstrong, 114 Cal. 570, 573, 574, 46 P. 611; People v. Sullivan, 144 Cal. 471, 473, 77 P. 1000; People v. Baker, 25 Cal.App.2d 1, 3, 76 P.2d 111; People v. Hickok, 28 Cal.App.2d 574, 580, 83 P.2d 39; People v. Derenzo, 46 Cal.App.2d 411, 415, 115 P.2d 858; People v. White, 48 Cal.App.2d 90, 94, 119 P.2d 383. The record here reveals statements and admissions of the defendant made to peace officers and another witness which furnish sufficient corroboration.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

88 Cal.App.2d 238

HODGES v. PORIKOS et al.

Civ. 13740.

District Court of Appeal, First District, Division 1, California.

Oct. 28, 1948.

1. Appeal and error 🔑1011(1)

Where evidence is conflicting, appellate court is bound by the findings of trial court, if supported by any evidence.

2. Witnesses 🔑183½

In executor's action to recover money allegedly loaned by decedent to defendant, testimony was required to be scanned with a watchful scrutiny.

3. Money lent 🔑7(1)

In action by executor to recover money allegedly loaned by decedent to defendant, evidence that defendant had received a check from decedent and received the money thereon did not create a presumption that the contract constituted a loan to defendant by decedent.

4. Money lent 🔑7(1)

In executor's action to recover money allegedly loaned to defendant by decedent, plaintiff had burden of proving that transaction between defendant and decedent, whereby defendant received a check from decedent and defendant received the money thereon, constituted a loan.

5. Appeal and error ⚿994(3)

Whether testimony of plaintiff or of defendant and witnesses corroborating defendant should be believed was for trial court as trier of facts.

6. Evidence ⚿588

The trier of facts must reconcile, if possible, any apparent conflict, whether developed upon whole case or in testimony of an individual witness, and give effect to all the evidence, when nature of case will admit of such a disposition, or, if conflict is irreconcilable, must affix his own value to contradictory evidence.

7. Money lent ⚿7(3)

In executor's action to recover money allegedly borrowed by defendant from decedent, evidence justified judgment for defendant on ground that it was not shown defendant had borrowed money from decedent.

8. Appeal and error ⚿232(2)

Where plaintiff executor did not pursue overruled objection to admission of defendant's testimony as to conversation with decedent, from whom defendant allegedly had borrowed unrepaid money, and did not raise question on plaintiff's appeal, except to contend that defendant's testimony, when admitted, was entitled to but little weight because admitted in violation of dead man's statute, whether testimony was admissible under dead man's statute would not be considered. Code, Civ.Proc. § 1880, subd. 3.

◆

Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Action by John A. Hodges, as executor of the will of James A. Nicholson, deceased, against Nick Porikos, First Doe and Second Doe, to recover unrepaid money allegedly borrowed by defendant from deceased. From an adverse judgment, plaintiff appeals.

Affirmed.

Chas N. Douglas, of San Francisco, for appellant.

Melvin, Faulkner, Sheehan & Wiseman and A. J. Zirpoli, all of San Francisco, for respondents.

BRAY, Justice.

Plaintiff appeals from a judgment in favor of defendant.

There are two causes of action. In the first, plaintiff, who is the executor of the will of James A. Nicholson, deceased, alleged that on or about February 24, 1945, defendant borrowed $10,000 from the deceased, which he failed to pay on demand. The second cause of action alleges that on or about the same date defendant received from the deceased $10,000 for the purpose of investing it in certain real property, to be held in the name of defendant but for the use and benefit of decedent. No evidence was introduced under the second cause of action and a nonsuit was granted as to it. In the findings, the court found against plaintiff on both causes of action. No attack is made, or could be made, on the court's ruling on the second cause of action.

[1] The sole question raised is whether there is substantial evidence to support the judgment as to the first cause of action. Plaintiff recognizes the rule that binds this court on a contention that the evidence does not support the judgment[1], but contends that the defendant's evidence in this case was so incredible, contradictory and obviously false as not to measure up to the standard of being substantial evidence.

In view of this challenge, a resume of the evidence is necessary. The case arises from the fact that among the effects of the decedent a cancelled check for $10,000, dated February 24, 1945, was found, executed by him to defendant less than three months prior to death.

Plaintiff testified that the day after decedent died, defendant, who lived in Fairfield, came to a mortuary in San Francisco. There, he showed plaintiff two cancelled checks executed by defendant to decedent and totaling about $8,000 and stated that without those checks he would "have been in a hell of a fix" as people were saying defendant had borrowed $10,000 from decedent and had not paid it back. (It was conceded later that these checks were in repayment in 1944 of a loan theretofore made defendant by decedent.) Shortly thereafter plaintiff found the above mentioned check. About a month after the decedent died, defendant came to plaintiff's office with one Jensen. Plaintiff was under the impression that the $10,000 check was given to defendant to purchase certain property for decedent. This defendant denied. Plaintiff then intimated that decedent had loaned defendant the $10,000 evidenced by the check. This also defendant denied, and then stated that the check was given for money which defendant had loaned decedent. Plaintiff then asked defendant where he got the money. After first asking plaintiff "do I have to make a statement, do I have to prove it?" and being told that he did, he claimed he made the money gambling some time in the month of January, and that he had kept the money in his pocket from the time he made it until he gave it to decedent. When told that plaintiff did not believe that story, defendant then stated that he had made it in his business (a restaurant in Fairfield), and that he had told the gambling story as he did not report this money in his income tax report. Defendant then signed a statement that a few days before the check was cashed (March 1st) he had given decedent $10,000 at the Derby Cafe in currency of $20 and $100 denominations, for which decedent gave him a post dated check.

---

[1] Where there is a conflict of the evidence the appellate court is bound by the findings of the trial court if there is any substantial evidence to support them. Rutherford v. Berick, 82 Cal.App.2d 331, 186 P.2d 23.

Decedent was the owner of the Derby Cafe and had six different bank accounts. The check in question here was drawn on the Day and Night Branch of the Bank of America. From February 21, to February 26, the amount in that account was only $2,979.59. February 24, the date of the check, was a Saturday. On Monday, February 26, evidently for the purpose of meeting this check, deceased added to the moneys then in that account, currency of $1,725.00, a check for $4,000, which he drew on his account with the Morris Plan, a check for $250 on the Anglo California Bank, a check for $257.60 on the Humboldt Branch of the Bank of America, and a check for $25.38 on the Central Bank of Oakland. Although there is some discrepancy in the amounts as shown in the transcript, it is conceded that the total actually in the bank when the check was presented was over $10,000. The cashing of the $10,000 check by defendant on March 1 reduced the Day and Night Branch account to a small balance. Subsequent to the time when defendant claimed he gave decedent $10,000 in cash, there are no entries in any of decedent's bank accounts which reflect any portion of that sum, nor was there any currency in the decedent's safe deposit box, other than a sum less than $100.

Plaintiff cross-examined defendant briefly under sec. 2055, Code of Civil Procedure, concerning matters occurring in 1944 and 1945 and relating to the checks which he claimed defendant exhibited to him at the mortuary. Jensen, the only other witness called by plaintiff, merely testified that at the meeting in plaintiff's office, defendant "changed his mind about where the money had come from." Thus, in plaintiff's case, there was no evidence that the $10,000 check was given as a loan. At most the evidence showed that defendant on March 1 had cashed a $10,000 check issued to him by decedent; that defendant had told plaintiff different versions of how he had obtained the money which he claimed he gave decedent for the check; and that as executor plaintiff had been unable to trace any portion of the $10,000 in currency which defendant claimed he gave decedent. Shortly after the date of the check, decedent, whose health was not good, had gone to the hospital for a period, and then on April 30 returned, dying there on May 8.

Defendant took the stand in his own behalf. He told the circumstances of a loan of $8,100 made to him by the decedent for the purchase of the restaurant at Fairfield, now owned by defendant, and the repayment of that loan by the checks which plaintiff claimed defendant exhibited to him at the mortuary, a transaction with which plaintiff was fully familiar as he acted as attorney in it. Defendant also testified concerning another financial transaction between himself and decedent in 1944. Then he stated that a few days before February 24, 1945, his wife and he came to San Francisco and went to the Derby Cafe where they had lunch and a few drinks. While sitting in the cocktail lounge, he gave decedent $10,000, receiving the latter's check therefor. $5,000 was in his purse and a like sum in his wife's purse. The check was post dated four or five days, or a week. Defendant held the check for several days, when decedent telephoned him and asked that he put the check through the bank, which defendant then did. Defendant admitted telling plaintiff in his office that he had obtained the $10,000 through gambling, because he didn't think it was plaintiff's or anybody's business how he happened to have that much cash in his hands. He also admitted telling plaintiff that he had not made a proper income tax accounting of this money, and that he had signed the statement testified to by plaintiff. He then stated that there was $9,000 in $100 bills; one $500 bill, one $50 bill and one $10 bill and that the balance was in $20 bills. (The signed statement merely referred to $20 and $100 bills.) He admitted seeing plaintiff at the mortuary, but could not remember whether he had talked to him.

Mrs. Porikos, defendant's wife, stated that they were at the Derby Cafe on a Thursday in February and told about the same story as her husband. In a little more detail, she stated they had all been drinking and she wanted her husband to give the money to decedent as she didn't think it was safe for them to carry it, and defendant gave decedent the $10,000 and received the check in return.

The witness Demetreades had known decedent since 1939; Porikos only a few years. Witness patronized the Derby Cafe almost daily and one evening when he went there to get the decedent to go to a movie with him, he went into the small room, now the cocktail lounge, and saw defendant and his wife and the decedent seated at a table counting money. There were a number of $100 bills—the exact number he didn't know, but more than ten. He then went out to sit in the cafe with Mr. Agnost, the partner of the decedent. About half an hour later, decedent, with defendant and defendant's wife, came out of the room where the witness had seen him, with paper money in his hands and went into his private office. When decedent emerged from his private office he had a check in his hands and said to the witness that he would not "see you to-night, but I can see you to-morrow morning." The following day decedent told the witness that defendant was "over-indulging" and that decedent "got from him $10,000."

James Levas, an apartment house owner, testified that in the first part of 1945, defendant came to his place in Alameda to put up a deposit on the purchase of an apartment house from him. Defendant had telephoned, asking the price of witness' equity and was told it was $35,000. Defendant stated he would be down Thursday with the money. Witness said it was not necessary to bring all the money; that "a little deposit" would do. Defendant and his wife arrived Thursday morning and then it developed that defendant had misunderstood witness as to the price, thinking witness had said "$25,000." At that time defendant pulled out a roll of bills, offering to make a deposit if witness would sell his equity for $25,000. Witness could not testify how much was in the roll, but the bills were " quite a bit" in number and he saw quite a few $100 bills.

Peter Agnost, who was the partner of the decedent in the Derby Cafe from the day it opened until the death of decedent, testified that shortly after the decedent returned from the hospital in February, witness saw decedent, defendant and his wife in the cocktail lounge. They were counting paper money. Witness asked decedent why he borrowed money from defendant and didn't use the partnership money in the bank. Decedent replied: "Porikos don't owe me any money, I don't owe Porikos any money, * * *. But they had the money in their hands and they gave him the check in order to protect them from losing the money." At a subsequent date witness called defendant at Fairfield to ask him to buy some meat. Decedent then took the telephone and said to defendant: "Nick, you can put that check through, it won't bounce back, I put the money in." Plaintiff Hodges in rebuttal testified that both Demetreades and Mr. Agnost had told plaintiff subsequent to the death of decedent and prior to the trial that they knew nothing about the $10,000 check or the money. Both witnesses denied making such statements. Plaintiff also testified that Demetreades owed the decedent money on a note.

[2] It is true that the defendant made some conflicting and false extrajudicial statements, and that there are some peculiar, difficult-to-understand circumstances in the case. For example, why, if decedent had $10,000 in cash given him by the defendant, did it not appear in one of his bank accounts, and why on Monday morning did he have to withdraw money from the Morris Plan and other sources in order to cover the check? However, the trial judge saw the witnesses, heard them testify, observed their demeanor and believed defendant and his witnesses. As to the witnesses, in a case of this kind, it is our duty "to examine their testimony with a jealous care, and to scan it with a watchful scrutiny."[2] Actually there is no evidence that defendant's story, somewhat peculiar though it is, is not true. Human beings do strange things and we cannot say as matter of law the defendant's claim is so fantastic or so impossible that it cannot be true.

The testimony of defendant and his wife is corroborated by the three witnesses, Demetreades, Levas and Agnost. For us to reverse the trial court we must find as matter of law that not only the defendant and his wife, who of course were interested witnesses, but also the other three witnesses, committed deliberate perjury. Plaintiff testified to contradictory statements made to him by these three witnesses, which they denied. Again, it was for the trial court to determine the credibility of these witnesses.

Defendant's story—that he had held out of his bank deposits the sum of $10,000 to keep from having to report it in his income tax accounting, and that he and his wife brought it to Alameda to make a deposit on account of the purchase price of the property he expected to buy—is not so inherently improbable that we must hold that the court, who observed defendant and his wife testify, had no legal right to believe them. The same applies to the story that, finding the price of the property too high, they went on to San Francisco and, because of their drinking, felt it unsafe to keep the money on their persons and gave it to their friend in exchange for his check. Especially is this so, as they were corroborated. While the fact that the decedent did not deposit the money in the bank, and the manner in which he obtained the money to meet the check are strong circumstances in favor of the assumption that decedent received no money for his check, still they are not strong enough to overcome the testimony of five witnesses whom the court believed.

The facts in Herbert v. Lankershim, 9 Cal.2d 409, 71 P.2d 220; In re Estate of Emerson, 175 Cal. 724, 167 P. 149; In re Estate of Baird, 193 Cal. 225, 223 P. 974 and Reese v. Smith, 9 Cal.2d 324, 70 P.2d 933, are so dissimilar to those in the case at bar as to make those cases not applicable here. The Lankershim case stated that testimony as to oral admissions of a decedent is the weakest of testimony unless corroborated by satisfactory evidence. This statement is explained in Ferrari v. Mambretti, 58 Cal.App.2d 318, at pages 322, 323, 136 P.2d 326, 328: "We do not understand that the Lankershim case made a new rule in appeals involving the question of the sufficiency of the evidence * * * It is true that the court quoted with approval from an early English case holding that in the proceedings of this kind the evidence of the oral admissions must be 'satisfactory' and 'convincing.' The use of these words has been frequently criticized in our decisions, and we do not understand that, in the Lankershim case, the supreme court was departing from the rule that the weight of the evidence, and particularly the credibility of the witnesses, was each a matter for the trial court or jury."

---

[2] Quotation from Lehigh Coal & Nav. Co. v. Central R. Co., 41 N.J.Eq. 167, 3 A. 134, given in Re Estate of Emerson, 175 Cal. 724, at page 728, 167 P. 149, 151.

[3-6] There was no evidence that the decedent made a loan to defendant. Plaintiff relies entirely upon the check itself, upon decedent's method of covering the check, the fact that defendant made contradictory statements as to where he got the $10,000 to give decedent and upon plaintiff's testimony that the testimony of the corroborating witnesses was contradictory to statements which they had made to him, which statements they denied. While no California case has been cited on the subject, nor have we found any, it has been held elsewhere that the mere fact that a defendant has received a check from a plaintiff's intestate and received the money thereon does not create a presumption that the contract constituted a loan (Faletti v. Child, 204 Ill.App. 158), and that the burden of proving such a transaction to be a loan is upon the plaintiff. Krull v. Arman, 1923, 110 Neb. 70, 192 N.W. 961. As to the contradiction between plaintiff and the corroborating witnesses, the court evidently believed the latter. This, like the weight to be given all the evidence, is a matter for the trial court. " 'It is the duty of the trier of facts to reconcile, if possible, any apparent conflict, whether such conflict is developed upon the whole case or in the testimony of an individual witness, and to give effect to all the evidence, when the nature of the case will admit of such a disposition, or, if the conflict is irreconcilable, to affix their own value to the contradictory evidence. * * * It is a cardinal doctrine often enunciated that where, upon a question of fact, the testimony in the court below involves a substantial conflict, the action of the court below will not be disturbed. It is to be presumed that the trial judge reconciled and accounted for to his own satisfaction any and all inconsistencies which might be made to appear in the testimony.' 10 Cal.Jur., pp. 1171, 1172, §§ 382, 383, citing Adkins v. Brett, 184 Cal. 252, 193 P. 251". McKean v. Alliance Land Co., 200 Cal. 396, 398, 399, 253 P. 134, 135.

[7] As pointed out before, while the facts are somewhat peculiar, we cannot say as matter of law that the story is inherently improbable, or that all five witnesses for the defendant committed perjury.

[8] Plaintiff at one time in the trial of the case objected to defendant testifying as to his conversation with decedent at the Derby Cafe on the grounds that such testimony is inadmissible under the provisions of sec. 1880, subd. 3, Code Civ. Proc. The objection was overruled. He did not pursue his objection and has not raised the question on appeal except to contend that the testimony of defendant, when admitted, is entitled to but little weight because violative of the policy of the section. We, therefore, have not considered the effect of that section on the admissibility of the testimony. Its weight, of course, was a matter for the trial court.

The judgment is affirmed.

PETERS, P. J., and WARD, J., concur.

---

88 Cal.App.2d 163

KENNEY et al. v. WOLFF et al.

Civ. 13677.

District Court of Appeal, First District, Division 2, California.

Oct. 25, 1948.

Rehearing Denied Nov. 24, 1948.

Hearing Denied Dec. 23, 1948.

Parties 🔑40(2)

The possibility that judgment in action by persons who were non-operating employees of street railway company at time of its system's acquisition by city and county to determine relative seniority rights of plaintiffs and persons already in municipal railway system's employ at such time as city employees may establish rule of law affecting rights of conductors and motormen, employed on municipal railway before such acquisition, in future litigation, does not give them sufficient interest in subject matter of action to entitle them to intervene. Code Civ.Proc. § 387.

◆

Appeal from Superior Court, San Francisco County; Hon. Thos. M. Foley, Judge.

Action by W. D. Kenney and others, individually and as constituting the Charter Employees Association, against Harry K. Wolff and others to determine plaintiffs' rights as employees of the City and County of San Francisco since its acquisition of the street railway system of the Market Street Railway Company, of which plaintiffs were employees, in which Robert U. Johnson and others, street railway employees of such city and county at the time of such acquistion, intervened. From an order striking out the complaint in intervention, intervenors appeal.

Affirmed .

See also 191 P.2d 88.

Milton Marks and Morris Lowenthal, both of San Francisco, for plaintiffs-respondents.

Jno. J. O'Toole, City Atty. of San Francisco, for defendants-respondents.

Jos T. Curley and Marvin Hix, both of San Francisco, for intervenors-appellants.

DOOLING, Justice.

This is an appeal from an order of the trial court striking from the files appellants' complaint in intervention. The action in which appellants sought to intervene was commenced by plaintiffs, former employees of the Market Street Railway Company, to determine their rights as employees of the City and County of San Francisco under section 125 of the charter. The questions involved in counts four and five of the complaint have to do with the relative seniority rights of employees already in the employ of the Municipal Railway system at the time the Market Street system was acquired by the City and County of San Francisco and the plaintiff employees who entered the employment of the City and County at the time of such acquisition. It is as to these counts only that appellants sought to intervene.

It is admitted that the plaintiffs are none of them conductors or motormen and that the appellants are all either conductors or motormen who were employed on the Municipal Railway prior to the acquisition of the Market Street sytem by the City and County. For this reason no adjudication of the seniority rights of the plaintiffs will directly affect the seniority rights of any of the appellants. Their only interest in the litigation is that the judgment may establish a rule of law in the interpretation of the seniority rights of plaintiffs as former employees of the Market Street Railway which might affect appellants' rights in future litigation. That this is not a sufficient interest in the subject matter of the action to entitle appellants to intervene is settled by the decision in Jersey Maid Milk Products Co. v. Brock, 13 Cal.2d 661, 91 P. 2d 599. We quote from the opinion in that case, 13 Cal.2d at pages 662–664, 91 P.2d at page 600:

"Interveners are distributors of milk within the Los Angeles county area, and like the plaintiffs in this action are interested in the validity of said chapter of the Agricultural Code, and also like the plaintiffs, they are opposed to the enforcement of the provisions of said chapter and the stablilization plan formulated thereunder. They contend, therefore, that they have such 'an interest in the matter in litigation', and in the success of the plaintiffs in said action that entitles them to intervene in the action under the terms of section 387 of the Code of Civil Procedure. The sole question for decision, therefore, is whether the interveners have any interest in the proceeding that will entitle them to intervene as parties therein.

"Section 387 of the Code of Civil Procedure provides in part that, 'At any time before trial, any person, who has an interest in the matter in litigation, or in the success of either of the parties, or an interest against both, may intervene in the action or proceeding.' We find no direct authority upon the precise question before us under facts similar to those in the present action. Section 387 of the Code of Civil Procedure has been the subject of frequent discussion in numerous decisions of the appellate courts of the state.

"In the case of Isaacs v. Jones, 121 Cal. 257, 261, 53 P. 793, 794, 1101, it was held, 'To avail himself of the right given by this section (sec. 387, Code Civ.Proc.) the applicant must have either an interest in the matter in litigation or in the success of one of the parties to the action, or an interest against both of them. The interest here referred to must be direct, and not consequential, and it must be an interest which is proper to be determined in the action in which the intervention is sought.' In a later case by this court, we find the following statement in reference to the language of said section, 'The interest mentioned in the Code which entitles a person to intervene in a suit between other persons must be in the matter in litigation and of such a direct and immediate character that the intervener will either gain or lose by the direct legal operation and effect of the judgment.' Elliott v. Superior Court, 168 Cal. 727, 734, 145 P. 101, 105.

"The question again came before the court, and it was held that, 'The interest in the matter in litigation as contemplated by the Code section, must be of such a direct and immediate character that the intervener will either gain or lose by the direct legal operation and effect of the judgment. Elliott v. Superior Court, 168 Cal. 734, 145 P. 101. The interest must be direct, and not consequential, and must be such an interest as is proper to be determined in the proceeding in which the intervention is sought. Isaacs v. Jones, 121 Cal. 257, 53 P. 793, 1101.' La Mesa Lemon Grove & Spring Valley Irr. Dist. v. Halley, 195 Cal. 739, 741, 235 P. 999, 1000.

"The last-mentioned case was brought against the officers of the plaintiff to compel them to sign and attest certain bonds claimed to have been duly authorized by the plaintiff district. Certain owners of lands within the district applied for leave to file a complaint in intervention, claiming that the bonds when issued would be invalid because the indebtedness to be evidenced thereby was beyond the power of the district to assume. Their application was denied. On appeal, the order denying their application was affirmed, the court holding that, 'The matter in litigation in the pending proceeding is whether or not the respondents have refused, without legal justification, to do that which the law specifically required them to do, as duties resulting from their respective offices.' Applying the definition there given to the words 'The matter in litigation', to the present proceeding, it is apparent that 'the matter in litigation' herein is whether or not the defendant should be enjoined as against the plaintiffs from enforcing the provisions of chapter 10 of division IV of the Agricultural Code. Any judgment rendered in said action will have no direct effect whatever upon any person other than the parties to said action. If the judgment should be in favor of the plaintiffs the defendant will be restrained from enforcing said acts against the plaintiffs but against no other person. If it should be in favor of the defendant, then the latter would be free from any legal restraint to enforce said judgment against the plaintiffs. This judgment would in no way be binding upon the interveners as long as they are not parties to said action, and they will be as free to pursue their business after the rendition of said judgment, as they were before. They, therefore, would not gain or lose by the direct operation of the judgment. The legal operation of said judgment will have no direct effect upon interveners. *It is true there may be an adjudication that said act is a valid legislative enactment which might serve as a precedent upon any action instituted against interveners for the violation of the terms of said act and to that extent it might be said that the interveners have an interest in the matter in litigation, but as the judgment so rendered would have no binding effect upon the interveners, as it would upon the parties to this proceeding, and would in no way directly affect them, their interest is not a direct but a mere consequential interest in the matter in litigation.*"

The portion of the opinion which we have italicized applies with equal force to the position of appellants here and is conclusive against their right to intervene.

Order affirmed.

NOURSE, P. J., and GOODELL, J., concur.

88 Cal.App.2d 230

PEOPLE v. GRYSZKIEWICZ.

Cr. 2521.

District Court of Appeal, First District, Division 1, California.

Oct. 27, 1948.

1. Larceny 🔑65, 66

Evidence sustained convictions of grand theft and attempted grand theft in connection with theft and attempted theft of women's wallets.

2. Criminal law 🔑620(1)

Denial of motion for separate trials on counts of information charging grand theft and attempted grand theft of women's wallets on succeeding days was not abuse of discretion, though offenses were committed on separate days and proof of identification on grand theft charge was much weaker than on attempted grand theft charge. Pen. Code § 954.

3. Criminal law 🔑234
Indictment and information 🔑137(5)

Limitation of cross-examination of complaining witness at preliminary examination on ground that point had not been brought out on direct examination and question had been asked and answered several times was not improper, and denial of motion to set aside information on ground that defendant did not have a full and fair preliminary examination was not error.

4. Criminal law 🔑234

Where preliminary examination was twice continued to permit defendant to produce two witnesses, but on each occasion defense counsel failed to appear and judge thereupon appointed a deputy public defender for defendant, defendant could not complain that he was unduly restricted in presenting evidence at preliminary hearing.

5. Criminal law 🔑351(3)

Evidence that defendant, upon seeing police inspector a few days after commission of offenses charged, boarded a streetcar, which inspector also boarded, and that defendant rode only one block, was admissible as tending to show flight though it also showed that defendant knew police inspector.

6. Criminal law 🔑351(1, 3)

Any conduct of a defendant subsequent to commission of crime tending to show consciousness of guilt is admissible, and flight is a circumstance to be considered by jury in determining if there is a consciousness of guilt.

7. Criminal law 🔑814(16), 1172(6)

Giving instruction on effect of failure to deny accusatory statement was improper, in absence of evidence of any accusatory statement, but was not reversible error, where evidence of defendant's guilt was convincing and instruction commenced with the words, "if you should find from the evidence".

8. Criminal law 🔑787(2)

Instruction in accordance with constitutional provision on legal effect of defendant's failure to testify was proper. Const. art. 1, § 13.

9. Criminal law 🔑784(1)

Evidence of flight when policeman was called at time of attempted theft and flight just prior to arrest justified instruction defining circumstantial evidence.

10. Criminal law 🔑808½

Instruction on reasonable doubt and presumption of innocence, reciting verbatim provisions of Penal Code which the Code expressly provides may be read to jury without further instruction on the subject was not objectionable. Pen.Code, §§ 1096, 1096a.

11. Criminal law ⟹1159(2)

Where complaining witnesses at trial positively identified defendant as man who stole or attempted to steal their wallets, contention that defendant was not sufficiently identified because both complainants had described the man who committed offenses as five feet five or seven inches tall, whereas defendant was five feet one inch tall, merely went to the weight of the evidence and could not be considered on appeal.

◆

Appeal from Superior Court, City and County of San Francisco; Albert C. Wollenberg, Judge.

Frank Gryszkiewicz was convicted of attempted grand theft and grand theft, and he appeals.

Judgments affirmed.

Ernest Spagnoli, of San Francisco, for appellant.

Fred N. Howser, Atty. Gen., David K. Lener, Deputy Atty. Gen., and Edmund G. Brown, Dist. Atty., and Alvin Weinberger, Asst. Dist. Atty., both of San Francisco, for respondent.

PETERS, Presiding Justice.

By count one of an information defendant was charged with attempted grand theft in that on October 13, 1947, he attempted to steal the wallet of Betty Chapman, containing $20, and in count two he was charged with grand theft in that on October 14, 1947, he stole the wallet of Lydia Rossi which contained $275. He was also charged with, and admitted, convictions and service of terms on two prior felonies. He was found guilty of both offenses by a jury, and from the judgments of conviction, prosecutes this appeal.

[1] The evidence on both counts is sufficient to sustain the convictions, and defendant makes no serious contention to the contrary. In regard to the attempted grand theft charge, Betty Chapman testified that on October 13, 1947, at about 12:30 p.m. she was walking northerly on Grant Avenue toward Maiden Lane in San Francisco; that she felt her purse bump against her side; that she looked down and saw that her purse was open and that a man's hand, reaching from behind her, was in the purse; that she closed her purse and turned around to face the man who was just behind her. She positively identified that person as the defendant. Both Miss Chapman and Jack Foster, a doorman in a nearby store, testified that Miss Chapman asked the man whose hand had been in her purse, what he thought he was doing; that defendant answered "how dare you accuse me of anything?"; that Foster advised Miss Chapman to call a policeman; that Foster then whistled for a policeman, whereupon defendant ran down Maiden Lane and disappeared. Miss Chapman reported the facts to the police and described the man involved as being five feet five or seven inches tall, between thirty and thirty-five years of age, wearing glasses, no hat and a dark suit.

The evidence on the grand theft charge was as follows: Mrs. Rossi testified that on October 14, 1947, about 4:10 p.m. she was standing near the Flood Building on Market Street in San Francisco; that she was severely jolted by someone bumping into her; that she noticed that her purse, which she was carrying by a strap over her arm, was open and that a wallet containing $275 was missing; that she immediately looked around and saw the defendant, the only person near her, rapidly moving away; that she could see his face, and she positively identified that person as the defendant; that the man was about five feet five or seven inches tall, wore a dark suit, glasses and no hat; that she saw him only an instant before he disappeared into the crowd; that the following day the wallet, minus the $275, was returned to her by the post office.

Inspector Iredale, for eighteen years on the pickpocket detail of the police department, testified that on October 16, 1947, he noticed the defendant in a safety zone on Market Street opposite Roos Bros.; that defendant looked at him, then jumped on a westbound streetcar, rode one block and got off at the front end; that Iredale boarded the same car, and got off at the rear end; that he walked up to defendant and asked him what he was doing there;

that he then walked him down to Stockton and Market Streets where another police inspector was waiting, and they arrested defendant. Both complaining witnesses separately identified defendant in a police lineup.

Defendant, who did not take the stand, produced two witnesses to establish an alibi, i.e., that he was in Oakland working on the 13th and 14th of October, and, therefore, could not have been in San Francisco. Mr. Gilmore testified that in October of 1947 he operated two separate establishments; that one was a bar and one a fountain; that defendant worked for him from the early part of October up through October 14th doing odd jobs; that defendant normally worked at the bar from noon until 4 p.m., and then went and assisted at the fountain; that he was quite positive that defendant worked on the 13th and 14th; that his time book, which he produced, showed a payment of $36 to defendant on October 17th, on which date the defendant was in jail; that he paid defendant at the rate of $9 a day; that he may have made other payments to defendant during October, but that there was no entry showing them. Mrs. Hoopes managed the fountain between the hours of 4 to 11 p.m. She testified that on the 13th and 14th defendant came to work at the fountain at 4 p.m. She had told Inspector Iredale that defendant sometimes had not come to work until 6 p.m.

At the trial it appeared that defendant was five feet one inch tall.

[2] As already pointed out, defendant does not directly attack the sufficiency of the evidence, but he does contend that the trial court committed prejudicial error in that it denied his motion, made before the jury was impanelled, for separate trials on each count. Section 954 of the Penal Code provides in part that an information "may charge two or more different offenses * * * of the same class of crimes or offenses, under separate counts, and if two or more indictments or informations are filed in such cases the court may order them to be consolidated * * * ; provided that the court in the interest of justice and for good cause shown, may, in its discretion, order that the different offenses or counts set forth in the indictment or information be tried separately * * *." Defendant concedes that the two charged offenses were of the same class, and that, under the above-quoted code section, it was discretionary with the trial court whether the two counts should be tried separately, but he contends that it was an abuse of discretion to deny his motion. His theory is that the trial court knew, as a result of the preliminary examination of defendant, which was introduced as part of the motion, that the proof of identification on the grand theft charge would be much weaker than it would be on the attempted grand theft charge. It is urged that the defendant would have had a much better chance of being acquitted on the grand theft charge if it had not been tried with the attempted grand theft charge. To have denied the motion for a severance, under such circumstances, according to defendant, amounted to an abuse of discretion. The precise point was decided adversely to defendant in People v. Kelly, 203 Cal. 128, 263 P. 226, in which case the constitutionality of § 954 of the Penal Code in conferring discretion on the trial court was upheld. See, also, People v. Eudy, 12 Cal.2d 41, 82 P.2d 359. The fact that the two crimes charged were committed on separate days does not require that they be tried separately. People v. Northcott, 209 Cal. 639, 289 P. 634, 70 A.L.R. 806; People v. Feigelman, 65 Cal.App. 319, 223 P. 579; People v. Hanna, 100 Cal.App. 509, 280 P. 379; People v. Thorn, 138 Cal. App. 714, 33 P.2d 5. Moreover, just what defendant would have gained by a severance, had one been granted, does not appear. Had the grand theft charge been tried alone, evidence of the attempted grand theft by defendant the day before and only a few blocks away from where the theft occurred, and where the evidence would have shown that both crimes were committed in the same manner, would have been admissible to show common plan, scheme or design. People v. Duane, 21 Cal.2d 71, 130 P.2d 123; People v. Mayen, 188 Cal. 237, 205 P. 435, 24 A.L.R. 1383; People v. McClain, 55 Cal.App. 2d 399, 130 P.2d 978.

[3] It is next urged that the trial court erred in denying a motion by defendant to set aside the information on the ground that defendant did not have a full and fair preliminary examination. This contention is based upon the fact that at the preliminary examination Betty Chapman testified that after defendant's arrest she visited the jail and identified him in a police lineup. The defendant's counsel then cross-examined her at some length and then attempted to cross-examine her as to whether an accusatory statement had been made by her and whether defendant had then denied it. The court limited this cross-examination on the ground that the prosecution had not brought out this point on direct examination, and because the question had been asked and answered several times. An examination of the preliminary examination demonstrates that defendant was given a full and fair opportunity to ask the complaining witnesses all proper questions, and that in no instance was the defendant improperly curtailed in his examination.

[4] Defendant also seems to contend that the committing magistrate cut the hearing short without giving him an opportunity to produce witnesses. The record shows that the hearing was held on October 24, 1947. It was continued to October 25, 1947, to permit defendant to produce two witnesses. Defendant's counsel failed to appear on that day, and the hearing was again continued, this time until October 27th. Again defense counsel failed to appear and the judge was compelled to appoint a deputy public defender for defendant. Under such circumstances defendant is in no position to urge that he was unduly restricted in presenting evidence at the preliminary hearing.

[5, 6] The contention that certain of the testimony of Inspector Iredale was inadmissible is also without merit. Iredale testified that he saw defendant standing in a specified safety zone on October 16th; that the defendant looked at him and jumped on the back of a westbound streetcar; that he, the inspector, got on the same car; that defendant rode one block and got off at the front end of the streetcar; that he, the inspector, also alighted and asked the defendant what he was doing; that the defendant said: "Mr. Iredale, can I talk to you?"; that he then walked defendant down to another inspector, and the arrest was made. Defendant urges that this testimony was elicited for the sole purpose of showing that defendant knew Iredale. The evidence was clearly admissible as tending to show flight. Any conduct of a defendant subsequent to the commission of the crime tending to show consciousness of guilt is relevant and admissible, and flight is a circumstance to be considered by the jury in determining if there is a consciousness of guilt. See cases collected 8 Cal.Jur. p. 44, § 158; People v. Santora, 51 Cal.App.2d 707, 125 P.2d 606; People v. Gregoris, 70 Cal.App.2d 716, 161 P.2d 568; People v. Hall, 199 Cal. 451, 249 P. 859.

[7] Objection is also made to the giving of certain instructions. Thus, complaint is made that the court gave an instruction on the legal effect of failing to deny an accusatory statement. An examination of the reporter's transcript discloses that at the trial (as distinguished from the preliminary examination) there was no evidence of an accusatory statement. Therefore, the instruction should not have been given. 8 Cal. Jur. p. 628, § 606. The error, however, could not have been prejudicial. The instruction starts with the words: "If you should find from the evidence," so that it did not tell the jury that an accusatory statement had been made. The evidence was clear and convincing. Under such circumstances, the error could not have been prejudicial. In People v. Tuthill, 31 Cal. 2d 92, 101, 187 P.2d 16, 21, the Supreme Court disposed of a similar contention in the following language: "Defendant contends that prejudicial error was committed in the giving of an instruction as to the effect of an accusatory statement. The correctness of the instruction in the abstract is not questioned but it is argued that the jury might have been misled for the reason that there was no evidence in the record of any accusatory statement, and that the error was accentuated by the fact that the subject of accusatory statements had been brought before at least three of the jurors on voir dire examination. In the absence

of any facts to which the instruction might apply it should not have been given. However, the giving of an instruction outside the issues or beyond the applicable facts is not reversible error unless it can be said to have been prejudicial. [Citing authorities.] Here there is no indication of prejudice. The jurors were presented with clear and convincing proof of defendant's guilt, and within an hour of submission of the cause to them returned their verdict of guilty. It is obvious that the omission of the instruction would not have altered their conclusion in any way. "

[8] The court also instructed on the legal effect of the failure of the defendant to testify. The instruction was in accord with Art. 1, § 13, of the Constitution, which provides that "in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury." The constitutionality of this section and of § 1323 of the Penal Code, also so providing, has been upheld in many cases. See People v. Waller, 14 Cal. 2d 693, 96 P.2d 344; People v. Murray, 42 Cal. App.2d 209, 108 P.2d 748; Adamson v. People of the State of California, 332 U.S. 46, 67 S.Ct. 1672, 91 L.Ed. 1903, 171 A.L.R. 1223.

[9] Objection is also made to an admittedly correct instruction defining circumstantial evidence on the ground that there was no circumstantial evidence in the case to which it could have applied. Defendant is in error in contending that there was no circumstantial evidence in this case. There was the evidence of flight when Jack Foster whistled for a policeman at the time of the attempted theft from Betty Chapman, and the flight just prior to the defendant's arrest.

[10] Some criticism is made of the instruction on reasonable doubt and presumption of innocence. The questioned instruction is a verbatim recitation of the provisions of § 1096 of the Penal Code. Section 1096a of the same code expressly provides that § 1096 may be read to the jury "and no further instruction on the subject of the presumption of innocence or defining reasonable doubt need be given."

[11] The only direct attack made on the sufficiency of the evidence is defendant's contention that he was not sufficiently identified. This contention is built around the evidence that both complainants described their assailant as five feet five or seven inches tall, and he is, in fact, but five feet one inch tall. Both complaining witnesses at the trial positively identified defendant as the man who committed the crimes, and Betty Chapman was corroborated by Jack Foster. The objection merely goes to the weight of the evidence and cannot be considered on appeal.

The judgments appealed from are affirmed.

WARD and BRAY, JJ., concur.

33 Cal.2d 67

PEOPLE v. MACHABIE et al.

Cr. 4934.

Supreme Court of California, in Bank.

Nov. 5, 1948.

1. Burglary ⚿41(1)
Larceny ⚿65

Evidence sustained convictions of burglary of the second degree and grand theft.

2. Larceny ⚿64(1)

Possession of stolen property shortly after it was stolen is a circumstance pointing to guilt of the one in possession.

◆

Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

Mitchell Machabie and William O. Reed were convicted of second degree burglary and grand theft. From an order denying the motion of William O. Reed for new trial, he appeals.

Order affirmed.

Prior opinion 195 P.2d 467.

Crispus A. Wright, of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., John F. Hassler, Deputy Atty. Gen., and Wm. E. Simpson, Dist. Atty., and Jere J. Sullivan, Deputy Dist. Atty., both of Los Angeles, for respondent.

PER CURIAM.

A hearing was granted to William O. Reed by this court after the order denying a new trial of the action in which he was convicted was affirmed by the District Court of Appeal. With certain modifications, the conclusions stated by Mr. Justice Wood as the reasons for the decision are now adopted as the opinion of this court. They are as follows:

"Defendant Reed and one Machabie were convicted of burglary of the second degree and grand theft. Trial by jury was waived. Proceedings were suspended as to Reed and he was placed on probation. Reed appeals from an order denying his motion for a new trial.

"He contends that the evidence was not sufficient to justify the decision. The evidence shows that between the hours of 6:15 p.m. on March 5, 1947, and 8:30 a.m. on March 6, 1947, burglary and grand theft were committed at the warehouse of S. L. Abbott Company in Los Angeles. The skylight of the building was broken and the lock on a rear entrance door at the delivery 'pit' had been pried off, and 98 sacks of pure shellac of an approximate value of $10,000—each sack weighing 164 pounds—had been taken from the building. One week later 88 of those sacks of shellac were found in a garage at 10501 Zamorra Street, Watts, California. This kind of shellac is used principally in the production of the phonograph record material that is known as 'the biscuits' in the phonograph record manufacturing business.

"Mr. Jackson, a witness called by the plaintiff, testified that he resided at 10501 Zamorra Street in Watts, and that he operated a service station at 5251 Central Avenue, Los Angeles; that on March 5, 1947, about 1 p.m., appellant, whom he had known about three years, came to the service station and told him that he wanted to rent a garage 'to store some stuff in'; that it was 'arranged' to rent the garage, which did not have a roof on it, until the roof was put on and the owner was ready to use it; that between 11 p.m. on March 5th, and 1 a.m. on March 6th, appellant came to the front door of his (witness') house and told him that some 'fellows' were bringing 'some stuff' to put in the garage and 'don't be alarmed' if he should 'hear some noise out there, don't think someone was breaking in the house'; that after appellant left, he (witness) heard the motor of a truck in the driveway; that on March 9th, appellant went to the service station and paid the $8.00 rent, and at that time, in response to Jackson's request that the garage be vacated, appellant said he would have the stuff moved out the next day, March 10th; that he saw appellant, the next time, on March 12th at appellant's home when he (witness) went there with police officers.

"Police officer Goldstone testified that he, another officer, and Mr. Jackson, went to the home of appellant on March 12th, and knocked on the door; that someone, in response thereto, said, 'Who is there?'; that Jackson then said, 'Jackson, the garage man'; that the door was then opened by appellant; that appellant, in response to an inquiry as to what his occupation was, said that he was in the phonograph record business at 709 East 29th Street; that they took appellant to that address and observed that phonograph records were being made there; and that Jackson said, in the presence of appellant, that he had rented the garage to appellant.

[1, 2] "Appellant testified that his codefendant and friend, Machabie, had told him that some fellows wanted to hire him (Machabie) to do some hauling for them; that, as a favor to Machabie and to aid him in getting the hauling job, he told Jackson that some fellows wanted to rent a garage for storage for a short time; that Jackson replied that he had a partially finished garage and if appellant would 'stand good for the rent' he would rent it for a short time for $8.00; that appellant told Machabie where the garage was located; that appellant went to Jackson's house about 10:30 p.m. and 'told him the fellows were coming to bring something out there,' and that perhaps he also told him 'not to be alarmed, that they were coming to store something in his garage'; that Machabie gave appellant the $8.00 rent; that when Jackson told him that he wanted him to get the stuff out of the garage, he replied that he 'would try to see the fellows and tell them his desires'; that appellant was in the business of manufacturing phonograph records; that he did not use shellac in manufacturing the records; that he used 'a biscuit' from which he pressed the records; that he did not know anything about the burglary, and was not implicated in any burglary; that when the officers asked him some questions he told them that he did not know what it was all about and that if they were attempting to implicate him in something he would appreciate it if they would speak with his attorney. * * * Although the evidence as to appellant's participation in the crime was circumstantial, it was sufficient to support the judgment * * * Immediately after the crimes were committed the shellac was taken to the garage which appellant had rented a few hours previously for a short time only. Possession of stolen property, shortly after it is stolen, is a circumstance pointing to the guilt of the accused. People v. Carroll, 79 Cal.App.2d 146, 148, 179 P.2d 75. His explanation of his conduct in renting, and in assuming the rental responsibilities of, the garage was unsatisfactory. In the afternoon preceding the night the crimes were committed, the appellant, for and on behalf of some unknown 'fellows,' rented a roofless garage as a storage place for some unidentified 'stuff' or 'something,' merely for the purpose, according to his testimony, of aiding his codefendant Machabie in getting a job of hauling something to such a place as appellant might rent. He was present at the garage premises about midnight immediately before the delivery of the stolen property to the garage, and aroused the garage owner from his sleep, and announced to him that 'some fellows' were then bringing 'some stuff' to the garage. His explanation of that conduct, to the effect that his only interest in being there under such unusual circumstances was to warn the garage owner not to be alarmed was unsatisfactory. That explanation, in view of other testimony by him, means that he was so solicitous of the welfare of the garage owner that about midnight he left his work at his phonograph record manufacturing company on 29th Street in Los Angeles, where he was working the night shift, and traveled several miles to the garage premises in Watts. Of course, his midnight trip to the garage premises, while the 'stuff' was being delivered to the garage, had no relation to the matter of helping Machabie get the hauling job—it appearing that prior to that time Machabie or someone had obtained the job. His statement, made about three days after the property had been delivered to the garage, that he would have it removed the next day after the garage owner asked him to move it, indicates that he had an interest in the transaction other than that of helping Machabie get a hauling job. Another circumstance to be considered is that pure

shellac is used principally in manufacturing phonograph record material, and that appellant was in the business of manufacturing phonograph records."

The order denying the motion for a new trial is affirmed.

32 Cal.2d 828

McELROY v. McELROY et al.

L. A. 20256.

Supreme Court of California, in Bank.
Oct. 28, 1948.

1. Trusts 🔑44(1)

In wife's suit for divorce, evidence sustained finding that husband's parents held money transferred by son during his marraige, as trustees for plaintiff and her husband.

2. Trusts 🔑363

Where trust was created by son from community funds, duty of husband's parents as trustees under the trust ran to the community and wife's interest could be enforced by her in divorce action if court had jurisdiction over trust obligation.

3. Trusts 🔑359(1)

Ordinarily, the beneficiary of a trust may enforce his rights by proceeding either against the trust property or against the trustee personally.

4. Trusts 🔑363

Where proceeding is brought to enforce trustee's obligation, and judgment does not undertake to operate directly on corpus of trust, court's power to act is based on jurisdiction over trustees and not on location of trust res.

5. Divorce 🔑202

In dividing community assets located in state, court exercises jurisdiction in rem and personal service on husband within State is not necessary.

6. Constitutional law 🔑309(1)

Requirement of due process is fulfilled in action for divorce by obtaining an order for publication of summons and personally serving husband in foreign state. Code Civ.Proc. § 413.

7. Divorce 🔑274

Where community property had been delivered to parents as trustees by husband who was served only by publication in action for divorce and property involved was outside state, but defendant's parents personally appeared, wife was entitled to recover that portion of trustees' obligation which court was authorized to assign her under statute relating to division of community property upon dissolution of marriage and trial court properly awarded a money judgment in wife's favor against parents. Civ.Code, §§ 146, 147.

8. Continuance 🔑19

Unavoidable absence of a party does not necessarily compel court to grant a continuance and in such a case the court should be governed by course which seems most likely to accomplish substantial justice, and it may take into consideration legal sufficiency of showing in support of motion and good faith of moving party.

9. Continuance 🔑48

In wife's action for divorce, wherein parents of husband were joined on claim they were trustees of community property, denial of parent's motion for continuance supported only by affidavit of counsel that father was ill and was unable to travel, and though trial was delayed, no further effort was made to support motion by competent evidence was not abuse of discretion.

◆

Appeal from Superior Court, Los Angeles County; William J. Palmer, Judge.

Action by Esther F. McElroy against Benjamin McElroy, her husband, for divorce wherein defendant's parents, Emma McElroy and James B. McElroy, were joined on plaintiff's allegation that certain community funds had been transferred to parents by their son during his marriage. From a judgment for plaintiff, defendant parents appeal.

Judgment affirmed.

For prior opinion, see 187 P.2d 439.

Brooks Gifford, Delmas R. Richmond, Frederick G. Stoehr and Robert J. Johnston, all of Pasadena, for appellants.

Herbert Gall and Edward Fitzpatrick, both of Los Angeles, for respondent.

GIBSON, Chief Justice.

The plaintiff filed an action for divorce on the ground of extreme cruelty against Benjamin McElroy, her husband, and joined his parents, Emma and James McElroy, alleging that they were liable to the plaintiff for certain community funds which had been transferred to them by their son during his marriage. The husband could not be served personally within this state, but summons was ordered published, and he was served personally and by registered mail in the state of Oregon. He did not answer or appear, and his default was duly entered. The parents appeared and defended.

The wife was given a judgment of divorce which awarded her certain community property situated in this state consisting of household furniture, 14 government bonds, $150 in cash, and a 1930 automobile. She was also awarded the custody of their infant son. The husband did not appeal from the judgment.

The court further found that the wife was entitled to $3,000 of the funds transferred by the son to his parents, and she was given judgment against them in that sum. At the time the transfers were made, the parents lived in California and deposited the money in a California bank, but before this action was brought the money was removed to Oregon, where the parents now reside. The court found that no consideration had been given for the transfer and that the parents had received the money with knowledge that the funds were community property.

The parents have appealed contending primarily that the court lacked jurisdiction to enter a money judgment against them. They argue that the effect of the judgment was to adjudicate the respective interests of the husband and wife in property not located in California, and that the court was without power to render such a judgment since the husband was not personally served within this state.

[1] The trial court found that the parents held the money transferred to them as trustees for plaintiff and her husband, and the evidence amply supports this finding. It was stipulated that $6,000 derived from the earnings of the husband after his marriage was transferred to the parents and no claim was made that the money was intended as a gift to them or as payment of any legal obligation owed to them. Plaintiff testified that the purpose of the transfer was for "safekeeping." In a letter from James McElroy to his son, the father stated, "We will be on the lookout for your Insurance Policy and such funds as you allot to us will be carefully guarded as a nest egg for you when you are discharged. It is then you will need it."

[2-7] The trust having been created from community funds, the duty of the parents under the trust ran to the community, and the wife's interests therein could be enforced by her in the divorce action if there was some basis for the court's jurisdiction over the trust obligation. Berniker v. Berniker, 30 Cal.2d 439, 182 P.2d 557. Ordinarily the beneficiary of a trust may enforce his rights by proceeding either against the trust property or against the trustee personally. Title Insurance etc. Co. v. Ingersoll, 158 Cal. 474, 111 P. 360; Lathrop v. Bampton, 31 Cal. 17, 89 Am.Dec. 141; see Rest. Trusts, §§ 198, 199. Where, as in this case, the proceeding is brought to enforce the trustees' obligation, and the judgment does not undertake to operate directly on the corpus of the trust, the court's power to act is based upon jurisdiction over the trustees and not upon the location of the trust res. The situation is analogous to one in which a debt may be regarded as an asset wherever the debtor is subject to suit. In re Estate of Waits, 23 Cal.2d 676, 680, 146 P.2d 5. Accordingly, the obligation of the parents to the community may be treated as a community asset wherever the parents may be sued, and, the parents having appeared, the court had jurisdiction over them and over their personal obligation to the community. In dividing community assets located in California, the court exercises jurisdiction in rem, and personal service on the husband within the state is unnecessary. See Beale, The Conflict of Laws [1935],

Vol. 1, p. 437; Restatement, Judgments, § 32; Note 126 A.L.R. 664; Code Civ. Proc. § 412. Although due process requires that reasonable notice and opportunity to be heard be given to the defendant, this requirement was fulfilled in the present case by obtaining an order for publication of summons and personally serving the husband in the state of Oregon. Code Civ. Proc. § 413. The wife was entitled to recover for her own use that portion of the trustees' obligation which the court was authorized to assign her under sections 146 and 147 of the Civil Code, which relate to the division of community property upon dissolution of a marriage (Berniker v. Berniker, 30 Cal.2d 439, 182 P.2d 557), and the court properly awarded a money judgment in her favor against the parents. Title Ins. v. Ingersoll, 158 Cal. 474, 479, 480, 111 P. 360.

[8, 9] It is also contended that the trial court erred in refusing to grant them a continuance on the ground that the father could not attend the trial because of illness. The unavoidable absence of a party does not necessarily compel the court to grant a continuance. Sheldon v. Landwehr, 159 Cal. 778, 781, 116 P. 44; Lynch v. Superior Court, 150 Cal. 123, 88 P. 708. In such cases the court should be governed by the course which seems most likely to accomplish substantial justice, and it may take into consideration the legal sufficiency of the showing in support of the motion and the good faith of the moving party. Sheldon v. Landwehr, supra, 159 Cal. at page 781, 116 P. at page 44; Barnes v. Barnes, 95 Cal. 171, 177, 30 P. 298, 16 L.R.A. 660.

The parents were notified on September 16, 1946, that the case was set for trial on November 6. When the case was called on the latter date, they moved for a continuance, basing the motion on an affidavit of their attorney which recited that on November 4 he telephoned to the mother in Oregon, and she told him that the father had been ill and would be unable to attend the trial. In opposition to the motion plaintiff filed an affidavit in which her attorney stated that on November 1, he had been informed by counsel for the parents that they were not expected to be at the trial because, in view of the cost of the trip from Oregon, "they certainly would not spend the money considering the amount involved" in the suit. The motion was denied on November 6, but the trial was not begun until the morning of November 8, and that same afternoon it was continued until November 12. Although the parents had ample opportunity in the interval between November 4 and November 12 to augment their showing by presenting affidavits of themselves or their physician, they chose to stand solely on the affidavit of their attorney and made no further effort to support their request for a continuance. Furthermore, the mother's testimony was introduced by deposition, and, at the close of the evidence, the court suggested a continuance on its own motion in order to secure the testimony of the father and the son, but counsel was unable to assure the court that either would appear. Under these circumstances it is clear that there was no abuse of discretion in refusing to grant a continuance.

The judgment is affirmed.

SHENK, EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

32 Cal.2d 843

Ex parte BYRNES.

Cr. 4932.

Supreme Court of California, in Bank.
Oct. 28, 1948.

1. Criminal law 🔑1208(9)

Prisoner serving consecutive sentences must be regarded as undergoing a single continuous term of confinement thereunder for the purpose of redetermination by the Adult Authority of the length of time of his imprisonment.

2. Criminal law 🔑1190
Habeas corpus 🔑30(3)

Where defendant had been convicted in 1932 on three counts in one action which would sustain a cumulative sentence of 90 years, and on four counts in another action and court ordered sentences to run consecutively, with probation for prior felony to be revoked, with that sentence to run concurrently, and Board of Prison Terms and Paroles in 1935 fixed term at 35 years apparently on basis of five years for each offense and in 1944 refixed it at 30 years, reversal of conviction on four counts and acquittal on retrial in 1948 did not invalidate the previously redetermined sentence and defendant was not entitled to release on habeas corpus. Pen.Code, §§ 208, 264, 288a.

3. Criminal law ⚿1208(9)

Statutes which permit redetermination of length of time of imprisonment do not make possible the imposition of a longer term than could have been imposed when the offenses were first committed. Pen. Code, §§ 1168, 3020, 3021.

4. Criminal law ⚿1208(9)

Where defendant had been convicted on three counts in one action and four counts in another action, and Board of Prison Terms and Paroles fixed term at 35 years apparently on basis of five years for each offense, and later refixed it at 30 years, and after serving 16 years, defendant was acquitted on retrial of the four offenses, it was appropriate that Adult Authority reconsider his term of confinement solely in relation to valid portion of his convictions.

◆

Original habeas corpus proceedings by Frederick John Byrnes to secure release from state prison, on ground that he had completed his term of lawful imprisonment.

Writ discharged, and petitioner remanded.

Frederick John Byrnes in pro. per.

Fred N. Howser, Atty. Gen. and Clarence A. Linn, Deputy Atty. Gen., for respondent.

SPENCE, Justice.

Petitioner, who is confined in the State Prison at San Quentin, seeks his release on the ground that he has completed his term of lawful imprisonment. While the record does not sustain his position in that regard, nevertheless it does appear appropriate that the Adult Authority should reconsider the propriety of his continued confinement in the light of subsequent events as will hereinafter be delineated.

Following two trials in 1932—one in July and the other a month later—petitioner was convicted on seven counts, divisible three on the first trial and four on the second. The indictment in each case charged two prior convictions of felonies—forgery and grand theft—and these were admitted. By its judgments, the court ordered that the sentences on the seven offenses—consisting of alleged acts of kidnapping, rape, and violations of section 288a of the Penal Code as separately stated—run consecutively. At the time of the alleged commission of these seven offenses, petitioner was on probation on account of the two prior felony convictions and he had never served a penitentiary term on those charges. Such probation was thereupon revoked, and judgment was pronounced with the sentence to run concurrently with the sentences upon the other seven offenses. Petitioner started his term of imprisonment on September 15, 1932. On October 18, 1935, the Board of Prison Terms and Paroles fixed the length of time of petitioner's imprisonment at thirty-five years, apparently computed on the formula basis of five years for each of the seven enumerated offenses to run consecutively, and five years on the prior felony conviction to run concurrently. On April 4, 1944, petitioner's total sentence was refixed by the board at thirty years, and with the available credit allowances, this term has been reduced to nineteen years and three months, permitting petitioner's release in 1951 unless further action is taken by the Adult Authority, successor to the aforesaid board. Pen. Code, sec. 3000, as am. by Stats. 3d Ex. Sess.1944, ch. 2, sec. 40.

Meanwhile petitioner had encountered considerable delay in prosecuting his respective appeal proceedings, and he applied to this court for a determination of his rights in seeking a review of the judgments of conviction entered against him in the two 1932 trials. As the circumstances were so outlined, this court by decision of August 14, 1945, in In re Byrnes, 26 Cal.2d 824, 161

P.2d 376, 378, directed the trial court "to hear any motion or motions" that petitioner might make "for the purpose of securing relief from default in the presentation of the record upon appeal in either or both of the actions referred to." 26 Cal.2d at page 828, 161 P.2d at page 378. Thereafter petitioner perfected his respective appeals, and on March 1, 1948, the District Court of Appeal rendered its decisions, whereby "the judgments" of conviction in the first action were "affirmed" (People v. Byrnes, 84 Cal. App.2d 64, 71, 190 P.2d 286; hearing denied by this court in March 30, 1948) and "the judgments" of conviction in the second action were "reversed" and "a new trial" was "ordered as to the charges in the several counts of the indictment under which [said] judgments * * * were [t] heretofore rendered." People v. Byrnes, 84 Cal.App.2d 72, 80, 190 P.2d 290, 295, hearing denied by this court on March 30, 1948. The retrial of the second action resulted in petitioner's acquittal on July 16, 1948.

Petitioner challenges the legality of his continued imprisonment under the above circumstances. He contends that he has served the sentences fixed on the judgments of conviction as affirmed on appeal in the first action—computing the length of time to be five years on each of the three counts, or an aggregate of fifteen years, with the period of commitment beginning in September 15, 1932, and completed, on the basis of alleged goodtime credit allowances, as of March 15, 1942—and that he is now entitled to his release because no other judgments stand against him following the reversal ordered on the appeal on the four counts comprising the second action and his subsequent acquittal on the retrial of those charges. In support of his position, petitioner refers to these statements made in the opinions rendered with regard to his appeal proceedings: (1) In re Byrnes, supra, 26 Cal.2d 824, 161 P.2d 376, where in the light of petitioner's consecutive sentences, this court noted 26 Cal.2d at page 827, 161 P.2d at page 377: "* * * it is conceded that, as the petitioner has served his full term for the offenses of which he was convicted in the first trial, he cannot obtain relief as to them so far as imprisonment is concerned * * *" and (2) People v. Byrnes, supra, 84 Cal.App.2d 64, 190 P.2d 286, where in reviewing "the judgments in the first case", the District Court of Appeal similarly observed, 84 Cal.App. 2d at page 66, 190 P.2d at page 287, that petitioner "had served out the terms fixed as punishment under the judgments in the first prosecution before the decision of the Supreme Court in the habeas corpus proceeding [1945], and is now serving the sentences imposed under the judgments in the second case * * * In the habeas corpus matter the Supreme Court took note of the fact that the first judgments had been fully satisfied * * * saying, 26 Cal.2d [824], at page 828, 161 P.2d [376], at page 378: 'For although Byrnes served the full terms of imprisonment imposed under the judgments of conviction in the first action, that fact does not bar his right to an appeal * * *'" therefrom.

In opposing petitioner's claim to release, respondent maintains that petitioner is serving one continuous sentence as a total period of confinement fixed by the prison authorities rather than a series of separate, consecutive servitudes imposed upon him in pursuance of the original judgments of conviction—five years on each of seven counts. Respondent also notes that the "cumulative sentence," originally fixed by the Board of Prison Terms and Paroles at thirty-five years, was reduced thereafter to thirty years; that in so refixing the length of time of petitioner's imprisonment, the board treated it as a "single term of confinement" and without reference to the specific counts evidenced by the seven commitments, all of which then stood unimpeached against petitioner; that the judgments on the three offenses that were affirmed in the first action (People v. Byrnes, supra, 84 Cal.App.2d 64, 190 P.2d 286) will sustain a "cumulative sentence" of ninety years—twenty-five years as the maximum penalty provided by law for kidnapping, Pen.Code, sec. 208, fifty years for rape, Pen.Code, sec. 264, and fifteen years for sex perversion, Pen.Code, sec. 288a—independent of the reversed judgments on the four counts subject of the second action against petitioner (People v. Byrnes, supra, 84 Cal.App.2d 72, 190 P.2d 290); and that with credit allowances the reduced "cumulative sentence" will expire in approximately three years, but that petitioner will be eligible for parole as early as November, 1948, when his entire term of imprisonment will be subject to full reconsideration and redetermination by the Adult Authority in view of his "acquittal" on the retrial of the offenses charged in the second action.

[1] Respondent's position accords with the recent decision of this court in Re Cowen, 27 Cal.2d 637, at pages 645, 646, 166 P.2d 279, 283, wherein it was declared that: "* * * a prisoner serving consecutive sentences must be regarded as undergoing a single, continuous term of confinement thereunder for the purpose of redetermination by the Adult Authority of the length of time of his imprisonment. As in the case of the forfeiture of good time, any other result would nullify at least in part the results sought to be accomplished by the statute. Section 3021 of the Penal Code provides that 'When a prisoner has imposed upon him two or more cumulative or consecutive sentences, the board may determine and redetermine after the expiration of six months of his first sentence, what length of time he shall serve on *all* such cumulative or consecutive sentences' (italics added) without any suggestion that by the passage of time (short of the ultimate end of the entire term) the authority of the board (now the Adult Authority) to redetermine the length of time under some of such cumulative sentences is lost. The word cumulative means 'composed of accumulated parts; formed, or becoming larger, by * * * successive additions' (Webster's New Int. Dict., 2d Ed.) and the use of such word by the Legislature in section 3021, apparently as a synonym for consecutive, suggests that the several sentences are to be regarded as a unit in administering the law." And it was further said 27 Cal.2d at page 647, 166 P.2d at page 284: "The objection that the 'coalescing into one' of 'sentences which have no legal relation to each other,' is 'impossible,' is not persuasive. In the case of a prisoner who is serving concurrent sentences for crimes committed on separate occasions, perhaps in separate counties, the sentences are similarly, and unobjectionably, 'coalesced into one.' And consecutive sentences, even if regarded as separate and distinct for some purposes, necessarily coalesce into one aggregate term of confinement during which the prisoner is continuingly restrained of his liberty."

[2] While in the Cowan case the precise issue was the power of the Adult Authority to revoke credits theretofore earned by a prisoner confined under consecutive sentences and refix his total term of imprisonment after the first of such sentences had expired by reason of such credits, such right of reconsideration and redetermination was deemed to exist under our penal statutes not only in furtherance of the effective operation of the credit system but likewise for the successful administration of the whole theory of the law relating to consecutive sentences as premised on the concept of "a single, continuous term of confinement rather than a series of distinct, independent terms" (27 Cal.2d at page 643, 166 P.2d at page 282)—as appears from the above-quoted language. It therefore becomes immaterial here that petitioner had completed, according to the formula followed by the Board of Prison Terms and Paroles, the "full terms of imprisonment imposed under the [three] judgments of conviction [affirmed on appeal] in the first action" (People v. Byrnes, supra, 84 Cal. App.2d 64, 67, 190 P.2d 286) or that respondent in the prior habeas corpus proceeding had assumed the position that any and all questions which could be presented on appeal from the judgments of conviction in the first action had become "moot" since petitioner had "served his full term" therefor (In re Byrnes, supra, 26 Cal.2d 824, 827, 161 P.2d 376). The aforesaid board nevertheless had the power in 1944 to reconsider petitioner's "continuous term of confinement" in relation to his adjudicated guilt as it then stood unimpeached as to both actions. In re Albori, 218 Cal. 34, 36, 37, 21 P.2d 423. The subsequent reversal of the judgments of conviction on the four counts subject of the second action against petitioner (People v. Byrnes, supra, 84 Cal. App.2d 72, 190 P.2d 290), and then his "acquittal" thereon, did not render said board's reconsideration of his total term of

imprisonment, followed by the imposition of a thirty-year "cumulative sentence," void as an act beyond its jurisdiction nor require petitioner's release from custody when the maximum penalty prescribed by law for the valid convictions against petitioner in the first action was greater than the "term of imprisonment" as so redetermined. In re Mann, 192 Cal. 165, 166, 219 P. 71.

Petitioner's position is not strengthened by his reliance on the case of In re Shull, 23 Cal.2d 745, 146 P.2d 417, 418, involving an entirely different factual situation and distinct principles of law. There the Board of Prison Terms and Paroles had imposed upon the petitioner a term of ten years on a conviction for the commission of an assault with a deadly weapon (the maximum—Pen.Code, sec. 245) and an "additional five-year term" because of his possession of a pistol contrary to the provisions of the Deadly Weapons Act, Stats. 1923, p. 696, sec. 2, Deering's Gen.Laws, 1937, Act 1970, applicable to a person "previously convicted of a felony". The latter term was deemed improper because it constituted an "added penalty" for a factor—the "deadly weapon"—which as an integral part of the basic offense had already served to fix the full extent of the punishment therefor. With these considerations affecting the propriety of the petitioner's continued confinement, it was said 23 Cal.2d at pages 752, 753, 146 P.2d at page 420: "The record discloses that petitioner was entitled to certain credits for good behavior which were allowed him by the Board of Prison Directors. The allowance of these credits had the effect of reducing his term so that he was entitled to his release except for the additional five-year term imposed under section 3 of the Deadly Weapons Act. After the expiration of his term as so reduced, petitioner violated a regulation of the prison and all of his credits were declared forfeited. In declaring such forfeiture the board exceeded its authority. By reason of the allowance of credits, under the correct interpretation of the law, petitioner's term as reduced had expired and he was entitled to his discharge before the act upon which the forfeiture was based occurred. Section 2940 of the Penal Code provides that a prisoner shall be discharged upon completion of his term as fixed by the board. Section 2942 states that the discharge date mentioned in section 2940 'shall be shortened to the extent of any time credits allowed and not forfeited.' * * * [Accordingly] the petitioner is ordered discharged from custody."

[3, 4] Thus it appears in the Shull case that the voiding of the "additional term" entitled the petitioner to his immediate release from custody because he had then already served the maximum term, as reduced by credits, for the offense for which punishment had been validly imposed, and the "Board of Prison Directors", by a subsequent declaration of the forfeiture of such credits, could not breathe life into a total term of imprisonment which had come to an end. So the distinction is made in Re Cowen, supra, 27 Cal.2d 637, at page 643, 166 P.2d 279, at page 282 where "the holding" of the Shull case is quoted as follows: " 'once a prisoner has been allowed credits and by reason thereof his reduced term has expired, his term, as not reduced, may not thereafter be revived by a forfeiture of credits for conduct occurring after the expiration of his reduced term.' " But in the present case the board's redetermination of petitioner's "cumulative sentence" at thirty years still left his total term of confinement well within the maximum limits of punishment which the law prescribed as the aggregate penalty (ninety years) on the convictions on the three counts subject of the first action, and which were affirmed on appeal. People v. Byrnes, supra, 84 Cal. App.2d 64, 190 P.2d 286. While our penal statutes, Pen.Code, secs. 1168, 3020, 3021 permitting redetermination of the length of time of imprisonment do not make possible the imposition of a longer term than could have been imposed when the offenses were first committed, such principle was not violated here. Petitioner had no vested right to have his "term of confinement" for the three affirmed convictions fixed at fifteen years (computed on the formula basis of five years on each count) or any other period less than the maximum penalty provided by statute, and the subsequent voiding of his convictions on the four counts

subject of the second action (People v. Byrnes, supra, 84 Cal.App.2d 72, 190 P.2d 290) did not invalidate his previously redetermined sentence. However, in view of petitioner's later "acquittal" on the retrial of the four offenses subject of indictment in the second action, it is appropriate that the Adult Authority now reconsider his "term of confinement" solely in relation to the valid portion of his convictions. In re Kingsbury, 74 Cal.App.2d 959, 963, 170 P.2d 82.

The writ is discharged and the petitioner remanded.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR and SCHAUER, JJ., concur.

---

88 Cal.App.2d 353

PEOPLE v. ORMES.

Cr. 4252.

District Court of Appeal, Second District, Division 1, California.

Nov. 5, 1948.

1. Criminal law ⇨1023(10)

An appeal could not be taken from a verdict. Pen. Code, § 1237.

2. Criminal law ⇨982

Under statute, court could not impose fine exceeding $200 as a condition of probation of defendant convicted of perjury. Pen.Code, §§ 672, 1203.1.

3. Witnesses ⇨329

Wide latitude should be allowed in cross-examination for purpose of testing accuracy or credibility, especially if witness is a reluctant one, or is hostile, or if he is one of the parties in interest, or is a witness against a defendant in a criminal prosecution.

4. Witnesses ⇨280

On cross-examination, questions designed to test the knowledge, recollection, interest, mental condition, and character of the witness, and to elicit answers which will contradict his testimony, are proper.

5. Criminal law ⇨1153(4)
Witnesses ⇨267

Trial court has discretionary power over cross-examination which will not be disturbed on appeal unless abused.

6. Witnesses ⇨268(5)

In prosecution for perjury by falsely establishing an alibi for a defendant in a burglary prosecution restricting cross-examination which would have disproved the testimony of witness testifying on direct examination to facts establishing the falsity of the alibi was error.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Earl Ormes was convicted of perjury, and he appeals.

Order denying motion for new trial reversed, appeals from verdict and judgment dismissed, and order fixing term of defendant's probation directed to be modified.

Richard A. Haley, of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., and James A. Doherty, Deputy Atty. Gen., for respondent.

YORK, Presiding Justice.

Defendant Ormes was charged in an information with the crime of perjury, in that on December 18, 1945, after being properly sworn, he testified in behalf of one John D. Wade, who was then on trial for the crime of burglary, and that he "did then and there willfully, knowingly, corruptly, falsely and feloniously and contrary to said oath, swear, take oath, say and give in evidence certain evidence that he then and there knew to be false, and upon and about matters which were then and there material to the case on trial, being testimony in regard to persons present at a crap game in the City of Wilmington, and that one Jack Arnold was present at said crap game, and that said Jack Arnold presented said $50 check in said crap game"; further, that defendant's testimony was material to the issues in the trial of said John D. Wade "in that said testimony tended to show, and did show, an alibi for and on behalf of the said John D. Wade. That in truth and in fact, as he the said Earl Ormes then and there well knew, all of said testimony and statements and things so given, sworn to and stated by the said Earl Ormes in the evidence as aforesaid were then and there false and untrue, and he, * * * did then and there, as aforesaid, feloniously, willfully, knowingly and corruptly swear falsely and commit perjury."

The jury found defendant guilty, as charged. Thereafter defendant's motion for a new trial was denied, proceedings were suspended on April 30, 1948, and defendant was placed on probation for three years on condition that he pay a $250 fine through the probation officer and obey all laws and the probation officer.

Thereafter, defendant filed his notice of appeal from "the verdict and judgment * * * and also from the order denying defendant's motion for a new trial."

[1] Since there is no appeal from a verdict, and no judgment was ever entered herein, the attempted appeals from the verdict and judgment must be dismissed. Section 1237, Penal Code.

[2] Since section 126 of the Penal Code provides only imprisonment as punishment for perjury, and the case of People v. Kuhlman, 86 Cal.App.2d 566, 195 P.2d 53, holds that, under sections 672 and 1203.1 of the Penal Code, where the punishment provided for the crime is imprisonment only, the maximum fine which may be imposed as a condition of probation is the sum of $200, the order fixing the terms of defendant's probation should be modified by reducing the fine to be paid by him to the sum of $200.

By stipulation of counsel, it was agreed that Frank Gordillo and John D. Wade were tried and convicted in December, 1945, for the crime of burglary; that appellant Ormes, after being properly sworn, testified on behalf of said Wade and Gordillo; that a certain check drawn in the sum of $50 was deposited by and credited to the account of Gordillo. It was further stipulated that appellant's testimony given at the Wade-Gordillo trial might be read in the instant trial.

The check in question shows by perforations that it was deposited on August 22, 1945, and a clearing house stamp marked upon it bore the date of August 23. The check was dated August 19, 1945, which was a Sunday, and was made payable to the order of cash in the sum of $50 by one Maurine Questad. On the night of August 19th it was presented by the maker and cashed by one Leroy Nash, a bartender, employed at the Track Cafe in Pasadena. After the close of business that night, Nash placed said check in a money sack which he turned over to the manager of the cafe, Mr. Francis J. Gagnon, who hid the sack in the cafe before he left that evening. On August 20, 1945, the Track Cafe was burglarized, and on September 3 or 4, 1945, a money sack, which was identified as one set up "for the handling of the money out of one of the cash drawers" of the Track Cafe, was found in the home of John D. Wade, one of the persons above referred to as having been convicted of burglary.

Appellant herein was called as a witness in behalf of John D. Wade during the burglary trial. His testimony therein, which was read into the record at the instant trial, showed that he had known Wade for a period of five years and had been employed by Wade; that appellant also knew one Jack Arnold, recalling that the first time he remembered seeing him was in a crap game at Terminal Island, during the lunch hour, at approximately 12:05 or 12:10 p. m., on a day in the latter part of August, 1945; that appellant, Gordillo and Arnold were among the ten or twelve persons playing the game; that Wade was there but was not in the game; that the Jack Arnold referred to was a part owner of the Track Cafe; that a check for $50 identified as the same check which was given to Leroy Nash on August 19th, was introduced into the crap game; that Gordillo said, "Arnold, is that check any good?" to which the latter replied: "Well, of course, it is good. I know it is good." That later, when appellant had acquired an interest in the check, Arnold repeated: "It is good. I stand back of it." That at the end of the game, Gordillo was in possession of the check.

On cross-examination in the burglary trial, appellant testified that he did not know who first introduced the check into the game; that Arnold won a sum of money in the game; that such crap games were an almost daily occurrence; that checks did not appear frequently in crap games; that he did not know who wrote this particular check, did not know its date and did not examine it.

Mr. Jack Arnold testified that he was not in Wilmington on August 20, 1945, between the hours of 11:00 and 1:00 p. m.; that he did not take part in a crap game in Wilmington on that particular day; that he did not see appellant or the check in question on that day; that in fact he did not see the check until the burglary trial in December, 1945, several months after the date of the alleged crap game.

Miss Amelia Hammack, who was employed as bookkeeper and secretary at the Track Cafe, testified that she had lunch with Mr. Arnold at the cafe in Pasadena on August 20, 1945, and that she saw him around the cafe from 10:00 a. m. until about 5:00 p. m., when she finished work for the day.

On cross-examination of Mr. Arnold, the following took place:

"By Mr. Haley: Q. You still own the Track Cafe, Mr. Arnold?

"Mr. Galliano: Objected to as immaterial.

"The Court: Sustained, and not proper cross-examination as well.

"Mr. Haley: Q. Now, you were a friend and acquaintance of John Wade before this burglary, weren't you? A. I knew him, yes.

"Q. Well, you used to work with him. You had a business with him, didn't you? A. Yes, I did.

"Q. You also were a friend of Gordillo's, weren't you? A. Well, I wasn't a friend. I knew him.

"Q. Well, you worked with him, didn't you? A. No, I was employed by the same concern.

"Q. Yes, Western Pipe and Steel, is that correct? A. Yes.

"Q. And Gordillo worked there with you? A. Yes.

"Q. You were also acquainted with Rose and Rose's Cafe on 133rd and Broadway?

"Mr. Galliano: Objected to as immaterial and not proper cross-examination.

"The Court: Sustained.

"Mr. Haley: May counsel approach the bench?

"The Court: Yes, sir. (The following discussion took place between the court and counsel out of the hearing of the jury.)

"Mr. Haley: I want to show, if the Court please, a background of gambling activity to prove and show the basis for the fact that this man was in the crap game at Wilmington on the day we are speaking of.

"The Court: All right, but that won't prove it.

"Mr Haley: That is our offer of proof, if the Court please.

"The Court: How do you connect Rose's Cafe up with it?

"Mr. Haley: Rose's Cafe is one of the places they gambled. There is another place I have in my notes. All of these boys gambled all these years from 1942 right down to the present day. That is my line of defense, the line of questions I wanted to ask, and it is proof I wanted to offer.

"The Court: The objection will be sustained. (Counsel resumed their places at counsel table and the following proceedings were before the jury.)

"Mr. Haley: Q. Where do you live now, Mr. Arnold? "A. At the moment I am staying at the Villa Riviera in Long Beach.

"Q. Now, then, you have spent a good deal of time around Wilmington, California, haven't you?

"Mr. Galliano: Objected to as immaterial.

"The Court: Sustained. We are only concerned with whether or not he was there on that particular day.

"Mr. Haley: Well, if the Court please, these are preliminary to that question.

"The Court: The objection is sustained.

"Mr. Haley: Q. Now, then, at or about the 20th day of August, or thereabouts, you did indulge in gambling games, did you not, Mr. Arnold? A. I don't quite understand the question.

"Q. On the 20th day of August—was it 1945, counsel?

"Mr. Galliano: Yes.

"Mr. Haley: Q. On the 20th day of August, 1945, at or about that time, did you engage in gambling games?

"Mr. Galliano: I think that is immaterial, if the Court please.

"The Court: Sustained.

"Mr. Galliano: And vague and indefinite.

"Mr. Haley: Q. Well, on or about the 20th day of August, 1945, did you engage in a poker game with Tommy Morgan and Mr. Brown?

"Mr. Galliano: Objected to as immaterial.

"The Court: Sustained.

"Mr. Haley: No further questions.

"Mr. Galliano: All right, will you step down, please, Mr. Arnold?"

Appellant took the stand in his own defense and acknowledged that the testimony read into the record from the previous trial was his testimony and stated that it was true and honest as to the best of his knowledege and belief. On cross-examination, he denied he had conferred with Cordillo and Wade with respect to the testimony he would give at their trial, except that they asked him if he remembered the crap game and the check incident, and he told them that he did. In answer to the question: "As a matter of fact, you did not see Mr. Arnold in Wilmington on the 20th day of August of 1945, did you?" this witness stated: "I don't know the exact date. He was there the day I testified to this particular crap game. I don't recall the date."

Appellant here urges that the evidence is insufficient to justify the verdict, because of lack of sufficient corroboration and failure to show that the defendant knowingly testified falsely; also that the court erred in its decisions on matters of law arising during the course of the trial.

The check in question was made and cashed at the Track Cafe on the 19th of August, 1945; the cafe was robbed on the 20th, and the check was deposited on the 22nd by Gordillo, who was later convicted of burglarizing the cafe. These facts raise the inference that the check was stolen from the cafe, and the conviction of Wade and Gordillo further establishes that the check was stolen by them.

Appellant placed the crap game, in which the check made its appearance, at Wilmington during the lunch hour of a day in the "latter part of August, 1945." However, the prosecution in questioning the witnesses Arnold and Hammack confined itself with what occurred on August 20, 1945. In fact, except for the statement of Arnold that he never saw the check until the burglary trial in December, 1945, the only material evidence produced by the prosecution was the testimony of Arnold that he was not in Wilmington on August 20, 1945, together with the testimony of Miss Hammack that she had lunch with him on that day and saw him at the Track Cafe in Pasadena from 10:00 a.m. until 5:00 p.m. when she left the place for the day.

In this state of the record, appellant's contention that the trial court committed prejudicial error in sustaining objections to the questions asked of Jack Arnold on cross-examination must be sustained.

[3] As stated in 27 Cal. Jur. 96, sec. 76: "The authorities all agree that wide latitude should be allowed in cross-examination for the purpose of testing accuracy or credibility, especially if the witness is a reluctant one, or is hostile, or if he is one of the parties in interest, or *is a witness against a defendant in a criminal prosecution.*"

[4] Again in the same work at page 103, sec. 78: "A witness may be cross-examined for the purpose of testing his accuracy, veracity or credibility, and great liberality is shown in the allowance of

questions directed to that end. Thus it is proper to ask questions which are designed to test the knowledge, recollection, interest, mental condition and character of the witness, and likewise to elicit answers which will contradict his testimony."

[5] In People v. Serpa, 67 Cal.App.2d 327, 332, 154 P.2d 6, 9, the court stated: "* * * that while wide latitude should be allowed in cross-examination for the purpose of testing accuracy or credibility, especially if the witness is a reluctant one, or is a witness against a defendant in a criminal case, nevertheless the trial court has discretionary power over cross-examination which will not be disturbed on appeal unless it appears that there has been an abuse of such discretionary power; that thus the trial court may confine an examination within reasonable limits, or may curtail a cross-examination which is unduly protracted, frivolous, or which relates to matters which are irrelevant, or have already been covered * * * ."

Again, in People v. Williams, 43 Cal. App. 60, 65, 184 P. 498, 500, appears a statement by the court which is particularly applicable to the facts presented by the instant prosecution: "The utmost latitude compatible with our rules of evidence should have been permitted in the cross-examination of that witness. The record shows other instances where the cross-examination was held, within boundaries more restricted than is usual under circumstances where the guilt of the defendant depends to a considerable extent, not only upon indirect evidence, but also upon the credibility of a single witness."

[6] It is obvious that in sustaining the objections of the prosecution to the questions asked of Mr. Arnold upon cross-examination, appellant's substantial rights were prejudiced, for the reason that had such evidence gone to the jury, they could and might have drawn therefrom an inference that Mr. Arnold was in a crap game at the time testified to by appellant. Such evidence went directly to the credibility of Mr. Arnold's denial that he was present at such crap game, and therefore it should have been allowed. Restricting the cross-examination to the extent it was done in this cause, amounted to an abuse of discretion on the part of the trial court.

In view of the conclusion here reached, it is not deemed necessary to pass upon other points made by appellant in this appeal.

For the reasons stated, the order denying appellant's motion for a new trial is reversed. The appeals from the verdict and from the judgment are dismissed, and it is directed that the order fixing the terms of appellant's probation be modified by reducing the fine to $200.

DORAN and WHITE, JJ., concur.

88 Cal.App.2d 303

NELSON v. REILLY et al.

Civ. 16202.

District Court of Appeal, Second District,
Division 3, California.
Nov. 3, 1948.

1. Mandamus ⇨16(1)

A licensed liquor retailer's centention that when he filed mandamus petition to compel rescission of rule of State Board of Equalization requiring such licensees to enter into fair trade contracts, Alcoholic Beverage Control Act did not render operation under such contracts obligatory, raised only moot question, in view of subsequently added section requiring retail sale of distilled spirits pursuant to such contracts. Gen.Laws, Act 3796, §§ 55.5, 55.6.

2. Administrative law and procedure ⇨390
Trade-marks and trade-names and unfair competition ⇨80½

Provisions of rule of State Board of Equalization, requiring that fair trade contracts, filed with board by manufacturers, wholesalers and rectifiers of distilled spirits, state minimum resale prices to consumers, minimum retail prices chargeable by purchasers from vendees, and discounts offered, and provisions as to obtaining permission for "close out" sales, are valid as setting up reasonable means for administration of act. Gen.Laws, Act 3796, §§ 55.5, 55.6.

3. Trade-marks and trade-names and unfair competition ⚷68(2)

If there is irreconcilable conflict between state Anti-Trust Law and provisions of subsequently enacted Alcoholic Beverage Control Act, legalizing fair trade contracts in liquor industry, later legislation must control. Gen.Laws, Act 3796, §§ 55.5, 55.6; Act 8702.

◆

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Proceeding by B. B. Nelson for a writ of mandate commanding George R. Reilly and others, members of the State Board of Equalization, to rescind and set aside the Board's rule requiring persons licensed to sell whiskey or domestic brandy to enter into fair trade contracts. From a judgment of dismissal, plaintiff appeals.

Affirmed.

Leslie S. Bowden and Frank Mergenthaler, both of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for respondents.

SHINN, Presiding Justice.

Appellant, B. B. Nelson, filed his petition for a writ of mandate directed to the members of the State Board of Equalization, commanding them to rescind and set aside a certain regulation of the board, effective March 1, 1947, known as Amended Rule 99, which rule requires those licensed to sell whiskey or domestic brandy to enter into fair trade contracts for which provision is made by section 55.5 of the Alcoholic Beverage Control Act, Gen.Laws, Act 3796, Stats.1935, p. 1123. He alleged that he is duly licensed under the laws of the State of California to engage in the business of retailing intoxicating liquors and is so engaged, and that the said regulation is unreasonable, contrary to law and will, if enforced, cause him irreparable damage in that it will deprive him of the right to fix or establish the retail selling price of his merchandise. The general demurrer of the respondents to the petition was sustained without leave to amend and the proceeding was dismissed by judgment rendered June 23, 1947. Petitioner appeals.

Appellant's attack upon the rule is based upon a state of the law which no longer exists. A premise from which his argument proceeds is that at the time the regulation was promulgated by the board, fair trade contracts of the type described in the rule were declared by section 55.5 of the control act to be lawful but were permissible only, whereas, by the rule they are made compulsory. Appellant contends that no authority had been or could be delegated to the board by the legislature to enact regulations having the force of law which would require retail licensees to enter into and comply with fair trade contracts. The theory appears to be that such a regulation would not be within the policy and purpose of the control act and that the legislature alone had the power to require licensees to operate under fair trade contracts.

Section 55.5 declares that no contract relating to the sale or resale of any alcoholic beverage which bears the trademark, brand, or name of the producer or owner, and which is in fair and open competition with alcoholic beverages of the same general class produced by others, shall be deemed in violation of any law of the state by reason of provisions therein (1) that the buyer will not resell such alcoholic beverage except at the price stipulated by the vendor; (2) that the producer or vendee of the alcoholic beverage require, on the sale thereof to another, that such purchaser agree that he will not, in turn, resell except at the price stipulated by such producer or vendee. Further provision is made respecting conditions under which alcoholic beverages may be resold without reference to the agreement but such provisions are not here involved.

Said amended rule 99 requires every manufacturer, manufacturer's agent, wholesaler and rectifier, to file with the board copies of his fair trade contracts stating, as to whiskey and domestic brandy, the containers of which bear labels stating the brand or name of the owner or producer, (1) the minimum resale price to consumers; (2) the minimum retail price that any purchaser from the vendee shall charge at the retail to consumers; (3) any discounts offered. Sales are required to be made at not less than the stipulated prices. Other provisions of the rule are incidental to the foregoing provisions.

In 1947, Stats.1947, p. 1698, a new section numbered 55.6 was added to the Control Act, reading, in part, as follows: "All distilled spirits sold at retail shall be, and any other alcoholic beverage may be, sold pursuant to a contract executed under the provisions of Section 55.5 of this act. No licensee shall violate any of the provisions of said contract.

"Every distilled spirits manufacturer, brandy manufacturer, rectifier and wholesaler shall file and maintain with the board a price list showing the prices at which distilled spirits are sold to retailers by such licensee. Sales of distilled spirits to retailers by each distilled spirits manufacturer, brandy manufacturer, rectifier and wholesaler shall be made in compliance with the price list of such licensee on file with the board.

"The board may adopt such rules and regulations as it may determine to be necessary for the administration of this section."

[1, 2] Although prior to the enactment of section 55.6 appellant was conducting his business under fair trade contracts because of and pursuant to the rule in question, his duty now is derived from the statute. The fact that the rule imposes the same duty presents no question as to the powers of the board to adopt the rule. The objection that at the time his petition was filed it was not obligatory under the Control Act to operate under fair trade contracts raises only a moot question. Other provisions of the rule with relation to the statement of minimum resale prices to consumers, the prices to be fixed for resale to consumers, discounts offered, and the obtaining of permission for "close out" sales are not questioned by appellant and are obviously valid. They set up reasonable means for administration of the act and were properly adopted under the powers of the board to make rules and regulations such as it may deem necessary for that purpose.

[3] Although the principal question argued by appellant has become moot, and the appeal would be subject to dismissal on that ground, there is an additional point raised by him that should be disposed of. He argues that if rule 99 was otherwise valid, as the law stood prior to the enactment of section 55.6, the requirement for fair trade contracts would be invalid for the reason that it would be in conflict with the Cartwright Anti Trust Law of 1907. Act 8702, Deering's General Laws. It is claimed that price fixing agreements, such as those authorized by the Control Act, would be illegal under the Cartwright Law. We need not consider that question. If there is an irreconcilable conflict between the earlier legislation and the provisions of the Control Act which legalizes fair trade contracts in the liquor industry, the later legislation must control.

The judgment is affirmed.

WOOD and VALLEE, JJ., concur.

---

88 Cal.App.2d 313

EMDEN v. VITZ et al.

Civ. 16251.

District Court of Appeal, Second District, Division 3, California.

Nov. 3, 1948.

Hearing Denied Dec. 30, 1948.

1. Damages 🔑50

Recovery may be had where physical injuries are the consequence of mental or emotional excitation caused by wrongful conduct as well as where physical injuries are the direct and immediate result of wrongful conduct.

2. Damages 🔑50
Torts 🔑5

If nerves are affected or entire nervous system is affected by defendant's wrongful conduct, there is a physical injury thereby produced for which defendant is liable, and if the primal cause of injury is tortious, it is immaterial whether it is direct, as by a blow, or indirect through some action on the mind.

3. Torts ⚿15

If bodily harm is the direct result of mental condition without any intervening cause, the act which caused the condition set in motion the agencies by which the injury was produced, and is the proximate cause of such injury.

4. Torts ⚿6

Once the wrongful quality of defendant's conduct inducing physical harm to plaintiff through its effect on mind and nervous system is established, plaintiff can recover for such physical harm whether conduct consists of acts alone or of acts accompanied by words, or of mere spoken words alone.

5. Threats ⚿10

Where defendants, by shouting at plaintiff and threatening her, intentionally and unreasonably subjected plaintiff to severe mental distress and fright with result that plaintiff suffered an acute upset of her glandular system causing nervousness and unstable pulse, heart beat, and blood pressure, defendants were liable for those injuries.

6. Constitutional law ⚿90

The constitutional right of freedom of speech is not a license for commissions of crimes or the malicious oppression of one's fellow citizens.

7. Constitutional law ⚿90

Judgment for personal injuries suffered by plaintiff as result of fright caused by defendants' threatening words, did not infringe on defendants' constitutional right of freedom of speech.

◆

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action by Helen Emden against Jacob L. Vitz and others, to recover damages for loss of personalty and for injuries. From a judgment in favor of the plaintiff, the defendants appeal.

Judgment affirmed.

Bertram H. Ross, of Los Angeles, for appellants.

Jones & Hoyt and George A. Elstein, all of Los Angeles, for respondent.

SHINN, Presiding Justice.

Defendants, the owner, manager and assistant manager of the Hermoyne Apartments in Los Angeles, appeal from a judgment awarding plaintiff damages for loss of personal property and for personal injuries. The action arose in the following manner.

Prior to October 10, 1945, the Hermoyne Apartments were in the possession and control of the California Building and Loan Commissioner, as administrator of the assets of Pacific States Savings & Loan Company. Prior to August 31, 1945, apartment 509 in the said building was leased on a month-to-month tenancy to one Victor G. Emden, father-in-law of the plaintiff in the present action. On August 31, 1945, Victor G. Emden having died, the said apartment was rented to plaintiff on a month-to-month tenancy, and she then paid the rental for the month of September. Plaintiff was given a receipt for the rent, placed in possession, and provided with a key, and the building employees were informed that she was a tenant. She moved in some personal belongings during September, and with the knowledge and consent of the management, used the apartment from time to time, though not as a permanent residence. By check dated October 1, 1945, plaintiff duly paid the rent for the month of October, and received a receipt therefor. On October 10, 1945, defendant Vitz completed the purchase of the Hermoyne Apartments from the Building and Loan Commissioner, and immediately entered into possession and control thereof. As part of this purchase arrangement, the October rentals were prorated as of October 10th, and the price was adjusted accordingly. Vitz' two daughters, Mrs. Barber and Mrs. Seigal, also defendants in this action, were designated by him as manager and assistant manager of the apartment.

On the evening of October 13th, when plaintiff attempted to enter apartment 509, she found that her key would not open the door. She went to the manager's office to complain, and to seek assistance. Mrs. Seigal heard her complaint, and then invited her into Mr. Vitz' private office where she found Vitz and Mrs. Barber awaiting her. Vitz told plaintiff she could not have the apartment. Mrs. Seigal leaned against the door so that plaintiff could not leave; and then she and Vitz yelled and screamed at plaintiff, saying the OPA could not run the property, while defendant Barber shook some papers at her, saying, "You haven't got an apartment here, we will select our own tenants." The court found upon ample evidence that the conduct of defendants as detailed by plaintiff caused plaintiff to become frightened, and as a proximate result thereof, to suffer an upset to her glandular condition, causing shortness of breath, pains about the heart, nervousness, headaches, loss of sleep, and inability to carry on her normal activities. There was evidence to support these findings as to the physical consequences of plaintiff's emotional distress. Her own testimony on the subject was corroborated and amplified by that of her physician, Dr. Billig, who stated that plaintiff had suffered an acute upset of her glandular condition in October, 1945, marked by excessive secretions of insulin in the Islands of Langerhans and pancreas, increase in nervous sensitivity, considerable lability of pulse and heart beat, and unstable blood pressure. Dr. Billig's opinion was that this condition was caused by "some sort of upset or emotional experience," and he stated that plaintiff had said in her history "that her experience was an upset from an apartment of some sort." He testified further that glandular imbalance is a "very serious" condition.

It was shown that Mrs. Barber, with the approval of Vitz, had ordered plaintiff's apartment to be bolted from the inside, thereby preventing her from gaining access thereto. On October 15th, plaintiff, in the presence of two policemen, exhibited to defendants her receipts and cancelled checks for the rent, and formally demanded admittance to the apartment, but was refused. Again on October 31st, plaintiff tendered a check for the November rent to Mrs. Barber, who refused to accept it. Plaintiff then requested that she be allowed to remove her personal belongings from apartment 509, but this request was also denied. The court found that defendants had unlawfully and without excuse or provocation, evicted plaintiff from her apartment and refused to permit her to enter to remove her personal belongings therefrom. Judgment was accordingly entered, awarding plaintiff $1,000 damages for loss of personal property, and $2,000 for personal injuries.

The only material issue raised by defendants' appeal involves the propriety of the award of damages for personal injuries under the circumstances shown. Appellants do not question the sufficiency of the evidence to support the court's findings, but contend that there can be no cause of action for personal injuries resulting from fright caused chiefly by spoken words alone.

[1, 2] In respect to the right to recover damages for personal injuries resulting from an emotional or mental disturbance, it has been said that "the authorities are in a state of dissension probably unequalled in the law of torts." (52 Am.Jur., "Torts," sec. 55, p. 399.) It must be conceded that the law has been reluctant to accord general protection to the interest in one's peace of mind or emotional tranquillity as such, largely, perhaps, because of the commonsense view that "against a large part of the frictions and irritations and clashing of temperaments incident to participation in a community life, a certain toughening of the mental hide is a better protection than the law could ever be." (Magruder, Mental And Emotional Disturbance In The Law of Torts, (1936) 49 Harv.L.Rev. 1033, 1035.) The interest in physical well-being, on the other hand, has long been accorded extensive legal protection (see cases cited below; Pound, Interests in Personality, (1915) 28 Harv.L.Rev. 343, 355–62), and it would seem clear that, contrary to appellants' contention, the right to maintain an action for a wrongful invasion of this latter interest cannot validly turn upon any

supposed distinction between cases where the physical injuries are the direct and immediate result of the defendant's wrongful conduct, and cases where they are the consequence of mental or emotional excitation caused by that conduct. The fallacy inherent in any such distinction was pointed out by the Supreme Court in Sloane v. Southern Cal. Ry. Co., 111 Cal. 668, 680, 44 P. 320, 322, 32 L.R.A. 193: "It is a matter of general knowledge that an attack of sudden fright, or an exposure to imminent peril, has produced in individuals a complete change in their nervous system, and rendered one who was physically strong and vigorous weak and timid. Such a result must be regarded as an injury to the body rather than to the mind, even though the mind be at the same time injuriously affected. Whatever may be the influence by which the nervous system is affected, its action under that influence is entirely distinct from the mental process which is set in motion by the brain. The nerves and nerve centers of the body are a part of the physical system, and are not only susceptible of lesion from external causes, but are also liable to be weakened and destroyed from causes primarily acting upon the mind. If these nerves, or the entire nervous system, are thus affected, there is a physical injury thereby produced; and, if the primal cause of this injury is tortious, it is immaterial whether it is direct, as by a blow, or indirect, through some action upon the mind."

[3] It is clear, furthermore, that the court in the Sloane case regarded the right to recover in such a case as dependent upon the nature of the results rather than the nature of the tortious conduct, for after reviewing the cases of Bell v. Great Northern Ry. Co., (1890) L.R. 26 Ir. 428 and Purcell v. St. Paul City Ry. Co., 48 Minn. 134, 50 N.W. 1034, 16 L.R.A. 203, the court went on to state (111 Cal. page 683, 44 P. page 323): "The mental condition which superinduced the bodily harm in the foregoing cases was fright, but the character of the mental excitation by which the injury to the body is produced is immaterial. If it can be established that the bodily harm is the direct result of the condition, without any intervening cause, it must be held that the act which caused the condition set in motion the agencies by which the injury was produced, and is the proximate cause of such injury." Accord Alabama Fuel & Iron Co. v. Baladoni, 15 Ala.App. 316, 73 So. 205, 207; Green v. T. A. Shoemaker & Co., 111 Md. 69, 73 A. 688, 691, 692, 23 L.R.A.,N.S., 667; cf. Salmi v. Columbia & N. R. R. Co., 75 Or. 200, 146 P. 819, 820, L.R.A.1915D, 834.

It may be conceded that the foregoing propositions, although firmly based upon well-recognized principles of tort law, have not met with universal application, for a definite cleavage of opinion exists among the authorities from the various jurisdictions as to whether an action for personal injuries resulting solely from fright or other mental distress may be maintained in the absence of some contemporaneous impact or injury to the plaintiff, however slight it might be. See cases collected in Hallen, Damages for Physical Injuries Resulting From Fright or Shock, (1933) 19 Va.L.Rev. 253; 98 A.L.R. 402; 76 A.L.R. 682; 40 A.L.R. 983; 11 A.L.R. 1120. The doctrine announced in Sloane v. Southern Cal. Ry. Co., supra, however, has been consistently followed in California, and recovery has been granted for physical injuries resulting, without impact, from mental distress in a variety of circumstances. Lindley v. Knowlton, 179 Cal. 298, 176 P. 440 [marauding chimpanzee]; Webb v. Francis J. Lewald Coal Co., 214 Cal. 182, 4 P.2d 532, 77 A.L.R. 675 [vehicle crashing into plaintiff's store]; Cook v. Maier, 33 Cal.App.2d 581, 92 P.2d 434 [semble]; Madeiros v. Coca-Cola Bottling Co., 57 Cal.App.2d 707, 135 P.2d 676 [disgusting looking object in bottle of beverage]. Similar decisions have been rendered in other jurisdictions, where spoken words alone have been held actionable if physical injuries resulted. Whitsel v. Watts, 98 Kan. 508, 159 P. 401, L.R.A. 1917A, 708 [violent and indecent language]; Erwin v. Milligan, 188 Ark. 658, 67 S.W.2d 592 [insulting proposals]; Johnson v. Sampson, 167 Minn. 203, 208 N.W. 814, 46 A.L.R. 772 [false accusation of unchastity]; Janvier v. Sweeney, [1919] 2 K. B. 316 [false accusation of being a spy]; Bielitski v. Obadiak, (Sask.Ct.App.) 65

Dom.L.R. 627 [false report that plaintiff's son had hanged himself].

[4] As these and other cases cited above amply illustrate, the nature of the wrongful conduct which induces physical harm through its effect on the mind and nervous system is generally immaterial. The determination whether or not given conduct is legally wrongful, of course, may involve factual distinctions of importance and substance (compare Rest., Torts, sec. 312 with ibid. sec. 313); but once the wrongful quality is established, it matters not whether that conduct consisted of acts alone, or of acts accompanied by words, or of mere spoken words alone, for the legal inquiry in each case is thenceforth confined to the wellestablished channels of proximate cause and damages.

Appellants' contention that the rule permitting the maintenance of the action would be impractical to administer and would flood the courts with litigation is but an argument that the courts are incapable of performing their appointed tasks, a promise which has frequently been rejected. See Simone v. Rhode Island Co., 28 R.I. 186, 66 A. 202, 206, 9 L.R.A.,N.S., 740; Chiuchiolo v. New England Wholesale Tailors, 84 N.H. 329, 150 A. 540, 543; Kenney v. Wong Len, 81 N.H. 427, 128 A. 343, 347; Note, 3 L.R.A., N.S., 51. See Throckmorton, Damages For Fright, (1921) 34 Harv.L.Rev. 260, 274.

[5] Considered in relation to the applicable legal principles, it cannot be doubted that the present case affords a sound basis for recovery. The evidence justified a conclusion that defendants intentionally and unreasonably subjected plaintiff to severe mental distress involving a risk of causing physical harm; and by clear and uncontradicted evidence, it was proven that substantial physical injuries were actually incurred by plaintiff as a proximate result of fright engendered by the said conduct of defendants. Liability under these circumstances is manifestly correct. (Rest., Torts, sec. 312.)

[6, 7] Appellants also claim that the judgment infringes upon their Constitutional right of freedom of speech. We mention the point only to remark that the right is not a license for the commission of crimes or the malicious oppression of one's fellow citizens. A decent respect for the right of free speech requires that it be protected against abuse.

The judgment is affirmed.

WOOD and VALLEE, JJ., concur.

88 Cal.App.2d 210

SECURITY-FIRST NAT. BANK OF LOS ANGELES v. WELLSLAGER et al.

Civ. 16539.

District Court of Appeal, Second District, Division 2, California.

Oct. 26, 1948.

Hearing Denied Dec. 23, 1948.

1. Constitutional law 🔑93(1)
Wills 🔑736

The probate Code providing for the apportionment of the federal estate tax was applicable to beneficiaries of a revocable trust executed before passage of the code which was in effect at time of trustor's death and such application did not deprive beneficiaries of any vested right. Probate Code, §§ 970–977.

2. Internal revenue 🔑982

The federal estate tax is not an inheritance tax but is a tax on the interest which is shifted; an excise upon the transfer of an estate on the death of the owner.

3. Evidence 🔑65

A trustor was presumed to know the law, including changes made therein after the execution of the trust.

4. Trusts 🔑112

The intent of the trustor must be ascertained from the instrument alone.

5. Executors and administrators 🔑1
Trusts 🔑1

The "principal" of a decedent's estate or of a trust is the corpus or main body of the estate or trust as distinguished from income, whereas the "residue" is that which remains after a part is taken, separated, removed or designated or that which remains after the satisfaction of all debts and previous devices and bequests.

See Words and Phrases, Permanent Edition, for all other definitions of "Principal" and "Residue".

6. Internal revenue ⚿1732
Wills ⚿736

The statute providing for equitable apportionment of federal estate tax requires an apportionment within the fund and does not contemplate an apportionment between principal and income, but refers to apportionment among beneficiaries. Probate Code, §§ 970–977.

7. Internal revenue ⚿1746
Wills ⚿736

Where there was no direction in declaration of trust as to apportionment within the fund of the federal taxes, and the only direction was that the taxes should be paid out of the principal, the Probate Code directing equitable apportionment of federal estate tax in absence of a contrary direction applied. Probate Code, §§ 970–977.

8. Trusts ⚿274(3)

In action by trustee for declaratory judgment as to apportionment of federal estate tax the attorney's fee allowed the trustee was properly directed to be paid in the same manner and out of the same fund that other trustee expenses were paid.

9. Trusts ⚿274(3)

Where attorney's fee was allowed trustee in action for declaratory judgment, such allowance would be properly chargeable to principal of the trust estate as an administrative expense, particularly in absence of any indication in trust instrument that any part of attorneys' fees or administrative expenses should be charged against the specific bequests and fact that payment out of principal would decrease residue was immaterial.

◆

Appeals from Superior Court, Los Angeles County; J. A. Smith, Judge.

Action by Security-First National Bank of Los Angeles against Elmer S. Wellslager and others for a declaratory judgment construing declaration of trust, together with amendments thereto particularly with respect to the payment and apportionment of the federal estate taxes. From a judgment ordering such taxes to be apportioned and pro rated in accordance with provisions of the probate code and awarding plaintiff $2,500 as counsel fee, to be paid in the same manner and out of same fund as other expenses the defendants Luther M. Grimes and Jessie T. Grimes appeal, and from that portion of the judgment allowing counsel fee to plaintiff so far as it failed to decree that such fee together with costs and disbursement should be paid pro rata by all the persons and corporations interested in the trust estate whose interests under the trust were or might be affected by the apportionment or proration of the federal estate tax the defendants Plymouth Congregational Church and Ponoma College appeal.

Judgment affirmed.

Lyman A. Garber, of Beverly Hills, and Luther M. Grimes, for appellants-respondents Grimes.

Johnson & Ladenberger, of Los Angeles, for respondent Coe College.

Schweitzer & Schweitzer and Brady & Nossaman, all of Los Angeles, for respondents Plymouth Congregational Church and Pomona College.

WILSON, Justice.

On August 6, 1938, Emma W. Whisenand created a revocable trust with the Security-First National Bank of Los Angeles. The declaration of trust provided for the payment of the income from the trust estate to the trustor during her lifetime and for the disposition of the property upon her death. The trustor died on October 3, 1944, leaving an estate which was subject to federal estate taxes in addition to the trust estate. This action for declaratory relief was brought by plaintiff Security-First National Bank of Los Angeles, as trustee, for the purpose of having the court construe the declaration of trust, together with the amendments thereto, particularly with respect to the payment and apportionment of the federal estate taxes.

From a judgment ordering such taxes to be apportioned and prorated in accordance with the provisions of sections 970 to 977, inclusive, of the Probate Code and awarding plaintiff $2,500 as counsel fees to be paid in the same manner and out of the same fund as other expenses are paid, defendants Luther M. Grimes and Jessie T. Grimes appeal. Defendants Coe College, Plymouth Congregational Church and Pomona College appeal from that portion of the judgment allowing counsel fee to plaintiff insofar as it failed to decree that such fee, together with costs and disbursements, shall be paid pro rata by all the persons and corporations interested in the trust estate whose interests under the trust were or might be affected by apportionment or proration of the federal estate tax.

The declaration of trust provides, in paragraph (10) thereof, as follows: "The Trustee shall pay out of principal, to the extent that this trust shall be included in the gross estate of the Trustor for the purpose of determining estate taxes, a ratable share of such taxes based upon the value of the trust estate and of the Trustor's estate as determined for estate tax purposes by the authority assessing such tax."

It is conceded by both appellants and respondents that the trust estate shall bear its ratable share of the federal estate tax. The only controversy upon this point is whether the tax should be paid out of the residue of the trust estate or apportioned among the beneficiaries in accordance with the provisions of sections 970 to 977, inclusive, of the Probate Code.

Paragraph (4) of the trust instrument, pertaining to the disposition of the property after the trustor's death, was entirely rewritten by an amendment dated August 16, 1939, and the provisions of that paragraph relative to the benefits to one of the named beneficiaries were modified by an amendment dated April 24, 1940. In general, these provisions as amended provide (1) for the payment of certain specified sums, subject to deduction for inheritance taxes, to twenty-three designated beneficiaries, among who are defendants Luther M. Grimes and Jessie T. Grimes, (2) from the remaining trust estate, the payment of $3,000, subject to deduction for inheritance taxes, to each of six named Iowa institutions and (3) if any trust estate remains the residue, also subject to inheritance taxes, to go in equal shares to Coe College, Cedar Rapids, Iowa, Pomona College, Claremont, California, and Plymouth Congregational Church, Des Moines, Iowa.

Section 970[1] of the Probate Code provides that in the absence of a direction by the trustor to the contrary, the federal estate tax "shall be equitably prorated among the persons interested in the estate to whom such property is or may be transferred or to whom any benefit accrues." Section 977 defines "Person interested in the estate" as "any person who receives or is the beneficiary of any property transferred pursuant to a transfer which is subject to a tax imposed by any Federal estate tax law, now existing or hereafter enacted." Section 972 provides that "In making a proration allowances shall be made for any exemptions granted by the act imposing the tax and for any deductions allowed by such act for the purpose of arriving at the value of the net estate."

Similar statutes have been enacted in other states. Their purpose is to apportion equitably the burden of the tax so that it is borne commensurately by those whose gifts contribute to the tax burden and there is eliminated from such burden all whose legacies do not in any way create or add to the tax. In re Harvey's Estate, 350 Pa. 53, 38 A.2d 262. The right of the states to enact legislation apportioning the estate tax burden has been upheld. Riggs v. del-Drago, 317 U.S. 95, 97, 98, 63 S.Ct. 109, 87 L.Ed. 106, 111, 142 A.L.R. 1131.

---

[1] "Sec. 970. Whenever it appears upon any accounting, or in any appropriate action or proceeding, that an executor, administrator, trustee or other fiduciary has paid an estate tax to the Federal Government under the provisions of any Federal estate tax law, now existing or hereafter enacted, upon or with respect to any property required to be included in the gross estate of a decedent under the provisions of any such law, the amount of the tax so paid, except in a case where a testator otherwise directs in his will, and except in a case where by written instrument executed inter vivos direction is given for apportionment within the fund of taxes assessed upon the specific fund dealt with in such inter vivos instrument, shall be equitably prorated among the persons interested in the estate to whom such property is or may be transferred or to whom any benefit accrues."

The effect of section 970 is to place the burden of the tax upon the beneficiaries whose gifts cause the liability for it to be incurred, in the absence of a contrary direction by the trustor. The parties have stipulated that the three residuary beneficiaries are of such character that bequests, legacies, devises or transfers to them are deductible for federal estate tax purposes. Thus they have not received any transfer which is subject to a tax imposed by any federal estate tax law and perforce none of the tax was incurred on behalf of any of the three residuary beneficiaries.

The Grimes Appeal.

Section 970 of the Probate Code became effective after the trust and the amendments thereto were executed but some fourteen months prior to the trustor's death. Appellants Luther M. Grimes and Jessie T. Grimes contend (1) that the provisions of section 970 do not apply because the statute was enacted after the trust agreement was executed and that if the statute were applied it would operate to divest the beneficiaries of a vested interest and (2) that it is clearly shown in the declaration of trust that it was the trustor's intent that the tax be paid "out of principal" which, appellants argue, means that the payment of the tax shall precede the allocating of funds to any gifts which are in the nature of general legacies.

[1, 2] Appellants' contention that to apply the provisions of that section would give the statute a retroactive effect because it would deprive appellants of a vested right is untenable. The trust was revocable. The trustor retained the power and control of the trust estate and could with a stroke of the pen have divested the beneficiaries of their interest. The federal estate tax is not an inheritance tax; it is a tax on the interest which is shifted, an excise upon the transfer of an estate on the death of the owner. Y.M.C.A. v. Davis, 264 U.S. 47, 50, 44 S.Ct. 291, 68 L.Ed. 558, 560; United States Trust Co. v. Helvering, 307 U.S. 57, 60, 59 S.Ct. 692, 83 L.Ed. 1104, 1107; Chase National Bank v. United States, 278 U.S. 327, 334, 49 S.Ct. 126, 73 L.Ed. 405, 407, 63 A.L.R. 388.

In Chase National Bank v. United States, supra, which involved a tax on the proceeds of insurance policies in which the insured reserved the right to change the beneficiary, the court said: "It is true, as emphasized by plaintiff, that the interest of the beneficiaries in the insurance policies effected by decedent 'vested' in them before his death and that the proceeds of the policies came to the beneficiaries, not directly from the decedent, but from the insurer. But until the moment of death the decedent retained a legal interest in the policies which gave him the power of disposition of them and their proceeds as completely as if he were himself the beneficiary of them." 278 U.S. at page 334, 49 S.Ct at page 127, 73 L.Ed. at page 407, 63 A.L.R. 388.

In the case of Saltonstall v. Saltonstall, 276 U.S. 260, 271, 48 S.Ct. 225, 227, 72 L.Ed. 565, 568, involving a succession tax imposed upon the beneficiaries of a revocable trust, the argument was advanced that the beneficiaries had a vested interest which was subject only to being divested by the exercise of the reserved power, which was never exercised, and that as their remainders vested before the enactment of the taxing statute it could not be constitutionally applied to them. The court, in upholding the constitutionality of the tax, stated: "So long as the privilege of succession has not been fully exercised it may be reached by the tax (citing cases). And in determining whether it has been so exercised technical distinctions between vested remainders and other interests are of little avail, for the shifting of the economic benefits and burdens of property, which is the subject of a succession tax, may even in the case of a vested remainder be restricted or suspended by other legal devices. A power of appointment reserved by the donor leaves the transfer, as to him, incomplete and subject to tax. Bullen v. Wisconsin, 240 U.S. 625, 36 S.Ct. 473, 60 L.Ed. 830. The beneficiary's acquisition of the property is equally incomplete whether the power be reserved to the donor or another. And so the property passing to the beneficiaries here was acquired only because of default in the exercise of the power during the donor's life and thus was on his death subject to the state's power to tax as an inheritance."

In Reinecke v. Northern Trust Co., 278 U.S. 339, 345, 49 S.Ct. 123, 125, 73 L.Ed. 410, 414, 66 A.L.R. 397, which cites both the Chase National Bank and Saltonstall cases, supra, the court stated: "* * * a transfer made subject to a power of revocation in the transferor, terminable at his death, is not complete until his death. Hence section 402, as applied to the present transfers, is not retroactive since his death followed the passage of the statute."

From the foregoing it is apparent that insofar as liability for taxes is concerned it is immaterial whether the beneficiaries had a "vested interest" as claimed by appellants and the cases cited by them in support of that contention are not applicable.

Both parties are in agreement that the provisions of section 124 of the New York Decedent's Estate Law McKinney's Consol. Laws, c. 13, are similar to those of sections 970 to 977 of our Probate Code. The applicability of the New York apportionment statute to inter vivos trusts created prior to the effective date of the statute has been repeatedly upheld. In Re Ryle's Estate, 170 Misc. 450, 10 N.Y.S.2d 597, 603, it was held that a decedent creating during his lifetime an irrevocable trust of which he reserved the right to change beneficiary and to alter participations in the fund would be held to have contemplated the exaction of death duties when he died under the law existent at his death, as respects apportionment of federal and state estate taxes. A similar holding is found in Re Appel's Estate, 189 Misc. 417, 69 N.Y.S.2d 772, 775. See also In re Mayer's Estate, 174 Misc. 917, 22 N.Y.S.2d 468; Central Hanover Bank & Trust Co. v. Peabody, 190 Misc. 66, 68 N.Y.S.2d 256; In re Scott's Estate, 158 Misc. 481, 286 N.Y.S. 138, affirmed, 249 App.Div. 542, 293 N.Y.S. 126, affirmed, 274 N.Y. 538, 10 N.E.2d 538, certiorari denied, Northwestern Mut. Life Ins. Co. v. Central Hanover Bank & Trust Co., 302 U.S. 721, 58 S.Ct. 41, 82 L.Ed. 557.

[3] The trustor was presumed to know the law, including changes made after the execution of the trust. And since the liability for estate or succession taxes would not be incurred until her death, she must have contemplated that they would be exacted under the laws extant at the time of her death. Although the provisions of section 970 to 977 became effective some fourteen months before the trustor's death, she made no change in the declaration of trust after the statute was in effect.

Sections 970 to 977, inclusive, of the Probate Code are applicable and unless in the declaration of trust there can be found a direction for apportionment which will bring it within the exception, the taxes must be prorated in accordance with the provisions of those sections.

Appellants assert that it was the intention of the trustor that the federal estate taxes be paid out of the residue and that a direction to this effect is contained in the declaration of trust. The language to which appellants call our attention as expressive of the trustor's intent in this regard is found in paragraph (10) quoted above and in paragraph (11) which reads as follows: "Unless otherwise herein specifically provided, the Trustee shall pay out of principal or income, or apportion between them as it may elect, property and other taxes, assessments, charges, expenses and attorneys' fee incurred in the administration or protection of this trust, and the Trustee's compensation as herein fixed. The discretion of the Trustee to pay said items from income or principal, or to apportion between them, may be exercised not only in the interests of the trust estate but for the benefit of any beneficiary."

In re Estate of Hotaling, 74 Cal.App.2d 898, 170 P.2d 111, 113, cited by both parties, involved a will which was executed prior to the date section 970 et seq. of the Probate Code became effective. The will provided that all inheritance taxes be paid from the same sources as administrative expenses are paid so that the "bequests, devises and benefits under trusts shall be paid and delivered in full and without deduction." No mention was made as to the federal estate taxes and under the law existing at the time the will was executed those taxes would have been charged to the residue. In finding that there was a direction against proration, the court states, 74 Cal.App.2d at page 902, 170 P.2d at page 114: "Conceding that the testator knew nothing, when he made his will, of the novel provisions of the law then in embryo, if at that time he intended his cash legacies should be paid in full without deductions for any taxes that intention should be given effect although he made no express mention of the federal estate tax. The words 'so that said bequests, devises and benefits under trusts shall be paid and delivered in full and without deduction' are all-inclusive and are certainly sufficient to show the intent that the legacies should be burdened with no taxes whatever. Instead of contemplating proration they '*otherwise direct*'. * * * It may be conceded that, but for an effective direction in the will, the federal estate tax herein would have to be prorated equitably in accordance with values as of the date of death. The only question presented is whether it was the testator's intention as expressed in his will (In re Estate of Lawrence, 17 Cal.2d 1, 108 P.2d 893; sec. 101 Prob.Code) *that it should not be prorated at all,* and this intention, as we have seen, is to be determined as of the making of the will." (Emphasis in the opinion.) In the case before us, there is no direction that the legacies should not be burdened with taxes. Indeed on the contrary, paragraph (4) of the trust provides that payments to the beneficiaries shall be "subject to such deduction for any inheritance tax which the Trustee shall have been required to pay thereon."

Several New York cases are cited by appellants as upholding their assertion that it was the intention of the trustor that the burden of the federal estate tax be borne by the residuary beneficiaries. These cases are either readily distinguishable or hold contra to appellants' contention.

In re Aldrich's Will, 259 App.Div. 162, 18 N.Y.S.2d 420 and In re Greenwald's Estate, Sur., 53 N.Y.S.2d 937, are similar, the latter citing and following the Aldrich Case. The Greenwald case involved a will and insurance benefits and the Aldrich case involved a will and two inter vivos trusts. The will in each case provided that all taxes be paid out of the *residuary estate*. In both cases the court held there should be no apportionment. In re Durkee's Estate, 183 Misc. 382, 47 N.Y.S.2d 721, there was a will and an inter vivos trust, the will providing for the payment of taxes out of the general estate as an expense of administration. The court held that there should be no apportionment on the testamentary gift but the trust was required to contribute its ratable share. In re Halle's Estate, 183 Misc. 858, 51 N.Y.S.2d 375, the will provided that all taxes be paid out of the residuary estate. The court, however, did not follow the ruling in the Aldrich case, supra, stating that that case applied only to the particular will and the facts involved therein. The beneficiary of a joint bank account was required to pay her proportionate share of the tax. In re Hund's Will, 266 App.Div. 379, 42 N.Y.S.2d 505 and In re James' Estate, 180 Misc. 441, 40 N.Y.S.2d 4, are similar. There was a direction in each will to pay out of "funds" of the estate all debts, funeral expenses, inheritance, succession and estate taxes. In each of these cases the court held that because the testator had bracketed the taxes with debts and funeral expenses, which would be paid out of the residuary estate, it must have been his intention to have them paid out of the same fund.

[4, 5] The intent of the trustor must be ascertained from the instrument alone. In re Estate of Hoytema, 180 Cal. 430, 432, 181 P. 645; In re Estate of Spreckels, 162 Cal. 559, 567, 123 P. 371; In re Estate of Baldwin, 69 Cal.App.2d 760, 766, 160 P.2d 124. In the instant case the trust instrument provided that "the Trustee shall pay out of *principal* its ratable share of the tax,"—not out of the residue. In Webster's New International Dictionary, Second Edition (p. 1966) the principal "of an estate or portion of an estate of a dece-

dent" is defined as "the corpus, or main body of the estate, portion, devise, or bequest;—distinguished from *income*," whereas the residue is defined (p. 2120) as "that which remains after a part is taken, separated, removed, or designated; remnant; remainder; rest * * * The part of a testator's estate, or of any part thereof, remaining after the satisfaction of all debts and previous devises and bequests."

[6] The direction for apportionment required by the statute is an apportionment "within the fund." Obviously the statute does not contemplate an apportionment between principal and income but refers to apportionment among the beneficiaries, since in the absence of such a direction the statute provides the taxes shall be apportioned among all the persons interested in the estate. The persons interested are the beneficiaries subject to payment of the federal estate tax. Probate Code, sec. 977. The trustor directed that the taxes be paid out of the principal of the trust estate but there was no direction that they be paid out of that part of the principal which would constitute the residue so that they would be borne by the residuary beneficiaries.

[7] In re Dennis' Estate, 184 Misc. 178, 53 N.Y.S.2d 797, 799, cited by appellants, it was held that where a will contained no express directions exempting the remaindermen from the burden of paying estate taxes, any intention of the testator with respect thereto must be determined from the provisions of the will as a whole "in the setting of law and fact" at the time when the will was made; failure of the will, drafted by an experienced lawyer, to contain language shifting the burden of paying estate taxes from the remaindermen must be deemed to show intent of the testatrix to follow the then general practice in leaving taxes to be paid as usual by residuary legatees. We do not agree with this decision in applying the provisions of section 970 of the Probate Code. The statute specifically provides that there shall be apportionment of the tax among persons interested in the estate (as defined in section 977) unless a "direction is given for apportionment within the fund of taxes assessed upon the specific fund dealt with in such inter vivos instrument". There being no direction in the declaration of trust as to the *apportionment within the fund* of the federal estate taxes, the only direction being that the taxes be paid out of principal, the statute will apply and the taxes will be apportioned in accordance with its provisions.

Appeal of Residuary Beneficiaries.

The only other question raised by this appeal is with respect to the $2,500 attorneys' fee which was ordered paid by plaintiff "in the same manner and out of the same fund that other Trustee expenses are paid." There is no controversy as to the amount or reasonableness of the fee awarded. Appellants Coe College, Pomona College and Plymouth Congregational Church contend these expenses should be borne by all parties whose interests under the trust were or might be affected by apportionment and not paid out of the residue. If they are paid out of the residue, the entire expense would be borne by these three residuary legatees.

Paragraph (11) of the declaration of trust, quoted above, contains directions as to the payment of expenses of administration, including attorneys' fees. Appellants contend that the situation in the instant case is analogous to controversies between the beneficiaries of principal and income accounts respectively as to which account should bear the expense of litigation, and cite cases in which the expense of litigation has been charged against the principal account as an extraordinary expense or apportioned between the two accounts. In this case there are no life tenants and remaindermen, no beneficiaries of the income account as distinguished from the principal account. The court below has ordered the fee paid out of the same fund as other trustee expenses are paid, which is the corpus or principal.

[8, 9] The judgment is correct. The attorneys' fee is properly chargeable to the principal of the trust estate as an administrative expense. In re Estate of Gartenlaub, 185 Cal. 648, 655, 198 P. 209, 16 A.L.R. 520; In re Estate of Duffill, 188 Cal. 536, 557, 206 P. 42. Nowhere in the trust instrument is there shown any inten-

tion on the part of the trustor that any part of the attorneys' fees or administrative expenses should be charged against the specific bequests. The fact that by paying these fees out of principal the residue will be decreased by that amount and that the practical effect will be that they will be borne by the residuary beneficiaries is immaterial.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.

---

88 Cal.App.2d 301

NICHOLS v. DREW et al.

Civ. 16614.

District Court of Appeal, Second District,
Division 1, California.
Nov. 3, 1948.

Trespass 🔑40(2)

Complaint seeking damages for trespass alleging that plaintiff had been, was entitled to, and went into possession under written contract had by plaintiff with defendants, incorporating contract by reference and alleging a rescission on ground of fraud by failing to allege that plaintiff had performed all or any conditions recited in contract constituting basis of right to possession was insufficient.

◆

Appeal from Superior Court, Los Angeles County; Edwin L. Jefferson, Judge.

Action by Louis R. Nichols against John Drew, Henry Keenan, Dyspeptic Bills, Incorporated, of Ventura Boulevard, a corporation, and others for damages for trespass. From the judgment, plaintiff appeals.

Judgment affirmed.

John G. Connor, of Los Angeles, for appellant.

Aaron Sapiro, of Los Angeles, for respondents.

DORAN, Justice.

This is an appeal from the judgment.

Defendants' objection to the introduction of any evidence was sustained; defendants maintained then and now contend that, "the complaint failed to state a cause of action and that there was no proper technical basis for any relief against the defendants".

The complaint is for damages for trespass. It alleges in substance, as set forth in appellant's brief, that, "on the 12th day of June, 1947, plaintiff and appellant was in possession of certain premises and the equipment and appurtenances thereto comprising a certain restaurant business located at Number 12275 Ventura Boulevard, Los Angeles, California; and that plaintiff not only was in possession but was entitled to the possession of the said property and premises; that upon said 12th day of June, 1947, all of the defendants 'openly, wrongfully and forcibly' came upon said premises, took the same over from appellant, and began immediately to tear up, remove and demolish the fixtures and equipment, and to oust the appellant. That appellant objected and protested but defendants disregarded him and forcibly proceeded." Actual and punitive damages are sought. According to appellant, the "sole question now before the court on this appeal" is "whether or not the complaint showed that plaintiff and appellant had a right of possession at the time of the alleged trespass".

The judgment recites that the trial court sustained an "objection to the introduction of evidence by plaintiff on the ground that the said plaintiffs complaint did not state facts sufficient to constitute a cause of action against the said defendants". The question on appeal, therefore, is not "whether the appellant had a right of possession at the time of the alleged trespass", but whether the record sustains the court's ruling that the complaint "did not state facts sufficient to constitute a cause of action".

In addition to the allegations above noted, the complaint also alleged that plaintiff "went into possession" of the premises in question "by virtue of a written contract had by plaintiff and the defendants * * * a copy of which said contract is attached hereto, made a part hereof by reference, and incorporated herein as fully as though fully set forth herein again". It is also alleged that plaintiff, on May 23, 1947, "sent to the defendants * * * a notice of rescission on the ground of fraud. * * * That at that time plaintiff offered to return to the said two defendants the said premises and business and all appurtenances thereto, provided that defendants paid to him all moneys he had expended on account of, or in connection with, the purchase price of said business". It is further alleged that on May 3, 1947, "this plaintiff filed suit in this court against said defendant * * * said suit being for rescission of the aforesaid contract and for damages resulting from the aforesaid alleged fraud". The within action was filed June 17, 1947.

In connection with the contention that the complaint fails to state a cause of action, respondent cites Risco v. Reuss, 45 Cal.App.2d 243, 113 P.2d 914. Appellant argues that "The whole issue is the 'lawful possession of the premises by plaintiff' which was held not to be shown by the complaint in Risco v. Reuss"; and continues, "In the instant case appellant's complaint, by setting out the contract and the various happenings thereafter, does show a "lawful possession of the premises by plaintiff".

It appears to be appellant's belief that because the contract was pleaded in the manner above noted, the complaint in effect alleges a "lawful possession of the premises by plaintiff" and hence is sufficient. All the complaint alleges, however, is that plaintiff "has been in possession and entitled to possession" and that "plaintiff went into possession * * * by virtue of a written contract had by plaintiff with the defendants". There is no allegation that plaintiff had performed all or any of the conditions recited in the contract which constituted the basis of plaintiff's right to possession. Indeed there is no allegation at all that plaintiff had fully performed the contract in any respect or at all. The fact that the contract is made a part of the complaint is not enough. There is no rule of pleading that permits the assumption that because a contract has been pleaded it has been performed. This defect in the pleading alone supports the trial court's conclusion that, "said plaintiff's complaint did not state facts sufficient to constitute a cause of action".

For the foregoing reasons, the judgment is affirmed.

YORK, P. J., and WHITE, J., concur.

88 Cal.App.2d 360

In re HOLMES' ESTATE.

Civ. 3829.

District Court of Appeal
Fourth District, California.
Nov. 5, 1948.

1. Wills 🔑290

To establish revocation of will by destruction of instrument, there must be proof that will was destroyed by testatrix, not by another, and that there was accompanying intention to revoke instrument. Probate Code, § 74.

2. Wills 🔑290

A will, found in mutilated condition among testator's private papers or in his depository immediately after his death, until which it was continuously in his possession, is presumed to have been mutilated by testator himself animo revocandi, but such presumption is inapplicable where will is not shown to have been continuously in testatrix's possession. Probate Code, § 74.

3. Appeal and error 🔑989, 996

While only question before appellate court, when judgment appealed from is attacked as unsupported by evidence, is whether there is any substantial evidence, contradicted or uncontradicted, to support judgment, reviewing court cannot substitute its deductions for those of trial court when two or more inferences can reasonably be deduced from facts in evidence.

4. Wills ⚷448

The policy of law is in favor of testacy rather than intestacy.

5. Wills ⚷446

When a man of sound mind and memory, by his own hand and signature, plainly makes disposition of his property by will, courts should carry out his intention, if possible without violating mandates of law.

6. Wills ⚷167

A will can be revoked only in manner and by means prescribed in probate code. Probate Code, § 74.

7. Wills ⚷171

Destruction of will, without intention to revoke it, or by accident, does not revoke will under probate code. Probate Code, § 74.

8. Wills ⚷306

Evidence was insufficient to justify superior court's finding that holographic will, offered for probate in mutilated condition, was destroyed by testatrix with intent to revoke it. Probate Code, § 74.

◆

Appeal from Superior Court, San Bernardino County; A. D. Mitchell, Judge.

Proceeding by Enid June Riebel and husband for probate of the will of Irene Sullivan Holmes, also known as Irene Holmes and Mrs. Stanley G. Holmes, a widow, deceased. From a judgment and order denying the petition for probate, petitioners appeal.

Reversed.

C. E. Crowley, of Ontario, for appellants.

MUSSELL, Justice.

This is an appeal from a judgment and order denying petition for the probate of a will.

The decedent, Irene Sullivan Holmes, died on or about September 21, 1947. On March 3rd of that year she executed an holographic will consisting of two separate documents, each of which was signed by her. The estate was divided, ⅓ to the eldest daughter, one of the petitioners; the sum of $1 each to two daughters Janet Lucile Holmes and Elizabeth Anne Holmes; ⅓ to another daughter Jean Irene Holmes, and ⅓ to a son.

Some time in the latter part of March, 1947, decedent went to a hospital for an operation and while there told petitioner that she had made a will in her own handwriting and also told her where it could be found. She also stated that after recovery from the operation she intended to see her attorney, Mr. Crowley, to find out if the will was correctly written. Mr. Crowley testified that some time in the summer, after March 3rd, the decedent came to his office and informed him that she had written out a will and wanted him to look it over to see if it was in proper form, and if not, he was to draw it over again; that decedent did not come back to his office and did not show him the will.

At the time of the first operation, petitioner came from her home in Fresno and took care of decedent at her home in Ontario. In August, decedent went to visit petitioner in Fresno and stayed there three days. She then returned to her home where she remained until six days before her death when she was again taken to a hospital by petitioner who had been taking care of her for two days. Before decedent left home for the second operation, petitioner asked her if she had seen Mr. Crowley regarding the writing of her will, to which decedent replied that she had not but that she had written it and that "The will is in my drawer."

On the date decedent died petitioner found the will in a chest of drawers in which decedent kept her clothes, purses and personal things in the bedroom of her home. The will when found was in an envelope bearing the name of petitioner and her husband and was torn into several pieces. The envelope was not tightly sealed and had apparently been opened. The drawer in which the will was found was never locked, the room was open and there were several other people living in the house, including the daughter Janet and a boarder who was a friend of the family. The decedent did not say anything to petitioner about the will having been torn and the two sisters who were left out of the will knew that it had been written and were present when it was found. The will, although torn, was all within the envelope and no parts were missing. It was put together by petitioner and her sister Elizabeth and was offered for probate by petitioner, Enid June Riebel, named therein as "guardian" of the estate, and her husband. No contest was filed and no testimony was offered except on behalf of petitioners as herein set forth.

The court found that the two instruments offered as the last will and testament of the deceased were each of them dated, all written and signed by Irene Sullivan Holmes in her own handwriting, "and that instrument, at the time of the execution thereof, was the legal holographic will of the deceased and that if said instrument had not been destroyed that the same would have constituted the Last Will and Testament of said deceased"; that subsequent to March 3rd, 1947, "and at a date unknown to the court and not established by the evidence the same Irene Sullivan Holmes tore up and destroyed each of said instruments with intent to revoke the same, and the same were by her thereby revoked, and that said deceased died intestate." The petition to probate was denied and this appeal was taken. There was no contest in the trial court, and no appearance has been made here in support of the order made.

The sole question here is whether or not there was any substantial evidence upon which the court could find that the will was destroyed by decedent with intent to revoke it.

Section 74 of the Probate Code provides in part as follows:

"Except as hereinabove provided, no written will, nor any part thereof, can be revoked or altered otherwise than: * * *

"(2) By being burnt, torn, cancelled, defaced, obliterated or destroyed, with the intent and for the purpose of revoking the same, by the testator himself, or by some person in his presence and by his direction. If such act is done by any person other than the testator, the direction of the testator, and the fact of such injury or destruction, must be proved by two witnesses."

[1, 2] In order to establish a revocation of the will it was necessary that there be proof that the will was destroyed by the decedent and not by another and that there was an accompanying intention to revoke the instrument. (26 Cal.Jur. 801.) When a will is found immediately upon the death of the testator, among his private papers, or in his depository, and in a mutilated condition, having been continuously in the testator's possession until his death, the presumption (inference) is that it was mutilated by the testator himself animo revocandi. Estate of Hewitt, 63 Cal.App. 440, 447, 218 P. 778.

But where, as here, the will was not shown to have been continuously in the possession of the testatrix we do not think the presumption is applicable. The decedent, upon her departure to the hospital six days before her death, informed her eldest daughter that her will was in a drawer. During those six days and for several months prior thereto, it was in a place accessible to several persons, some of whom knew that the will had been written. There is nothing in the record to indicate that the decedent intended to destroy her will or knew that it had been torn.

In Estate of Bristol, 23 Cal.2d 221, 224, 143 P.2d 689, the court in discussing the presumption in connection with the probate of a will which could not be found, held that the proponent of the will was entitled to a favorable decree when he presents evidence showing that it is equally probable (1) that the will was destroyed by another person than the decedent, or (2) that the act was not done wtih an intention to revoke the instrument. In the instant case the remarks of deceased to her eldest daughter are entirely inconsistent with the theory that the will had been destroyed by the testatrix.

[3] While it is true that when a judgment is attacked as being unsupported, the only question before the appellate court is whether there is any substantial evidence, contradicted or uncontradicted, which will support the judgment, and when two or more inferences can reasonably be deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court. Estate of Bristol, supra. There is an entire lack of evi-

dence to support the finding of the trial court, other than an inference, which, under the circumstances here shown is inapplicable. A short time after the execution of the will the testatrix expressed an intention to visit her lawyer "to see if she had written it all right," and on her visit to him she stated that she had written out a will and wanted him to look it over to see if it was in proper form and if not she was going to have him redraw it. These expressions do not support a reasonable inference that the will was destroyed or revoked by the testatrix.

[4, 5] No contest, as provided in sections 370–374, inclusive, of the Probate Code, was filed in the instant case, and the due execution of the will having been established the burden of proof would be on the contestant if a contest were filed. Estate of Latour, 140 Cal. 414, 73 P. 1070, 74 P. 441; 26 Cal. Jur. 756. The policy of the law is in favor of testacy rather than intestacy, and as was said in Estate of Janes, 18 Cal.2d 512, 515, 116 P.2d 438, 441: "When a man of sound mind and memory, by his own hand and signature, has plainly made a disposition of his property, the courts should carry out his intention if it can be done without violating the mandates of the law." Estate of Fay, 145 Cal. 82, 78 P. 340, 104 Am.St.Rep. 17. The court in the Janes case, supra, held that where the will was missing and a duplicate was found in decedent's possession, that all the facts bearing upon the possibility of revocation must be considered in determining whether a presumption arises, not solely the circumstance that one of the duplicates could not be found. The circumstances there shown prevented any presumption of revocation from arising.

[6, 7] The provisions of the Probate Code relative to the revocation of wills are specific and revocation can be made only in the manner and by the means prescribed therein. Destruction, without intention to revoke, or by accident, is not a prescribed method of revocation. Under the code, therefore, such destruction does not operate to revoke a will. Estate of Patterson, 155 Cal. 626, 635, 102 P. 941, 26 L.R.A.,N.S., 654, 132 Am.St.Rep. 116, 18 Ann.Cas. 625.

[8] It does not seem probable, under the circumstances disclosed by the record, that the testatrix, having written the documents in question and having placed them in a sealed envelope, would, or did, open the envelope, tear the will, place all the pieces back in the envelope, and reseal it. Such acts are not consistent with her statements that she had written the will and that it could be found in her drawer. There is no evidence that the testatrix saw the will at any time after it was written by her and placed in the drawer, and no substantial evidence that she destroyed or revoked it.

Judgment and order reversed.

BARNARD, P. J., and GRIFFIN, J., concur.

---

88 Cal.App.2d 246

JEW FUN HIM v. OCCIDENTAL LIFE INS. CO.

Civ. 16381.

District Court of Appeal, Second District, Division 1, California.

Oct. 28, 1948.

Hearing Denied Dec. 23, 1948.

1. **Insurance** ⇨146(1), 150

Insurance policies must be read as a whole and endorsements on a policy form a part of the insurance contract.

2. **Insurance** ⇨146(3)

The rule that insurance policies should be construed in favor of insured and against insurer is applicable only where ambiguities appear therein.

3. **Appeal and error** ⇨959(1)
Pleading ⇨236(1)

While a certain degree of liberality should prevail in allowing amendments to pleadings, the allowance or refusal of amendments is a matter so largely within sound discretion of trial court that its exercise will not be disturbed in absence of gross abuse.

4. Pleading ⟹236(2)

Where original complaint merely sought recovery of death benefit under endowment life policy without allegation or suggestion of fraud, rejection of proposed second amendment alleging for the first time after insurer's motion for summary judgent had been granted and case subsequently reopened that exclusion clause was surreptitiously inserted in policy with fraudulent intent to limit liability without insured's consent was not abuse of discretion in absence of explanation of long delay in alleging such fraud.

5. Judgment ⟹252(2)

Where insurer's answer to action to recover death benefit under endowment life policy prayed for judgment directing delivery of policy for cancellation and adjudication of non-liability thereunder upon refund of premiums paid, judgment that plaintiff take nothing was not supported by pleadings or order granting insurer's motion for judgment as prayed for in answer, and plaintiff was entitled to judgment in amount of premiums paid with provision for surrender of policy for cancellation and discharge of insurer from further liability.

6. Judgment ⟹251(1)

A judgment should definitely determine the claims of the contending parties in conformity with the pleadings filed.

◆

Appeal from Superior Court, Los Angeles County; A. W. Ashburn, Judge.

Action by Jew Fun Him against Occidental Life Insurance Co., to recover as beneficiary under endowment life policy. Summary judgment for defendant and plaintiff appeals.

Judgment reversed in part with directions

Harry M. Irwin, of Los Angeles, for appellant.

Gibson, Dunn & Crutcher and Frederic H. Sturdy, all of Los Angeles, for respondent.

DORAN, Justice.

The complaint herein alleges that on June 25, 1942, Clinton Chow, plaintiff's son, applied to defendant company for an endowment life policy which was issued on July 6, 1942. According to the appellant's brief, the insurer therein "agreed, if the insured should die before the end of said Endowment Period (at age 50), to pay $3,000 to plaintiff; that Clinton died on November 1, 1945"; that defendant refused to pay any sum whatever except $450.64 to be paid upon the execution by plaintiff of a full release of all liability, and that no part of the $3,000 has been paid. Neither the original complaint nor a first amendment thereto contain any allegation or suggestion of fraud or unfairness on the part of the insurer. A proposed second amendment refused by the trial court, did, however, charge fraud on the part of the insurer.

The respondent insurer defended the action upon the basis of a certain "War and Aviation Exclusion Clause" contained in the policy which, among other things, limited the insurer's liability to a return of the premiums paid, "if death of the insured result, directly or indirectly, from service, travel or flight in any kind of aircraft except as a fare-paying passenger in a licensed commercial aircraft * * * on a regular passenger air route between definitely established airports, both of which are within the Home Areas". The term "Home Areas" was defined as meaning "the forty-eight states of the United States, the District of Columbia and the Dominion of Canada".

From appellant's sworn proof of loss it appears that the insured Clinton Chow, a member of the armed forces, died in an airplane accident at Karlsruhe, Germany. Therefore, as stated in respondent's brief, "such death fell squarely within the exclusion clause". The $450.64, which the insurer offered to pay, represented the return of premiums paid, plus interest,—the limit of liability under the provisions of said exclusion clause.

After the case was at issue both parties moved for summary judgment, representing that no triable issue of fact existed and that the sole issue was one of law, namely, whether the War and Aviation Exclusion Clause was an effective part of the policy. The trial court granted defendant's motion for a summary judgment but on learning of a recent decision in Bebbington v. California Western, etc., Ins. Co., 1947, 30 Cal. 2d 157, 180 P.2d 673, relating to the applicability of a similar exclusion clause, reopened the matter for further argument. Later, however, summary judgment for the defendant was again granted, from which plaintiff has brought the present appeal.

Before the summary judgment for defendant was finally granted, plaintiff, appellant herein, sought to again amend the complaint by adding a proposed second cause of action sounding in tort, alleging for the first time that the exclusion clause hereinbefore mentioned, was "surreptitiously" inserted in the policy by the insurer, "with the fraudulent intention and purpose of limiting and restricting its liability"; that the insured never consented thereto, and that the same was therefore invalid. This motion for leave to amend was denied. Appellant now contends that the motion was improperly denied.

Appellant's brief also presents the point that "The judgment is not supported by the pleadings or by the order on which it purports to be based, viz.: the minute order granting defendant's motion for judgment '*as prayed for* in defendant's answer', but is directly contrary thereto". The argument here is that since defendant's answer admits liability to the extent of $450.64, representing premiums paid, the trial court's judgment "that the plaintiff take *nothing*", is manifestly wrong. (Italics added.)

In reference to the War and Aviation Exclusion Clause appellant claims that this "is contained in a separately executed 'Supplemental Agreement' which respondents '*attached to*' the policy"; that the insured "did not read or know the contents of the receipt or the policy, or that the receipt 'expressed satisfaction with' or mentioned any supplemental agreement or indorsement, and that Clinton (insured) was induced to and did sign the receipt upon the false representation by respondent's agent that it was merely 'a receipt for the policy'". This receipt, executed by the insured, provides among other things, that "The Beneficiary Designation, Special Settlement Agreement, *Supplemental Agreements and Indorsements,* if any, attached to the policy have been read and found satisfactory, and I hereby accept said Policy subject to all the terms and conditions of any such Agreements and/or Indorsements". (Italics added.) And, at the top of page 4 of the policy the following indorsement is typed: "See Supplemental Agreement entitled 'War and Aviation Exclusion Clause' attached to the policy". In this connection it is to be noted that appellant's brief states that the real policy to which the insured agreed, is contained "in the first seven pages" thereof, which obviously include the indorsement mentioned above.

[1,2] Insurance policies, like other contracts, must be read as a whole, and as said in Narver v. California State Life Ins. Co., 211 Cal. 176, 181, 294 P. 393, 395, 71 A.L.R. 1374, "Indorsements on an insurance policy form a part of the insurance contract". It should be pointed out, however, that statements in the Narver case and elsewhere to the effect that policies should be construed in favor of the insured and against the insurer are applicable only where uncertainties or ambiguities appear therein, and furnish no authority for appellant's position herein.

[3] Appellant's proposed Second Amendment to the complaint, alleging that the War and Aviation Exclusion Clause was fraudulently inserted in the policy without notice to the insured, was sought "on the ground that said amendment to complaint is necessary and proper in order that all of the issues and rights of the plaintiff may be judicially determined at the trial of the above entitled action." While it is doubtless true that a certain degree of liberality should prevail in reference to the allowance of amendments to pleadings, it is well established that "the allowance or refusal of amendments is a matter so largely within the sound discretion of the trial

court that its exercise will not be disturbed in the absence of a showing of gross abuse".

As was said in Fetterley v. Gibson, 210 Cal. 282, 283, 291 P. 411, 412, from which the above quotation was taken, "Such a showing has not been made" in the instant case. And, as pointed out in the respondent's brief, the proposed amendment "would add a second and completely new and different cause of action"; it would "completely change the character of the action from one sounding in contract to one (of fraud) sounding in tort". Moreover, no explanation was offered "for plaintiff's long delay in failing to set up the alleged facts (of fraud)". Again, as commented upon by respondent, appellant has cited no case approving the allowance of such an amendment under circumstances similar to those here prevailing. The cases cited merely deal with fundamental principles about which there is no dispute.

[4] Although the record indicates no reversible error in the trial court's refusal to permit the proposed second amendment to appellant's complaint, the summary judgment "that the plaintiff take nothing" cannot, in that form, be sustained. As pointed out in appellant's brief, the answer filed by the respondent insurer "prays judgment against plaintiff as follows: (1) That upon the payment to plaintiff of the sum of Four Hundred Fifty and 64/100 Dollars ($450.64), plaintiff be directed to deliver up to the defendant, for cancellation and satisfaction, the original of said policy No. 1370222, and that it be adjudged that upon such payment this defendant be discharged from any and all further liability under the said policy". The respondent's motion for summary judgment seeks "an order that plaintiff's complaint be dismissed and that judgment be entered in favor of defendant and against plaintiff *as prayed for in defendant's answer*". (Italics added.)

[5, 6] This motion the trial court granted, defendant's attorney being directed to prepare the judgment. But the judgment entered was in conformity neither with the prayer of defendant's answer nor with the motion for summary judgment. On the contrary, it completely ignored the insurer's admission of liability to the extent of $450.64 and relieved the insurer from legal liability to pay plaintiff any sum whatsoever. The respondent's assertion that this error is immaterial because it intends to pay this amount in any event, does not cure the fact that in its present form, the judgment entered by the trial court is manifestly wrong. The obvious purpose of a judgment is to definitely determine the claims of the contending parties in conformity with the pleadings filed. In the instant case there was a radical departure from these precepts.

The judgment in so far as it provides that "the plaintiff take nothing" is therefore reversed with directions to enter judgment in favor of plaintiff in the sum of $450.64, with the provision that upon the payment of such amount the plaintiff shall surrender the policy in question to the defendant for cancellation whereupon the defendant shall be discharged from any and all further liability under said policy.

YORK, P. J., and WHITE, J., concur.

---

88 Cal.App.2d 324

MOORE et al. v. MOSHER et al.

Civ. 13685.

District Court of Appeal, First District,
Division 2, California.

Nov. 4, 1948.

1. Appeal and error 🔑1071(3)

Where one finding of fact was supported by evidence and was sufficient to support judgment for defendant, that other findings of fact were not supported by the evidence would not be grounds for reversal.

2. Sales 🔑391(9)

A purchaser who fails to go on with his contract cannot recover from a vendor not in default who is ready and willing to proceed and fulfill all his obligations, all or any of the money that purchaser had paid to the vendor pursuant to contract.

3. Sales ⚖391(9)

Purchasers seeking to recover deposit paid on price of a dress shop could not assert as basis for recovery defects in inventory prepared by the vendor or vendor's failure to furnish required sales tax certificates where evidence established that purchasers had repudiated the contract. Revenue and Taxation Code, §§ 6811, 6812.

4. Appeal and error ⚖1071(6)

Where no recovery on defendant's cross-complaint was allowed, failure of court to make findings on plaintiffs' affirmative defenses to cross-complaint was not prejudicial to plaintiffs.

◆

Appeal from Superior Court, San Mateo County; Aylett R. Cotton, Judge.

Action by Eva E. Moore and La Von Moore (her husband), against Elizabeth Mosher and First Doe, to recover amount paid on purchase price of a dress shop owned by defendant, wherein defendant counterclaimed. From an adverse judgment, plaintiffs appeal.

Affirmed.

J. W. Jackson and Bergen Van Brunt, both of San Francisco, for appellants.

Norman S. Mennfee, of Redwood City, for respondents.

DOOLING, Justice.

Plaintiffs appeal from an adverse judgment. Plaintiffs entered into a contract to purchase a dress shop owned by defendant. The price was to be $2,300 plus the cost price of the goods on hand. Plaintiffs paid $1,300 on account and, the sale not having been consummated, they sued to recover back this amount pleading a common count for money had and received. Defendant answered and cross-complained for damages. The trial court entered judgment denying any affirmative relief to either party.

The evidence was in sharp conflict, plaintiffs testifying that they refused to pay the balance of the purchase price because defendant did not furnish them with an intelligible inventory of the purchase price of the goods on hand supported by the invoices, and did not furnish a sales tax certificate as required by secs. 6811, 6812, Revenue and Taxation Code; and defendant testifying that plaintiffs did not mention a tax certificate, made no objection to the inventory and did not question the amount of the purchase price, but refused to perform unless defendant reduced the price by $1,000.

[1] Plaintiffs claim that certain findings of the court are not supported by the evidence, but we find it unnecessary to discuss these findings. "It is elementary law that 'if a judgment is amply supported by findings which are unobjectionable, findings on other issues become immaterial, and it is not ground for reversal that such other findings are unsupported by evidence.' 2 Cal.Jur. p. 1028 § 612, citing many cases." Chapman v. Sky L'Onda Mut. Water Co., 69 Cal.App.2d 667, 680, 681, 159 P.2d 988, 995; Estate of Sproston, 4 Cal.2d 717, 722, 52 P.2d 924; Owen v. Cohen, 19 Cal.2d 147, 150, 151, 119 P.2d 713; Keegan v. Kaufman Bros., 68 Cal.App.2d 197, 202, 156 P.2d 261.

There is in this case one finding of fact supported by the direct testimony of the defendant which alone is sufficient to support the judgment. It was alleged in paragraph III of the cross-complaint (which was also pleaded as an affirmative defense): "That plaintiffs and cross-defendants, on or about the 5th day of February, 1946, willfully and without cause breached their agreement to purchase the said business and have refused and do now refuse, to pay the balance, or any of the purchase price for said business." The court found these allegations to be true.

The defendant testified that at the final meeting of the parties on February 7, 1946, the plaintiffs did not object to the form or correctness of the inventory which she had prepared, and did not request to see the invoices, but on the contrary "I told them what it totaled and they worked with me on it and they said that it was all right;" that the plaintiffs did not say anything about her failure to provide them with a sales tax certificate; that "they offered me one thousand dollars less than the price we agreed upon and I refused to take it. * * * They propositioned me to refund a percentage of their deposit and call the deal off. * * * I asked them why they changed their mind, why they hadn't let me know sooner, and they said they found another business that they could buy for about the same money, I think possibly a little less in San Francisco, a restaurant that would include a chance for both Mr. and Mrs. Moore to work in the same place. * * * (T)hey said I was high on my price, but they didn't say why."

This testimony, while flatly contradicted by the plaintiffs supports the quoted finding and the quoted finding is sufficient to support the judgment. The case is governed by Tomboy Gold & Copper Co. v. Marks, 185 Cal. 336, 339, 197 P. 94, 95, from which we quote:

[2] "No rule is more firmly settled with relation to contracts for purchase, whether concerning real or personal property, than that to the effect that a vendee who without lawful right refuses to go on with his contract, cannot recover from a vendor not in default, who is ready and willing to proceed and fulfill all his obligations, all or any of the money that he had paid to the vendor in accord with the terms of the agreement. This rule has been uniformly applied in California. It was declared in both opinions in Glock v. Howard, 123 Cal. 1, 10, 19, 20, 55 P. 713, 716, 720, 43 L.R.A. 199, 69 Am. St.Rep. 17, the opinion of Mr. Justice Henshaw saying that in such a case the vendor, 'still resting upon the contract, * * * may remain inactive, yet retain to his own use the moneys paid by the vendee, so that it is of no moment whether or not the contract declares that such moneys shall upon the breach be forfeited as liquidated damages,' and the opinion of Mr. Justice Harrison declaring it to be the law of the state that 'the vendee, who was himself in default in the payment of a portion of the money, could not against the will of the vendor repudiate the contract and recover the portion already paid.' Many cases might be cited in which this rule has been applied, but the rule is not disputed, and it is plain that plaintiff has no right of recovery here except upon the theory of mutual abandonment and rescission. Upon the facts of this case there is no other possible foundation for a right of recovery on the part of plaintiff."

[3] The court having found on sufficient evidence that the plaintiffs repudiated their agreement, they are in no position to urge before this court any defects in the inventory prepared by the defendant or the failure of the defendant to furnish them a sales tax certificate. Where a party to a contract flatly refuses to carry out his agreement and makes no objection to the form of the tender of performance by the other party any objection to the form of the tender is thereby waived. The court said in Hoover v. Wolfe, 167 Cal. 337, 341, 342, 139 P. 794, 796: "The statements of Wolfe were fairly to be interpreted as an absolute repudiation of liability under the contract, and a refusal, in any event, to accept the stock or pay therefor. Any objections to the mode of plaintiff's tender were capable of being obviated, if they had been pointed out. The failure to state them, and the refusal to accept the offer, constituted a waiver on Wolfe's part of any such objections (Civ.Code, §§ 1496, 1501; Kofoed v. Gordon, 122 Cal. 314, 54 P. 1115), if, indeed, the unqualified refusal to perform did not dispense with the necessity of any offer of performance by plaintiff. (Civ.Code, secs. 1440, 1515.)"

This conclusion makes unnecessary the consideration of other errors urged by the appellants since none of them would affect the finding which sufficiently supports the judgment.

[4] We may add that plaintiffs are not aggrieved by the failure of the court to make findings on the plaintiffs' affirmative defenses to the cross-complaint since no recovery on the cross-complaint was allowed.

Judgment affirmed.

NOURSE, P. J., and GOODELL, J., concur.

88 Cal.App.2d 320

LANDFIELD v. GARDNER et al.

Civ. 16260.

District Court of Appeal, Second District, Division 3, California.

Nov. 3, 1948.

1. Appeal and error ⟾598

Attorneys are not justified in availing themselves of privilege extended by rule, of accompanying agreed statement comprising record presented on appeal, with original exhibits, where only brief passages or provisions of bulky documents are necessary for purposes of appeal, and they can be easily extracted from exhibits and incorporated in the settled statement at a trivial expenditure of time and labor. Rules on Appeal, rules 5(e), 6.

2. Appeal and error ⟾598

The rule permitting attorneys to accompany agreed statement comprising record presented on appeal, with original exhibits, is designed to save labor, expense and inconvenience, and should not be followed blindly where the result will be to place unnecessary burdens on County Clerk and reviewing court. Rules on Appeal, rules 5(e), 6.

3. Appeal and error ⟾598

The use on appeal of original exhibits consisting of county records in matters of taxation and introduced to prove a few isolated entries, was a misuse of the privilege extended by a rule to accompany agreed statement comprising record presented on appeal, with original exhibits. Rules on Appeal, rules 5(e), 6.

4. Appeal and error ⟾151(2)

A defendant in quiet title action who had conveyed the realty was not aggrieved by judgment for plaintiff and hence was not entitled to appeal.

◆

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Quiet title action by Mike Landfield against Charles Gardner, as administrator with the will annexed of the estate of Annie Blanchard, deceased, and James H. Stuart and Isis Smith. From an adverse judgment, defendant Stuart appeals.

Affirmed.

John F. Poole and H. F. Poyet, both of Los Angeles, for appellant.

Mohr & Borstein, of Los Angeles, for respondent.

SHINN, Presiding Justice.

Plaintiff brought this action to quiet his title to real property which is based upon a tax deed from the state. He named as defendants, Charles Gardner, as administrator-with-the-will-annexed of the estate of Annie Blanchard, deceased, James H. Stuart and Isis Smith. Defendant Gardner did not appear and default judgment was entered against him as administrator. Defendant Stuart answered, denying plaintiff's title and alleging himself to be the owner of the property; Isis Smith also denied plaintiff's title and alleged herself to be the owner. Under stipulation, her answer was deemed to be also the answer of her husband, Wallace Smith. Findings and judgment were for plaintiff, as the owner and entitled to possession of the land, and that defendants, Stuart, Isis Smith and Wallace Smith had no interest therein. James H. Stuart alone appeals. The record is presented in the form of a settled statement.

Appellant, in his briefs, attacks the validity of the tax deed to plaintiff. He contends that the proceedings leading up to the deed to the state and the deed from the state to plaintiff were defective and invalid in the following particulars: (1) that the amount for which the property was to be sold was stated in the published delinquent tax list to be $522.32, whereas the correct amount was $523.51, an understatement of $1.19; (2) that "the published notice says 'Taxes,' 'Assessments,' 'Penalties' and 'Costs.' If there were no assessments in the record, this was an imposition and wholly invalid"; (3) "No proper affidavit to delinquent publication and assessment roll. This is absolutely essential"; (4) "There is no sufficient affidavit—No venue"; (5) "High School Levy excessive";

excess charges of $449,103.03 being listed as the total of "Collection charge against personal property, Los Angeles High School District, for which no levy was made." Another point is made, namely, that the complaint was insufficient in that it did not state the various steps in the taxation proceedings leading up to the execution of the deed to plaintiff.

The settled statement, after setting forth the evidence introduced by plaintiff, consisting of the tax deeds and proof of plaintiff's purchase, recites that the defendants introduced, (1) general tax schedules of the county of Los Angeles for the year 1931-2; (2) affidavit of the county auditor to the assessment roll for the year 1931; (3) assessment roll, Los Angeles County, for the year 1931, "with special reference to assessment No. 20695 against Annie Blanchard"; (4) delinquent assessment roll for the year 1931; (6) "Postal receipt for mailing of the assessment of 1931-1936." The settled statement also recites that plaintiff introduced into evidence a deed of Minnie K. Currant, which purported to convey the real property in question to James H. Stuart, and also a deed of James H. Stuart purporting to convey said real property to Isis Smith. Plaintiff also introduced into evidence probate file No. 167400, Los Angeles County, entitled "Estate of Annie Blanchard, deceased." The clerk's transcript contains a stipulation of counsel that "the clerk is also directed to include therein [the transcript], but the same need not be copied, and to transmit the originals thereof to the reviewing court the following documents: (1) All of plaintiff's exhibits; (2) All of defendants' exhibits." The settled statement does not contain any of those portions of the voluminous public records upon which appellant relies to establish invalidity of the proceedings, nor does appellant in his brief or appendix thereto set forth such portions of the records. He also assumes that Annie Blanchard was the owner of the property when the taxes were levied and the property sold to the state. He offered no proof of that fact, nor does he inform us as to the manner in which, or the time when, Minnie K. Currant is supposed to have succeeded to the interest in the property of Annie Blanchard. Neither does he give us the date of the deed from Currant to Stuart or the deed of Stuart to Isis Smith. Apparently we are expected to examine the numerous exhibits and glean the pertinent information from them.

[1, 2] Under Rule 6, Rules on Appeal, the parties may present a record on appeal consisting in whole or in part of an agreed statement, and this may be accompanied by a list of such exhibits as the parties desire to have transmitted as originals. Under Rule 5e, in preparing his transcript the clerk, unless directed by one of the parties, is not required to copy exhibits which may be transmitted in original form to the reviewing court. The privilege extended by the rule of transmitting originals to the reviewing court does not justify attorneys in following that procedure where ouly brief passages or provisions of bulky documents are necessary for the purposes of the appeal and these can be easily extracted from the exhibits and incorporated in the settled statement. The rule is designed to save labor, expense and inconvenience and should not be followed blindly where the result will be to place unnecessary burdens on the County Clerk and the reviewing court.

[3] Appellant's briefs contain no quotations from the various exhibits. He contents himself with such statements as "the affidavit to the assessment roll and delinquent assessment roll in evidence are defective," evidently expecting this court to examine the original for defects. The same is true as to figures purporting to state the amount of taxes and penalties against the property and the basis of the levy for high school purposes. There is not even a reference to the exhibits or portions thereof which it is claimed would furnish support for the statements in the briefs of appellant. If we should search through the exhibits we would find nothing in them except short isolated portions that could have been conveniently incorporated in the settled statement, or in appellant's briefs, or a supplement thereto. The use of original exhibits, consisting as they do here of

the records of the county in matters of taxation, introduced for the purpose of proving a few isolated entries, is a misuse of the privilege accorded by the Rules on Appeal.

The foregoing observations are not occasioned by any inconvenience which this court has suffered on the present appeal. They are for the general benefit of attorneys who may be confronted with the problem of deciding whether it would not be better practice to include the pertinent portions of given exhibits in a settled statement than to have the originals transmitted to the reviewing court. Where the exhibits are of great size or length and the portions thereof which are relied upon by the parties can be incorporated in the record at a trivial expenditure of time and labor, transmission of the originals is unnecessary and inadvisable. The settled statement is an appropriate method for the preparation of an abbreviated and adequate record.

[4] Respondent relies, in part, upon the curative acts, Stats.1943, c. 458; Stats. 1945, c. 1134. Citing Hall v. Chamberlain, 31 Cal.2d 673, 192 P.2d 759, and other cases of like import, appellant seeks to escape the effect of these acts upon the ground that title to the property passed from Annie Blanchard to Minnie K. Currant, from her to James H. Stuart, and from Stuart to Isis Smith, presumably before the effective date of the 1943 Act, although in his briefs he does not advise us when these transfers are supposed to have taken place. We find it unnecessary to examine the probate file and the several deeds listed as exhibits to which we have been referred. It is shown by the record that appellant, James H. Stuart, conveyed the property to Isis Smith and that Isis Smith, through the same attorney who appeared for Stuart, alleged in her answer that she is the fee simple owner of the same. In his reply brief appellant says, "it was considered by the trial court, attorneys for plaintiff and defendant, and the evidence in the record, that the interest of James H. Stuart and Isis Smith were identical, that one was holding for the other." The record is to the contrary. It appears that James H. Stuart has no interest whatever in the property. He is not aggrieved by the judgment and Isis Smith, his grantee, does not appeal.

The judgment is affirmed.

WOOD and VALLÉE, JJ., concur.

88 Cal.App.2d 307

DANZIGER v. PEEBLER et al.

PEEBLER et al. v. DANZIGER et al.

Civ. 16220.

District Court of Appeal, Second District, Division 3, California.

Nov. 3, 1948.

1. Declaratory judgment 🔑322

Where adjoining landowner brought action for declaration that roads extending through defendants' property were public and sought to enjoin defendant from interfering with them as well as from entering office building located upon defendant's property to which plaintiff asserted title, cross complaint based on facts put in issue by complaint and answer, whether roads had been dedicated as public roads as alleged by plaintiff or were private roads as asserted in cross complaint and based on conflicting claims to office building, was properly allowed. Code Civ.Proc. § 442.

2. Appeal and error 🔑901, 1032(1)

An appellant must show error at trial and that his rights were substantially prejudiced thereby.

3. Appeal and error 🔑901

Where trustee in bankruptcy alleged as appellant that judgment was improperly rendered against him since he had not been authorized by bankruptcy court to intervene or defend action, trustee had duty to present to District Court of Appeal a record showing that he lacked such permission, and where judgment roll was silent on the point, mere assertion in appellant's brief would be disregarded as unsupported.

4. Courts ⇐2

Want of capacity of party to sue does not go to jurisdiction of court.

5. Appeal and error ⇐174

Want of capacity to sue cannot be raised for first time on appeal, but may be raised by demurrer if incapacity affirmatively appears, otherwise by answer, and if not raised will be deemed to have been waived. Code Civ.Proc. §§ 430, 433, 434.

6. Appeal and error ⇐174

Where respondents made no objection on trial that appellant as trustee in bankruptcy had not been given permission by bankruptcy court to file complaint in intervention, appellant having invoked jurisdiction of court and submitted case for decision could not claim on appeal that court had no authority to adjudicate as to his claims even if he filed complaint in intervention without special permission of bankruptcy court. Code Civ.Proc. §§ 430, 433, 434.

7. Appeal and error ⇐174

A defendant cannot claim on appeal that he had no capacity to be sued where he failed to make objection at trial.

8. Appeal and error ⇐174

Where trustee in bankruptcy answered cross complaint and engaged in trial without raising objection that it was necessary for cross complainants to obtain permission of court in bankruptcy to bring him in as party defendant and trustee did not raise objection on trial, trustee could not claim as an appellant that he had no capacity to be sued.

9. Bankruptcy ⇐285

Trustee in bankruptcy needs no special permission of bankruptcy court to sue for recovery of assets claimed to belong to estate.

10. Costs ⇐260(1)

Where appeal was frivolous and prosecuted in bad faith for purpose of delay and to harass respondents, District Court of Appeal would impose penalty upon appellants. Code Civ.Proc. § 957, Rules on Appeal, rule 26.

◆

Appeal from Superior Court, Los Angeles County; William J. Palmer, Judge.

Action by Edith W. Danziger against Byron and Ethel M. Peebler for a declaration that certain roadways extending through defendants' property were public roads, and for other relief, wherein Stanley S. Stonaker, H. C. Fickeisen, trustee in bankruptcy, Albert Lopez and Lazaro Corral intervened, and defendants Byron and Ethel M. Peebler filed a cross complaint against Edith W. Danziger, H. C. Fickeisen and H. C. Fickeisen, trustee in bankruptcy, alleging that the roads in question were not public roads and denying the right of cross defendants to use them. From the judgment, Edith W. Danziger, H. C. Fickeisen, and another appeal.

Judgment affirmed.

See, also 77 Cal.App.2d 148, 174 P.2d 883.

H. A. Andrews, of Los Angeles, for appellants.

Roland Maxwell and Paul H. Marston, both of Pasadena, for respondents.

SHINN, Presiding Justice.

The judgment from which the instant appeal is prosecuted declares that certain roads extending across the property of defendants and cross complainants, Byron and Edith M. Peebler, are not public roads and that the defendants own a small office building located on their land.

For the purposes of our decision the following statement of facts will suffice. Edith W. Danziger owns a small parcel of land which she operates as a cemetery. Defendants Peebler own adjoining property, also operated as a cemetery. Certain roadways extend from a public road through the Peebler property to that of Danziger. The present action was brought by Danziger for a declaration that these are public roads, for injunction restraining defendants from interfering with public use of the same and restraining defendants from entering or occupying a certain office building located upon the property of defendants to which Danziger asserts title. H. C. Fickeisen, as trustee, filed a complaint in intervention alleging himself to be the trustee in bankruptcy of Graceland, a corporation; that the corporation in 1924 dedicated the roads in question as public roads, and that he "is the successor to said Graceland, a corporation, in the ownership and possession of the real property described in paragraph III of the complaint herein" (the Peebler property). Certain other persons joined with Fickeisen in the complaint in intervention, also asserting the public nature of the roads. The prayer of the complaint in intervention was that the roads be declared to be public roads and for an injunction restraining defendants from interfering with their use as such. The Peeblers filed a cross complaint against plaintiff and the intervenors, alleging that the roads in question were not public roads and denying the rights of the cross defendants to use the same, and also denying the claim of the plaintiff, Danziger, of ownership of the office building. They prevailed upon their cross complaint, not only upon the evidence of their ownership, but also upon the ground that the same issues had been decided in their favor in former litigation. The present is the latest, and it may be hoped the last, of a series of actions of the same breed that have plagued the courts for a number of years. A comprehensive history of the litigation between the parties over the same subject matter will be found in Peebler v. Olds, 71 Cal.App.2d 382, 162 P.2d 953. It is of interest here only as it throws light upon the motives of the appellants in the prosecution of the present litigation and as it points out the spurious nature of the bankruptcy proceedings of Graceland, and the unfounded nature of the claims of Danziger to any interest in the property of the Peeblers.

Danziger and Fickeisen appeal from the judgment and present only the judgment roll. Only one of the other intervenors appeals, he has filed no brief, and it does not appear that he is aggrieved by the judgment. Two points are raised on the appeal, (1) that the action was not one in which it was proper to allow the Peeblers to file a cross complaint asserting their ownership of the land and the private character of the roads thereon, and (2) that judgment was improperly rendered against Fickeisen, as trustee, for the alleged reason that he had not been authorized by the court in which the bankruptcy proceeding was pending to either intervene in or defend the action.

[1] The first point is stated without supporting argument or authority and has no semblance of merit. The very facts put in issue by the complaint and answer were the basis of the cross complaint, namely, whether the roads had been dedicated as public roads as alleged by plaintiff, or were private roads, as asserted in the cross complaint. The same is true as to the conflicting claims to the office building. Claims of a defendant to property "to which the action relates" are properly set up by cross complaint. Code Civ.Proc. sec. 442.

[2-9] In the consideration of appellants' second point, certain long-established and elementary principles, presumably known to all practitioners of the law, present themselves. (1) It is incumbent upon an appellant to show error at the trial, and that his rights were substantially prejudiced thereby. If the point was to be raised on appeal it was the duty of appellants to present to this court a record showing that Fickeisen had not been given special permission to sue or be sued, and not the duty of the defendants and cross complainants to show that he had received permission. Since the judgment roll is silent on the point, the mere assertion in the brief of appellants that no permission had been given will be disregarded as unsupported by the record. (2) Want of capacity to sue does not go to the jurisdiction of the court (Rosenbloom v. Southern Pac. Co., 59 Cal.App. 102, 210 P. 53; Crittenden v. Superior Court, 166 Cal. 340, 136 P. 287, Work v. Campbell, 164 Cal. 343, 128 P. 943, 43 L.R.A., N.S., 581; Agricultural Extension Club v. M. Hirsch & Son, 39 Cal.App. 433, 179 P. 430, and cannot be

raised for the first time on appeal. It may be raised by demurrer if incapacity affirmatively appears, otherwise by answer, and if not raised will be deemed to have been waived. Code Civ.Proc., secs. 430, 433, 434. It does not appear that objection was made by respondents at the trial as to Fickeisen's not having been given permission in the bankruptcy proceeding to file his complaint in intervention. If the point had been raised by respondents and had been decided against them, the ruling would have been in Fickeisen's favor and he could not be heard to object to it on appeal. Having invoked the jurisdiction of the court and submitted his case for decision he may not be heard to say here that the court had no authority to adjudicate as to his claims on the ground, even if it were the fact, that he filed his complaint in intervention without special permission of the court in bankruptcy. See Mays v. Fritton, 20 Wall. 414, 22 L.Ed. 389; Fischer v. Pauline Oil & Gas Co., 309 U.S. 294, 60 S.Ct. 535, 84 L.Ed. 764, 769. (3) The law is the same with respect to capacity to be sued. A defendant will not be heard to say on appeal that he had no capacity to be sued where he failed to make the objection at the trial. See cases cited from many jurisdictions: 24 C.J. page 909, note 76; 4 C.J.S., Appeal and Error, § 263, page 515, note 63. Appellants answered the cross complaint and engaged in the trial without raising the objection that it was necessary for cross complainants to obtain permission of the court in bankruptcy to bring in Fickeisen, as trustee, as a party defendant to the cross complaint. Respondents say no objection was made at the trial. Appellants' reply reads as follows: "Respondent contends that the demurrer to the cross-complaint raises the question as to the right of cross-complaint to sue, and the writer is informed that the point was raised in the court below before findings and judgment. The question of jurisdiction can be raised at any time, even after final judgment." It is true that the demurrer to the cross complaint specified "that the cross complainants do not have any legal capacity to sue." Even if we substitute the word "appellants" for "respondent" in the sentence quoted from the brief, the statement is irrelevant; the question of the cross complainants' capacity to sue is entirely foreign to the question of Fickeisen's authority to answer the cross complaint. The statement of counsel that he is informed that the question of Fickeisen's capacity to be sued was raised in the court below will be disregarded, as unsupported by the record. The statement, "the question of jurisdiction can be raised at any time, even after final judgment," is answered by what we have already said. (4) A final answer to the present contention is that a trustee in bankruptcy needs no special permission of the court in bankruptcy to sue for the recovery of assets claimed to belong to the estate in bankruptcy. 8 C.J.S., Bankruptcy, § 344, page 1130; 2 Collier on Bankruptcy, 14th Ed., 1743.

The court found that the rights asserted herein by plaintiff had theretofore been finally adjudicated adversely to her in former litigation with defendants, that plaintiff was not acting in good faith in instituting the present action, and that the same is but another step in her plan and program of malicious persecution of the defendants; also, that Graceland, a corporation, has no right, title or interest in or to any of the Peebler land and has had no interest therein since November 9, 1926, when it divested itself of title; that none of the cross defendants has any right, title or interest in or to the land; that the complaint in intervention was filed at the request of plaintiff as a part of a plan of plaintiff Fickeisen and some of the other intervenors to prevent the enjoyment by defendants of their rights in and uses of said land; and that the cross defendants have, and each of them has, unlawfully and improperly interfered with and prevented the operation of the cemetery on the lands of the cross complainants.

[10] The opinion of the court in Peebler v. Olds, 71 Cal.App.2d 382, 162 P.2d 953, supra, and the record on that appeal, disclose that J. M. Danziger, husband of plaintiff herein, B. C. Olds, an associate of Danziger, and Olive Lawn Cemetery, a corporation, operated by the individuals just named, maliciously prosecuted against

the Peeblers numerous actions involving the same property and rights therein that are in issue in the present case; that certain of said individuals caused the filing of a petition in bankruptcy against the Graceland corporation as a part of the general program and purpose to involve the Peeblers in litigation; that none of said parties had any interest in the Peebler property; that the prosecution of said litigation was animated by malice; and that by reason thereof the Peeblers were damaged in the sum of $977, for which judgment was awarded them in the trial court, which judgment was affirmed on appeal as to all defendants other than Edith Danziger. Considering the lack of merit in the present appeal, the findings to which we have alluded, and the history of the litigation prosecuted by the predecessors and associates of plaintiff herein, it appears clear that the present appeal is frivolous and has been prosecuted in bad faith, for the purpose of delay, and to further harass the defendants. This long-continued imposition upon and abuse of process of the courts should not be allowed to pass unnoticed. The appellants' conduct has not been wrongful merely because of lack of merit in the claims which they have asserted, but because such claims have been asserted with improper motives and with full knowledge that they were without merit. The failure of appellants to bring up the evidence is an admission that the issues in the present action were properly determined in the trial court as to the appellants, that the evidence supported the findings that appellant Danziger acted in bad faith in instituting the action, and that the appellant Fickeisen acted in bad faith in filing the complaint in intervention. Under section 957, Code of Civil Procedure, and Rule 26, Rules on Appeal, penalties may be imposed on offending attorneys or parties where an appeal is frivolous or taken solely for the purpose of delay. Since the object of these provisions is discouragement of like conduct in the future, we take it to be the duty of the court, where the circumstances of the case are aggravated, as they are here, to exercise the power thus conferred. The penalty here should fall upon appellants, Edith W. Danziger and H. C. Fickeisen, and not upon their present counsel, who did not represent them at the trial nor in the matter of taking the appeal.

The judgment is affirmed and Edith W. Danziger and H. C. Fickeisen are jointly assessed the sum of $100 as a penalty, in addition to costs on the appeal.

WOOD, and VALLÉE, JJ., concur.

33 Cal.2d 52

PEOPLE v. HARDY.

Cr. 4898.

Supreme Court of California.

Nov. 1, 1948.

1. Homicide 🔑18(5)

A determination by defendant to steal deceased's automobile, formed after the killing, would be insufficient to justify a conviction of first degree murder on theory that murder was committed in the perpetration of a robbery. Pen.Code, § 189.

2. Homicide 🔑253(6)

Evidence was insufficient to support a conviction of first-degree murder based on theory that killing was done in perpetration of a robbery. Pen.Code, § 189.

3. Homicide 🔑253(3)

Evidence was sufficient to sustain first-degree murder conviction on theory that killing was willful, deliberate, and premeditated. Pen.Code, § 189.

4. Criminal law 🔑538(3)

A defendant may be convicted of first-degree murder on his own confessions or admissions where the corpus delicti is independently proved. Pen.Code, § 189.

5. Criminal law 🔑696(1)

Where deputy sheriff testified in absence of jury in murder prosecution concerning conversation with defendant and her husband which implicated them in the murder, without designating what statements were made by defendant or her husband, and when jury was recalled deputy sheriff related conversation but made material departures from testimony given in jury's absence, and court directed reporter to read testimony given in absence of jury, court thereafter properly granted the defendant's motion, to strike testimony given in absence of jury, from record.

6. Criminal law 🔑1144(15), 1169(5)

Ordinarily, trial court is permitted to correct an error in admitting improper evidence by ordering it stricken from record and admonishing jury to disregard it, and jury is presumed to obey the instruction; but where incompetent evidence goes to the main issue, and where proof of defendant's guilt is not clear, error in admitting the incompetent evidence cannot be cured by striking out and instructing jury to disregard that evidence.

7. Criminal law 🔑1169(5)

Where proof of defendant's guilt of first-degree murder was not clear and convincing, error in twice admitting testimony of deputy sheriff concerning conversation with defendant and her husband, which implicated them in the murder, without designation by deputy sheriff of which particular statements were made by defendant and which by her husband, and without laying foundation for a confession, was not cured by striking such testimony and instructing jury that it was expunged from the record, and that jury should entirely disregard it. Pen.Code, § 189.

8. Criminal law 🔑761(12)

In first-degree murder prosecution, instruction that, in determining defendant's intention at time of transaction complained of, it is important to consider means used to accomplish the killing, and that intent is manifested by circumstances connected with offense and sound mind and discretion of accused, was erroneous for assuming that defendant killed deceased. Pen.Code, § 189.

9. Homicide 🔑300(8)

In first-degree murder prosecution, refusal of defendant's requested instructions on self-defense was error under the evidence. Pen.Code, § 189.

10. Criminal law 🔑778(2, 5)

In first-degree murder prosecution, instruction that, when evidence shows that a defendant acted as if he were conscious, the law presumes that he then was conscious, and that such presumption is controlling until overcome by a preponderance of the evidence, was erroneous as depriving defendant of full benefit of her testimony to effect that she was unconscious at time of killing and as placing burden on her of overcoming the presumption by a preponderance of the evidence. Pen.Code, §§ 189, 1096; Code Civ.Proc. §§ 1959, 1961–1963.

11. Criminal law 🔑561(1), 778(5)

The burden rests on the prosecution to prove offense beyond a reasonable doubt, and it is error to deprive an accused of the benefit of doctrine of reasonable doubt by giving an instruction that he has the burden of proving a defense by a preponderance of the evidence. Pen.Code, § 1096.

12. Criminal law ⚷561(1)

The mere fact that there is a presumption tending to support the prosecution's case does not change amount or quantum of proof which defendant must produce, and prosecution must prove offense beyond a reasonable doubt and, in so doing, may rely on any applicable presumptions, and defendant is not required to prove his innocence by a preponderance of the evidence, but only to produce sufficient evidence to raise a reasonable doubt in minds of jury.

13. Homicide ⚷150

In first-degree murder prosecution, wherein, defendant contended that she was unconscious at time of killing, burden on defendant of proving unconsciousness was merely the duty of going forward with the evidence and of raising a reasonable doubt, and not duty to overcome presumption by a preponderance of the evidence. Pen. Code, §§ 26, 1096.

14. Criminal law ⚷570(1)

The general rule as to the quantum of proof required of a defendant in proving unconsciousness at time of trial applies even where a statute places on a defendant the burden of proving certain facts.

15. Criminal law ⚷561(2), 778(5)

Statute providing that, once a defendant's commission of a homicide has been proved, he has burden of proving circumstances of mitigation, does not relieve the state of proving each element of guilt beyond a reasonable doubt, and it is error to instruct jury that defendant has burden of proving mitigating circumstances. Pen. Code, § 1105.

16. Criminal law ⚷46

Statutory provision that persons are incapable of committing crime, who do the act charged without being conscious thereof, does not refer to cases of unsound mind, but only to cases of persons of sound mind who suffer from some force that leaves their acts without volition. Pen. Code, § 26.

17. Criminal law ⚷823(9)

In murder prosecution, error in instructing jury that defendant had burden of proving unconsciousness by a preponderance of the evidence was not cured by further statement in instruction that such rule did not change the law placing on the people the burden of proving defendant's guilt beyond a reasonable doubt. Pen.Code, § 26.

18. Criminal law ⚷1169(1), 1172(1), 1173(1)

In murder prosecution, cumulative effect of errors relating to admission of improper evidence, giving of improper instructions, and refusal of proper instructions, resulted in miscarriage of justice requiring reversal of conviction based on weak evidence. Pen.Code, § 189.

◆

Appeal from Superior Court, Nevada County; James Snell, Judge.

Lois and Joe Hardy, her husband, were charged by information with the murder of James W. McLain. While they were awaiting trial, Joe escaped from jail, and Lois was tried alone on her plea of not guilty. The jury returned a verdict of murder in the first degree without recommendation. Defendant's plea of not guilty by reason of insanity was withdrawn, her motion for a new trial was denied, and the death penalty was imposed. This appeal is automatic under section 1239(b) of the Penal Code.

Judgment and order reversed.

Lynne Kelly, of Grass Valley, for appellant.

Fred N. Howser, Atty. Gen., and Doris H. Maier, Deputy Atty. Gen., for respondent.

GIBSON, Chief Justice.

The prosecution's case against defendant rests almost entirely upon oral statements made by her to different persons at different times after her arrest. These statements were in many respects contradictory, and some of them were apparently made by defendant in an effort to shield and protect her husband, who confessed to killing McLain and who is now serving a life sentence for the crime.

In the latter part of July, 1947, defendant and Joe, who were then unmarried, were hitchhiking from Salt Lake City to Reno. They were given a ride by McLain and the three spent the night in a cabin near Sparks, Nevada. The record is uncertain as to the date, but it appears probable that they arrived at Sparks on the evening of July 28 or 29. Defendant's statements as to what occurred on that night are fairly consistent. She said Joe left the cabin to get some beer, and that in his absence McLain assaulted her. He unbuttoned his pants and tried to push her down on a bed; she fought with him and after a struggle managed to escape. Defendant claims that as a result of the shock she sustained in the encounter with McLain, she suffered a loss of memory and consciousness, and that she has only a vague mental picture of what happened after she was attacked by McClain until she was involved in an automobile accident, which the record shows occurred near Las Vegas on July 31.

Defendant and Joe arrived in Las Vegas alone in McLain's car on the morning of July 31, and they were married there sometime during the day, but defendant claims she has only a hazy remembrance of the ceremony. They were arrested following the automobile accident because they were unable to make a satisfactory explanation of their possession of McLain's car. The police, acting on information given them by Joe while he was in jail, caused a search to be made for McClain's body, and it was found on August 4, near Hirshdale, California, which is approximately 30 miles from Sparks. He had been shot three times in the head and the condition of his body indicated that he had been dead about four days. Two cartridges were found at the scene of the crime, and there was evidence that they were fired from an automatic pistol which Joe had in his possession when taken into custody.

The statements made by defendant as to what she remembered about what happened during the period intervening between the night spent at Sparks and her arrest in Las Vegas are conflicting. One of these statements, which assertedly represents Joe's version of what occurred, contradicts defendant's claim of amnesia and lack of consciousness. It was made to Mrs. Dolley, a police matron, while defendant was in jail at Truckee, California, at the time of her preliminary hearing.

Mrs. Dolley testified that at the request of the sheriff she asked defendant what use was made of a handkerchief wrapped around a stick which was found near the place where McLain was killed. Defendant said that she did not remember anything about a handkerchief, but that she would tell what occurred, and it might recall the handkerchief to her mind. Defendant then told Mrs. Dolley that she was sitting on a blanket holding McLain's head in her hands, that Joe walked up from behind, and that when she nodded to Joe he shot McLain. She said blood was coming out of McLain's mouth and it made her sick and she reached up and took a handkerchief out of Joe's pocket and put it in McLain's mouth to stop the flow of blood. Defendant asked Mrs. Dolley if she noticed any lipstick on McLain's face, and Mrs. Dolley replied that the body was in such a condition that it could not be determined whether there was any lipstick. Defendant then said, "There was lipstick on it; it was mine."

Defendant admitted having had the conversation which Mrs. Dolley related on the witness stand, but explained that, except for the part about the handkerchief, it was Joe's version of what had occurred. She said that shortly after she was arrested in Las Vegas she asked Joe what they were doing in jail. He replied, "Don't you remember," and she said that she had only a hazy recollection of what had happened after she had been attacked by McLain in the cabin at Sparks, Nevada. Joe then told her that he had killed McLain and that she must repeat his story of what occurred, word for word, and not tell the police that she did not remember. She said that when questioned by Mrs. Dolley she did not know what to say about a handkerchief because Joe had not mentioned it, and that, while she was repeating to Mrs. Dolley what Joe had told her to say, she made up the part about the handkerchief. Her statement that this part of the story was invented by her finds support in the testimony of the coroner, who said that the wounds McClain received could not have caused bleeding from the mouth.

Another account of the killing of McClain was given by defendant to Dr. Catton, an alienist appointed by the court to examine her. Dr. Catton testified that she told him that after she had been attacked by McClain in the cabin the next thing she remembered she "was somewhere in the woods." She said "It seems I was falling down into darkness, I was horrified; it seems I got the gun which was tucked in my skirt and I shot him. I knew I shot him once." Dr. Catton asked her how she knew it was McClain, and she answered, "Because he was kissing me. * * *" She told Dr. Catton she first remembered shooting McLain when Joe told her about the killing.

The story which defendant told on the witness stand concerning what occurred following the night at Sparks, is similar to that which Dr. Catton said she told him. She testified, "After that, I don't remember what happened until,—this might be just a dream or nightmare of what happened in the cabin but it seems as though the next day I was out in the woods with a man, and he was pushing me down, and I was fighting with him. He kept on pushing, and it is all blank again until at night, it was awful dark, and I was in a car with Joe and he told me to reach in the dashboard and take out all of the papers, which I did, and he told me to throw them out the window, and I did that."

The sheriff of Nevada County, California, accompanied by the coroner, went to Las Vegas to take custody of the defendant and Joe and brought them back by automobile. The coroner testified that on the return trip defendant pointed out a place just off the highway and said they were going to shoot McLain down there but decided it was too close to the highway. The sheriff testified that the place was pointed out by Joe who made such a statement but that he did not hear the defendant say anything.

In testifying concerning defendant's claim of amnesia and unconsciousness, Dr. Catton stated that defendant was undernourished, neurotic, and of "low nervous reserve," and that she was under the influence of Joe whom he described as having a more powerful character. In his opinion she had been prevailed upon by Joe to pretend amnesia and to tell the various stories as to the manner in which McLain was killed. He said that he believed defendant had an independent recollection of what occurred and that she was not telling the truth because she wanted to protect Joe, rather than to do what she could to help herself. He stated, however, that the attack made on defendant by McLain in the cabin at Sparks could have caused both amnesia and automatism, and that if he was wrong in believing that Joe had put the amnesia story in defendant's mind, then his opinion "should be thrown out." Dr. Catton explained that "amnesia" is a word aimed at the memory of a transaction, while consciousness is the process of being aware of things around one, and stated that the term "automatism" is given to such activity as a person might engage in without being conscious thereof.

The foregoing statement of facts has been culled from a lengthy and confusing record, and it has been very difficult to segregate relevant from irrelevant evidence and to determine what portions of the evidence were stricken and what remained for consideration by the jury. There are frequent references in the record to statements and confessions made by defendant and Joe, to correspondence between them, and to reports made by Dr. Catton, none of which was in evidence and most of which were never offered in evidence. This unfortunate and confusing state of the record is a matter which has an important bearing in determining the prejudicial effect of the errors which occurred at the trial, since it appears that even the attorneys were not certain of what facts had been admitted in evidence, and the closing arguments of both counsel contain inadvertent references to matters which had been stricken or were never presented to the jury. Under the circumstances it is not unreasonable to assume that the jurors may likewise have been confused as to what evidence had been admitted, and that the references to facts not in evidence may have misled the jury into believing that at least some of those facts were to be considered by them in reaching their verdict.

The people claim that there was sufficient proof to support a conviction of murder in the first degree on either of two theories, namely, that the killing was done in the perpetration of a robbery or that it was wilful, deliberate and premeditated.

[1, 2] As to the first theory, there is evidence that defendant and Joe destroyed papers showing McLain's ownership of the car and that they made untruthful statements explaining their possession of the automobile after McLain's death. The facts indicate that there was an unlawful taking, and the evidence would support a finding of either robbery or theft, but these crimes are not synonymous. A determination to steal McLain's automobile, formed after the killing, would be insufficient to justify a conviction on the theory that the murder was committed in the perpetration of a robbery, and it is clear that the case was not tried upon this theory. No definition of robbery was given, and the only instruction which can be said to relate to this theory was given in the language of section 189 of the Penal Code.* Under the circumstances the record will not support a conviction based on the theory that defendant was guilty of murder committed in the perpetration of a robbery.

[3, 4] In support of the claim that the killing was wilful, deliberate and permeditated, the prosecution relies on the coroner's testimony that defendant said that she and Joe planned to kill McLain some time before the actual killing, and on defendant's statement to Mrs. Dooley that she gave a signal when Joe was to shoot McLain. This evidence shows premeditation and is sufficient to support a conviction on this theory. A defendant may be convicted upon his own confessions or admissions where, as here, the corpus delicti is independently proved. People v. Ruef, 57 Cal.App. 230, 233, 206 P. 775; see People v. McMonigle, 29 Cal.2d 730, 738, 177 P.2d 745. However, in considering the prejudicial effect of the errors to be discussed later, it is important to note that there are weaknesses and inconsistencies in this evidence, as shown by the foregoing statement of facts.

One claim of error relates to the testimony of Kennedy, a deputy sheriff, concerning an asserted oral confession made by defendant. Several written statements signed by Joe and defendant, which implicated them in the crime, were offered by the prosecution and were refused admission because the court found from an examination of the language used that the statements were not made by defendant. One of these statements was predicated on a conversation which Kennedy and another deputy had with defendant and Joe, and the prosecution sought to introduce the substance of the written statement through the witness Kennedy on the theory that the remarks made by defendant were only admissions. After objection that the conversation would not be admissible without a proper foundation if it constituted a confession, the court directed the jury to retire while the nature of the conversation was ascertained.

In the absence of the jury, Kennedy testified as follows: "They [Joe and defendant] had been talking but they started over and told it from the beginning. They were telling the story as to how they met McLain, how they had enticed him off to the side of the road, how she was holding him in her arms, kissing him while he shot him in the head, and after he fell over he shot him twice more. She felt his pulse and he was still breathing and then he hit him over the head with a rock. He said then that they went to Sparks and cleared out the auto court and then they went to Las Vegas and were married and then they left Las Vegas and wrecked the car and were arrested by the officer."

---

* Section 189 of the Penal code reads: "All murder which is perpetrated by means of poison, or lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, or mayhem, is murder of the first degree; and all other kinds of murders are of the second degree."

Over defendant's objection, the court ruled that this testimony did not constitute a confession by defendant and was admissible. The jury was then recalled and the witness was asked to relate the conversation. Defendant's objections were restated, and the court was requested to direct the witness to designate by whom each statement was made and to give the exact words of the person as near as he could. The request was denied, the objections were overruled, and the witness attempted to state the conversation. When it developed that the witness was making material departures from the testimony given in the absence of the jury, the court, over defendant's objection, directed the reporter to read the testimony as previously given by the witness.

[5] On the day after this testimony was read to the jury, defendant moved to strike it from the record, upon the grounds that it could not be determined which statements had been made by Joe and which by defendant, and that the conversation as related by the witness amounted to a confession for which no foundation had been laid. The trial court properly granted the motion. However, in an effort to distinguish between the part to be stricken and certain other testimony given by Kennedy, the court again read the testimony quoted above and then instructed the jury that it was expunged from the record and that the jurors should entirely disregard it in their deliberations.

[6, 7] Defendant urges that the action of the court was prejudicial because the testimony was read to the jury on two different occasions, and the jurors could not possibly have erased it from their minds. Under ordinary circumstances the trial court is permitted to correct an error in admitting improper evidence by ordering it stricken from the record and admonishing the jury to disregard it, and the jury is presumed to obey the instruction. People v. Prather, 134 Cal. 436, 439, 66 P. 589, 863; People v. Sourisseau, 62 Cal.App.2d 917, 929, 145 P.2d 916. However, as was stated in People v. McKelvey, 85 Cal.App. 769, at page 771, 260 P. 397, 398, "It has also been held that in certain cases where the incompetent evidence goes to the main issue, and where the proof of defendant's guilt is not clear and convincing, that the error in admitting the incompetent evidence cannot be cured by striking out and instructing the jury to disregard that evidence." In that case five witnesses were permitted to testify to defendant's bad moral character, although he had not put his character in issue. Despite the fact that the testimony was subsequently stricken, the conviction was reversed because "it was an intellectual impossibility for the jury to wholly erase such testimony from their memory and to disregard it as though they had never heard it." 85 Cal.App at page 771, 260 P. at page 397. In the instant case, the Kennedy testimony went to the main issue, and it was unduly emphasized by the manner in which it was presented to the jury. Under the circumstances it was extremely unlikely that the jury could wholly reject the evidence and completely disregard it in their deliberations. The prejudicial effect of the error was lessened, however, by the fact that parts of the story related by Kennedy were before the jury through the testimony of other witnesses. See People v. Sourisseau, 62 Cal. App.2d 917, 929, 145 P.2d 916.

[8] The court also erred in giving certain instructions and in refusing to give others. The jury was instructed "that in determining the intention of the defendant at the time of the transaction complained of, it is important to consider the means used to accomplish the killing. The intent or intention is manifested by the circumstances connected with the offense and the sound mind and discretion of the accused. All persons are of sound mind who are neither idots nor lunatics nor affected with insanity." The identical instruction was criticized in People v. Peterson, 29 Cal.2d 69, 77, 78, 173 P.2d 11, 15, because "It assumes that defendant killed deceased."

The court held, however, that since the case was not a close one on the facts, the error did not require a reversal. The same result might be reached here if this were the only error and the case against defendant were clear and convincing as to all of the essential elements of the crime of which she was convicted.

[9] As part of the same instruction, the jury were told that if they were satisfied "beyond a reasonable doubt that the defendant did assail, on the date mentioned, James W. McLain, violently with a dangerous weapon likely to kill, and which did in fact, destroy the life of said James W. McLain, the natural presumption is that such assailant intended death or great bodily harm, and in the absence of evidence to the contrary this presumption must prevail." There is evidence in the record that McLain was killed by defendant instead of by Joe, and the people contend that it is sufficient to support the instruction on the theory that defendant was the assailant. Defendant points out, however, that if this be true the court erred in refusing her requested instructions on the law of self-defense. Defendant testified that she had a nightmarish memory of fighting in the woods with a man who was "pushing me down." According to Dr. Catton, she told him "The next thing I knew I was somewhere in the woods. It seems I was falling down in the darkness, I was horrified; it seems I got the gun which was tucked in my skirt and I shot him. I knew I shot him once." Defendant also intimated in a letter which Dr. Catton read in the course of his testimony that it was she who killed McLain, and the district attorney in his argument to the jury read from another letter assertedly written by defendant to Joe, in which she said "You and I know I killed that man." These letters were apparently mentioned in Dr. Catton's report, but neither the report nor the letters were in evidence. However, they were treated as being in evidence by the attorneys and were before the jury for consideration with the instruction based on the hypothesis that defendant was the assailant.

Assuming that the evidence was sufficient to justify the instruction which was given on the theory that defendant was an assailant, it would seem clear that defendant is correct in her contention that she was entitled to the requested instructions based upon the theory that, if she shot McLain, she shot him in defense of her person.

[10] The defendant was further deprived of the full benefit of her testimony by the giving of the following instruction: "When the evidence shows that a defendant acted as if he was conscious, the law presumes that he then was conscious. This presumption is disputable, but is controlling on the question of consciousness until overcome by a preponderance of the evidence, which means such evidence as when weighed against the presumption, and any evidence supporting the presumption has more convincing force, and from which it results that the greater probability of truth lies therein."

[11] There is no *statutory* presumption that a man is conscious merely because he acted as if he were conscious. See Code Civ.Proc. §§ 1959, 1961, 1962 and 1963. Such a presumption, however, appears to have been recognized by judicial decision. See People v. Nihell, 144 Cal. 200, 202, 77 P. 916. But there can be no justification in the law for placing on the defendant the burden of overcoming the presumption "by a preponderance of the evidence." It is a cardinal rule in criminal cases that the burden rests on the prosecution to prove the offense beyond a reasonable doubt (see Penal Code, § 1096), and it is error to deprive an accused of the benefit of the doctrine of reasonable doubt by giving an instruction that he has the burden of proving a defense by a preponderance of the evidence. (People v. Thomas, 25 Cal.2d 880, 896, 897, 156 P.2d 7 [mitigating circumstances]; People v. Costello, 21 Cal. 2d 760, 763, 135 P.2d 164 [alibi]; People v. Marshall, 59 Cal. 386, 389 [intent to marry as defense to charge of taking minor female for purposes of prostitution]; People v. Agnew, 16 Cal.2d 655, 664–666, 107 P.2d 601 [lawfulness of arrest as defense to false imprisonment]; People

v. Roe, 189 Cal. 548, 560–561, 209 P. 560 [defense of another's person].) The necessary effect of the instruction given in the present case was to place on defendant not merely the burden of producing evidence which would raise a reasonable doubt as to her consciousness, but the much greater burden of proving unconsciousness by a preponderance of the evidence.

[12, 13] The mere fact that there is a presumption which tends to support the prosecution's case does not change the amount or quantum of proof which the defendant must produce. People v. Agnew, 16 Cal.2d 655, 107 P.2d 601. The prosecution is required to prove the offense beyond a reasonable doubt and, in so doing, may rely on any applicable presumptions. The defendant, on the other hand, is not required to prove his innocence by a preponderance of the evidence, but only to produce sufficient evidence to raise a reasonable doubt in the minds of the jury. The rule is the same whether the people rely on testimonial evidence or on presumptions, except where the presumption is conclusive. One of the factors in raising a disputable presumption, such as the one involved here, is that the matter relates to defendant personally and lies peculiarly within his knowledge, and hence for reasons of convenience and necessity he should have the burden of producing evidence thereon. This burden, however, involves merely the duty of going forward with the evidence and of raising a reasonable doubt, and not the duty to overcome the presumption by a preponderance of the evidence. See People v. Agnew, 16 Cal.2d 655, 663–666, 107 P.2d 601. In People v. Nihell, 144 Cal. 200, 77 P. 916, where defendant claimed he was unconscious by reason of epilepsy, it was held that the burden was on him to establish the peculiar mental condition upon which he relied, and the court stated 144 Cal. at page 202, 77 P. at page 917: "Men are presumed to be conscious when they act as if they were conscious, and if they would have the jury know that things are not what they seem, they must impart that knowledge by affirmative proof." This is merely another way of saying that defendant has the duty of going forward with the evidence, and it is entirely consistent with the rule that defendant has only the burden of producing evidence which would raise a reasonable doubt in the minds of the jury.

[14, 15] The general rule as to the quantum of proof required of a defendant applies even where a statute places on defendant the burden of proving certain facts. Section 1105 of the Penal Code provides that once a defendant's commission of a homicide has been proved, he has the "burden of proving circumstances of mitigation." As stated in People v. Thomas, 25 Cal.2d 880, 896, 156 P.2d 7, 16, this "section in reality merely declares a rule of procedure and does not relieve the state of the burden of proving each and every essential element of guilt beyond a reasonable doubt," and it is well settled that it is error to instruct the jury that defendant has the burden of proving mitigating circumstances by a preponderance of the evidence. People v. Thomas, supra, 25 Cal.2d 880, at pages 896, 897, 156 P.2d 7; People v. Post, 208 Cal. 433, 437, 439, 281 P. 618; People v. Roe, 189 Cal. 548, 564, 565, 209 P. 560.

[16] There are statements in a number of cases to the effect that in a separate trial on the issue of sanity the defendant has the burden of proving insanity by a preponderance of the evidence. People v. McLachlan, 13 Cal.2d 45, 55, 87 P.2d 825; People v. French, 12 Cal.2d 720, 734, 87 P.2d 1014; People v. Troche, 206 Cal. 35, 49, 273 P. 767; People v. Hickman, 204 Cal. 470, 477, 268 P. 909, 270 P. 1117. These statements have no application, however, to a case such as this where, under the plea of not guilty, the defense is that the accused was incapable of committing the crime because she was not conscious of her acts. As was noted in the Troche case, the Legislature has deemed it wise to provide that the plea of insanity at the time of the commission of the offense must be made in a special manner, but the issue of consciousness may be raised under the plea of not guilty, and no special plea is necessary. See People v. Methever, 132 Cal. 326, 329, 64 P. 481; People v. Coston, 82 Cal.App.2d 23, 39–41, 185 P.2d 632; People v. Cox, 67 Cal.App.2d 166, 153 P.2d

362; People v. Freeman, 61 Cal.App.2d 110, 142 P.2d 435; People v. Sameniego, 118 Cal.App. 165, 173, 4 P.2d 809, 5 P.2d 653. The Penal Code treats insane persons differently from those who commit an act without being conscious thereof. Penal Code, §§ 21, 26, 1026, 1369, 1370. Under subdivision 5 of section 26, persons are incapable of committing crime who do the act charged without being conscious thereof, and it has been held that this subdivision "does not contemplate cases of unsound mind,—that is, cases of idiots, lunatics, and insane persons,—but, upon the contrary, contemplates only cases of persons of sound mind" who suffer from some force that leaves their acts without volition. People v. Methever, 132 Cal. 326, 329, 64 P. 481, 483; People v. Rothrock, 21 Cal. App.2d 116, 119, 120, 68 P.2d 364; see People v. Cox, 67 Cal.App.2d 166, 153 P.2d 362 [blow on the head]; People v. Freeman, 61 Cal.App.2d 110, 142 P.2d 435 [epilepsy]; 18 So.Cal.Law Rev. 290 [1945].

[17] The error in instructing the jury that defendant had the burden of proving unconsciousness by a preponderance of the evidence was not cured by the further statement in the instruction that "The rule of law just announced does not change, or make an exception to, the law which places upon the people the burden of proving defendant's guilt beyond a reasonable doubt." The quoted sentence is directly contrary to the portion of the instruction heretofore criticized and could have served only to confuse the jury.

Finally, defendant urges that she was prevented from having a fair trial by the activities of a self-styled "citizens committee," which attempted to influence the conduct of the trial and the verdict of the jury. When the judge learned that one of the jurors had been approached by an unidentified person on behalf of the committee, and that other jurors knew of the incident, he immediately offered to declare a mistrial. Although the offer was declined, questions involving the fundamental rights of defendant are presented, certain aspects of which have not been mentioned by the parties, and additional briefs would be required if we were to pass upon them. However, our decision need not be delayed for this purpose as we are of the opinion that the errors heretofore noted require a reversal of the judgment.

[18] The evidence, which consisted almost entirely of statements made by defendant, is conflicting and contradictory as to certain essential elements of the crime, and, while legally sufficient, furnishes weak support for a judgment imposing the extreme penalty. In view of the state of the record, we conclude that the cumulative effect of the errors resulted in a miscarriage of justice.

The judgment and the order denying a new trial are reversed.

SHENK, EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

33 Cal.2d 45

PEOPLE v. HAMILTON et al.

Cr. 4881.

Supreme Court of California, in Bank.

Nov. 1, 1948.

Rehearing Denied Nov. 29, 1948.

1. Statutes 🔑231

Section of Code of Civil Procedure respecting impeachment of a witness by conviction of a felony must be construed with the section of the Penal Code defining a felony. Code Civ.Proc. § 2051; Pen.Code, § 17.

2. Criminal law 🔑27
Witnesses 🔑345(1)

As to a crime which may be either a misdemeanor or a felony depending upon punishment imposed therefor it is the punishment specified by the sentence which determines the character of the crime for all purposes including that of impeachment. Code Civ.Proc. § 2051; Pen.Code, § 17.

3. Witnesses 🔑337(6)

A defendant who had been convicted of crimes of burglary of the second degree and sentenced to the county jail for six months could not be impeached by proof of such conviction since for purposes of impeachment the conviction was for a "misdemeanor" and not a "felony". Code Civ.Proc. § 2051; Pen.Code, § 17.

See Words and Phrases, Permanent Edition, for all other definitions of "Felony" and "Misdemeanor".

4. Criminal law 🔑808½

An instruction to view with "caution" the testimony of any witness purporting to relate to an oral admission of defendants was not a compliance with the statutory provision requiring that jurors be instructed in language of the code section that testimony of an accomplice ought to be viewed with "distrust" since the word "caution" demands care and watchfulness, while "distrust" includes meanings ranging from doubt and suspicion, to lack of confidence. Code Civ.Proc. § 2061.

See Words and Phrases, Permanent Edition, for all other definitions of "Caution" and "Distrust".

5. Criminal law 🔑1186(4)

It is not every failure to instruct in the terms of the statute that testimony of an accomplice ought to be viewed with distrust that is reversible error but question for the appellate court is to determine whether considering entire record, the error prejudiced defendant's rights. Code Civ.Proc. § 2061; Const. art. 6, § 4½.

6. Criminal law 🔑1186(4)

In burglary prosecution failure to instruct in terms of the statute that testimony of an accomplice ought to be viewed with distrust constituted a miscarriage of justice requiring a reversal of conviction where it could not be said that under correct instruction a different verdict would have been improbable. Code Civ.Proc. § 2061; Const. art. 6, § 4½.

◆

Appeal from Superior Court, San Mateo County; Aylett R. Cotton, Judge.

Joseph Roy Hamilton and Alfred Bundy were convicted of burglary and they appeal.

Judgment and order denying a new trial reversed and cause remanded for a new trial.

For prior opinion see 188 P.2d 817.

Milton Stansky and Kenneth Carlton Zwerin, both of San Francisco, for appellants.

Fred N. Howser, Atty. Gen. and Clarence A. Linn and Leo T. Englert, Deputy Attys. Gen., for respondent.

EDMONDS, Justice.

Joseph Roy Hamilton and Alfred Bundy were convicted of burglary and their appeal from the judgments and from the orders denying a new trial presents, as one of the questions for decision, the admissibility of a record of conviction for the purpose of impeachment. Other grounds for reversal relied upon have to do with the sufficiency of the evidence to support the verdicts, an asserted lack of corroboration of the testimony of an accomplice, and the court's failure to give certain instructions as to an accomplice's testimony.

The appellants were jointly charged with the commission of three burglaries. The first of these, according to the information, occurred on November 7, 1946, when Lester's Market in San Carlos was entered and a small safe, containing about $2,300 was taken from it. Three weeks later, the Tower Market in San Mateo was broken into with the loss of 47 cases of whiskey. The last count of the information alleged that the Carlos Market was entered on the night of December 23, 1946, and a desk ransacked. Upon the first count the jury found Bundy guilty and acquitted Hamilton; they were both acquitted as to the burglary of Lester's Market and convicted of the crime charged in the third count.

Hilliett Roy Johnson was admittedly an accomplice in the entry of the Carlos Market. As a witness for the prosecution, he gave the jury an account of his association with Hamilton and Bundy on the night when this crime was committed. He met them about 7 p. m. at the corner of Post and Buchanan Streets in San Francisco. At that time Bundy, whom he had "seen around" for about nine months, spoke of "making some money" and Johnson asked "about cutting me in". After some discussion, Bundy agreed to "cut him in" for about $300 if Johnson would take out the back seat of his Buick sedan and haul 20 cases of whiskey in it.

Hamilton came up at this time and he and Johnson removed the rear seat from the Buick. Bundy prepared his Lincoln Zephyr in the same way and then drove down the Bayshore Highway, followed by Hamilton and Johnson in the Buick. Just before they reached the San Francisco county line, a traffic officer stopped Bundy and cited him for speeding. The three men then went on to Redwood City where Johnson and Hamilton entered Bundy's car. During the ride to Redwood City, Hamilton had said nothing to Johnson about what they proposed to do, except that they were going to pick up some whiskey; "Bundy knew where it was and Hamilton where to follow him".

With Bundy driving the Zephyr, the three men cruised around San Carlos and San Mateo, "casing" the markets in that vicinity. As they passed the Lucky Tower Market, the store mentioned in count two of the information, Bundy said that "we" took about 40 cases of whiskey from it and he explained some of the details of the burglary. When they passed Lester's Market, which is the place where the crime charged in count one was committed, Bundy said, "We got two grand out of there", and he mentioned "a nice little safe". During this part of the ride, Bundy did all of the talking; neither Hamilton nor Johnson commented upon his statements.

Continuing his testimony, Johnson said that they then returned to Redwood City where his car was parked near the home of Etta Rae Moulton. All of them went into the house, and before leaving at about twenty minutes to eleven, they had some beer and soft drinks. Hamilton and Johnson again got into the Buick and followed Bundy in his car. Johnson stopped at a service station and bought some gasoline for the Buick which Hamilton paid for. Hamilton then directed Johnson to drive to the Carlos Market. When they arrived, he told Johnson to park the Buick about 50 yards away from the store where he could watch the back door. The Zephyr was behind the building with Bundy standing beside it.

Johnson and Hamilton remained in the Buick until Bundy entered the market and came out through the back door. Hamilton then got out and ran over to where Bundy was standing. They spoke to each other and Bundy went back into the market, leaving Hamilton outside. Bundy came out again and, after saying something to Hamilton, they both entered the building.

It was a very dark night and as Johnson waited alone outside he "got afraid". He turned on the engine of his car and sat there watching the rear door of the market. Just then, Johnson saw someone flashing a light. "They threw the light on Bundy's car then they drove up and flashed the light on my face", Johnson told the jury. Two officers got out and approached Johnson. One went around to the right rear of the Buick. The other came up beside Johnson and asked him what he was doing there.

The officer started to open the car door and Johnson drove off. He heard several shots and by the time he reached Bayshore Highway he could see the officers' car following him. Johnson explained that he was "going back to San Francisco if (he) could get there" and was traveling "pretty fast". The car got out of control and crashed into another automobile, killing a man. Johnson was badly injured, but he managed to walk to a house where he asked that the police be called.

The following day, at the hospital where he had been taken, Johnson told the police the full story of the events of the preceding night. When he testified against Bundy and Hamilton, he was under arrest on a manslaughter charge arising out of the accident, but no charge had been brought against him in connection with the burglary.

Each of the appellants testified at the trial. In defense of the charge specified in count one, Bundy claimed that on the 7th of November he was at an all-night party in Richmond with Brown. Hamilton asserted that he was not then in the State and, according to his and Bundy's testimony, at the time of the burglary of the Tower Market they were at an all-night poker game in San Francisco. Hamilton accounted for his whereabouts on December 23rd with the statement that he was in Oakland with "his girl" and Bundy told the jury that when he was stopped for speeding on Bayshore Highway he was enroute to Mills Field to meet a young woman with whom he returned directly to San Francisco.

The record shows that during the cross-examination of Bundy, the district attorney inquired as to where he had been just prior to coming to San Francisco. When Bundy replied that he was then in Los Angeles, the prosecutor asked what he was doing there. Bundy replied: "I was in jail." The next question was: "Have you ever been convicted of a felony?" Bundy answered: "I will let my lawyer answer that for me." Upon being admonished by the trial judge that he must answer the question, Bundy said: "I don't know the law, I don't know what to say." Over the objection of counsel for Bundy, the trial judge then received into evidence a certified copy of a judgment of conviction of Bundy for the crime of burglary of the second degree committed in Los Angeles county. The sentence imposed for the offense was imprisonment in the county jail for a term of six months.

Section 2051 of the Code of Civil Procedure provides: "A witness may be impeached by the party against whom he was called * * * by evidence that his general reputation for truth, honesty, or integrity is bad, but not by evidence of particular wrongful acts, except that it may be shown by the examination of the witness, or the record of the judgment, that he had been convicted of a felony." Section 17 of the Penal Code provides in part: "A felony is a crime which is punishable with death or by imprisonment in the state prison. Every other crime is a misdemeanor. When a crime, punishable by imprisonment in the state prison, is also punishable by fine or imprisonment in the county jail, in the discretion of the court, it shall be deemed a misdemeanor for all purposes after a judgment other than imprisonment in the state prison * * *."

[1-3] The defendants contend that these two sections must be read in pari materia, and that since the judgment shows a sentence to the county jail, the crime became a "misdemeanor for all purposes" and the record was not admissible for the purpose of impeachment. The attorney general argues that section 17 of the Penal Code does not control the provisions of the Code of Civil Procedure; it has to do with the effect of the judgment, whereas the Code of Civil Procedure specifies the methods whereby a witness may be impeached, including the "conviction of a felony", which has been held to mean in regard to that statute, merely a plea of guilty or the verdict of the jury.

These two sections must be considered together, and the judgment of conviction with the sentence of imprisonment in the county jail did not subject Bundy to the statutory deprivation of credibility. As to a crime which may be either a misdemeanor or a felony, depending upon the punishment imposed therefor, sec. 17, Penal Code, it is the punishment specified by the sentence which determines the character of the crime "for all purposes" (sec. 17) including that of impeachment. People v. Lando, 92 Cal.App. 405, 268 P. 439; People v. McGee, 24 Cal.App. 563, 141 P. 1055. Therefore, the ruling of the court admitting the record of Bundy's prior conviction was erroneous.

[4] Error in the instructions to the jury is also relied upon as a ground for reversal of the judgments of conviction. The appellants characterize the instructions as vague and ambiguous. A more specific complaint concerns the court's failure to tell the jurors that Johnson was an accomplice in the commission of only the offense charged in the third count of the indictment; moreover, the instructions stated that Johnson was an accomplice as a matter of law and also presented, as a question of fact, his status in this regard. The final contention is that the court committed prejudicial error in failing to instruct the jurors in the language of section 2061 of the Code of Civil Procedure that "the testimony of an accomplice ought to be viewed with distrust".

The Attorney General takes the position that the instruction "to view with caution the testimony of any witness which purports to relate to an oral admission of the defendants or an oral admission by him," in effect, was a substantial compliance with the statutory requirement. However the statute specifies a different standard for weighing accomplice testimony from that of oral admissions generally. The oral admissions of a party are to be viewed with "caution" and that of an accomplice with "distrust." The two words are quite different. Caution demands care and watchfulness. Distrust includes meanings ranging from doubt and suspicion to lack of confidence. A jury's estimate of evidence which it was directed to view "with caution" might, and ordinarily would, be quite different from the effect which it would give to the same evidence considered "with distrust."

As further support for his position that the failure to instruct the jury in the language of section 2061 concerning the test for considering the testimony of an accomplice does not constitute error, the Attorney General calls attention to the appellants' failure to request such a charge. He concedes that the jury must be instructed upon the court's own motion, if not requested by counsel, as to certain propositions of law. But he argues that in a case such as the present one, a reversal is justified only "when the jury have not been able to clearly detect or distinguish a witness as an accomplice or when the court has issued an instruction contrary to the law of evidence produced by an accomplice."

[5, 6] It is, of course, true that not every failure to instruct in the terms of the statute is reversible error. People v. Koenig, 29 Cal.2d 87, 173 P.2d 1. The question for an appellate court under such circumstances is to determine whether, considering the entire record, the error prejudiced the defendant's rights. Const. Art. VI, sec. 4½. It cannot be said that, under correct instructions, a different verdict would have been improbable; therefore, the erroneous rulings constitute a miscarriage of justice, within the meaning of the constitutional provision. People v. Rogers, 22 Cal.2d 787, 141 P.2d 722; People v. Putnam, 20 Cal.2d 885, 129 P.2d 367.

In People v. Dail, 22 Cal.2d 642, 140 P.2d 828, this court upheld the statutory test for considering the testimony of an accomplice and stated that an instruction in the language of section 2061 is necessary "in a proper case and the failure so to instruct may be reversible error." 22 Cal.2d at page 656, 140 P.2d at page 836. Certainly this is such a case. The convictions of Hamilton and Bundy rest principally upon the testimony of the accomplice Johnson, and it is probable that, had the jury been instructed to view his accusations against them "with distrust", it would have returned different verdicts. Also, the record of Bundy's prior conviction, erroneously presented to the jury, unquestionably had much effect.

The judgments and the orders denying a new trial are reversed, and the cause remanded for a new trial.

GIBSON, C. J., and CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

33 Cal.2d 33

PEOPLE v. CORNETT.

Cr. 4864.

Supreme Court of California.

Nov. 1, 1948.

1. Homicide 🔑300(3)

Instruction that to justify killing on ground of self-defense it must appear to defendant's comprehension, as a reasonable man, that it was absolutely necessary to use deadly weapon to avoid great bodily harm or death, was objectionable as indicating that right to self-defense is available only where killing is absolutely necessary to save life, even though instruction as a whole showed that availability of defense depended upon reasonable appearance to defendant.

2. Criminal law 🔑781(6)

Failure to instruct jury to view with caution evidence of oral admissions of defendant in prosecution for murder was error. Code Civ.Proc., § 2061, subd. 4.

3. Criminal law 🔑823(1)

Instruction that to establish first-degree murder no appreciable space of time between forming of intent to kill and overt act need be shown was erroneous, and giving of other instructions correctly defining the deliberation and premeditation required to establish such offense merely created a conflict in the instructions and did not cure the error, where under the evidence jury could have found that defendant killed on a sudden impulse engendered by an argument or by defendant's fear for his own life. Pen.Code, § 189.

4. Homicide 🔑22(2)

The test of whether killing was "deliberate and premeditated" so as to constitute first-degree murder is the extent of the reflection resulting in intent to kill and not the length of time devoted to such reflection. Pen.Code, § 189.

See Words and Phrases, Permanent Edition, for all other definitions of "Deliberate and Premeditated Killing".

5. Homicide 🔑22(2)

To constitute a "deliberate and premeditated killing", slayer must weigh and consider the question of killing and the reasons for and against such a choice and, having in mind the consequences, must decide to and commit the unlawful act causing death. Pen.Code, § 189.

6. Criminal law 🔑1172(4)

Where it is impossible to determine which of inconsistent instructions were followed by jury, conflicting instructions may constitute reversible error.

7. Homicide 🔑22(2)

A killing which did not take place during commission of any felony enumerated in statute constituted first-degree murder only if it was the result of deliberation and premeditation. Pen.Code, § 189.

8. Criminal law 🔑808½, 823(9)

Instructing jury in language of statute concerning defendant's burden of proving mitigating circumstances when commission of homicide by defendant is shown, without explaining that defendant need only introduce evidence of such circumstances to raise a reasonable doubt of guilt and that such instruction was not applicable in determining the degree of murder, was error, particularly where defendant claimed self-defense, and giving usual instructions as to presumption of innocence and prosecution's burden of proving every element of crime beyond reasonable doubt, when not given in connection with instructions relating to mitigating circumstances, did not render erroneous instruction harmless. Pen. Code, § 1105.

9. Homicide 🔑151(1)

The statute relating to defendant's burden of proving mitigating circumstances when commission of homicide by defendant is shown merely declares a rule of procedure that imposes on defendant only a duty of going forward with the evidence of mitigating circumstances and does not set forth a rule relating to the burden of proof. Pen.Code, § 1105.

10. Homicide 🔑241

Under statute relating to defendant's burden of proving mitigating circumstances when commission of homicide by defendant is shown, defendant need only introduce evidence of such circumstances to raise a reasonable doubt of guilt and is not required to prove mitigating circumstances by a preponderance of the evidence. Pen. Code, § 1105.

11. Homicide 🔑151(1), 152

The statute relating to defendant's burden of proving mitigating circumstances when commission of homicide by defendant is shown is applicable only in determining whether the homicide constituted murder or manslaughter or was justifiable or excusable, and has no application in determining the degree of murder. Pen.Code, § 1105.

12. Criminal law 🔑823(9)

An instruction in language of statute concerning defendant's burden of proving mitigating circumstances when commission of homicide by defendant is shown may not be prejudicial, if jury is adequately instructed, in connection with instructions relating to mitigating circumstances, that prosecution has the burden throughout the entire trial of proving every element of the crime beyond a reasonable doubt and that burden of persuasion never shifts to defendant. Pen.Code, § 1105.

13. Homicide ⚷244(1)

Where defendant admitted killing but evidence was conflicting as to whether it was done in self-defense, defendant was entitled to have the jury in resolving the conflict in the evidence apply to his testimony the rule as to reasonable doubt.

14. Criminal law ⚷1172(2)

Where defendant admitted the killing but contended that it was done in self-defense, instructing jury in language of statute concerning defendant's burden of proving mitigating circumstances when commission of homicide by defendant is shown without explaining that defendant need only introduce evidence of such circumstances to raise a reasonable doubt of guilt resulted in a miscarriage of justice. Pen. Code, § 1105.

◆

Appeal from Superior Court, Tulare County; Frederick E. Stone, Judge.

Rebel V. Cornett was convicted of murder in the first degree, and, from judgment imposing death sentence and order denying his motion for new trial, an automatic appeal is taken.

Judgment and order denying a new trial reversed.

Edward M. Raskin, of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for respondent.

TRAYNOR, Justice.

Defendant was charged with the murder of Fred Weaver Cole, the stepfather of his divorced wife. A jury found him guilty of murder in the first degree and made no recommendation as to penalty. The trial court denied his motion for a new trial and sentenced him to death. This is an automatic appeal from the judgment imposing the death penalty. Penal Code, § 1239(b).

The circumstances of the homicide, according to the testimony of the witnesses for the proscution, were: At the time of the homicide defendant, a pipe yard worker, was living with his divorced wife, Pauline Cornett, and their eight children in a one-room cabin in a labor camp at Woodlake, California. On September 28, 1947, defendant was seeking employment for his children in the cotton fields and had returned to the cabin at 3:00 o'clock in the afternoon. Mrs. Cornett was then preparing dinner; several of the children were in the cabin, while the others were outside. After defendant entered the cabin an argument immediately took place between him and Mrs. Cornett. She accused him of drinking, and he cursed her repeatedly; he repeated that he was "going to get" her and the "entire bunch" including the decedent. Shortly after, she left the room to avoid him and went into the lavatory. Finally she went out of the house and concealed herself behind buildings nearby so that he would not be able to find her. Meanwhile, defendant secured a Japanese Luger from his bed and placed it under his shirt; after uttering words to the effect that he was going to get drunk, he left the cabin and drove away in his automobile. Thereafter a neighbor took Mrs. Cornett and seven of her children to the home of the decedent in Exeter. Upon their arrival Mrs. Cornett related to the decedent what had occurred at the cabin at Woodlake, whereupon the decedent secured two pistols and placed them under his shirt. She and the children went into the house, while he waited on the front porch. A short time later defendant arrived in his automobile. By this time all the children except Virginia, aged 15, had gone upstairs; Virginia and Mrs. Cornett remained in the front room in order to observe through the window the two men outside. After talking to the decedent for a few moments, defendant approached the front door and said, "Come on out, Mom, you are in trouble." Mrs. Cornett then rushed out of the front room and departed from the house through the rear door. She entered the house of a neighbor, where she remained until she heard a shot coming from the upstairs room of the decedent's house. As both defendant and decedent entered the house, Virginia ran upstairs.

Defendant proceeded to go up the stairs, and the decedent followed several steps behind. Neither defendant nor the decedent held a gun in his hands as he ascended. At this time Virginia was sitting on the window sill behind a dresser, which was located near the head of the stairs; Letta, aged 13, was standing at the head of the stairway, while James, aged 10, was behind a sewing machine; the younger children were playing on the floor. When the men arrived at the head of the stairs defendant said to the decedent, "You better draw, this is your last draw." As they entered the room defendant asked him if he knew where Mrs. Cornett had gone, and he replied that he didn't know. Thereupon defendant looked behind a dressing screen, apparently seeking Mrs. Cornett, and then removing his gun from his shirt, whirled around and shot the decedent, who at that time was standing sideways to him about five feet away. The decedent caught himself on a chair. Defendant then said, "I am going to Visalia and give up"; the decedent said, "I will go with you." Defendant replied, No, you are not," and approaching the decedent very closely fired a second shot into his stomach. This time the decedent fell to the floor. After removing the decedent's two guns from his shirt, defendant went downstairs and placed one of the decedent's guns in the front room. Taking the other two guns with him, he drove away in his automobile.

Defendant was apprehended a short time later in Woodlake by Chief of Police Borgman and Police Officer Bolen of Exeter, who testified as follows: After Chief Borgman had called at the residence of the decedent to investigate the shooting, he and Officer Bolen immediately proceeded to Woodlake, where they were joined by the chief of police of Woodlake. They proceeded to defendant's cabin but found no one there. As they were about to leave, however, they saw defendant's car approaching and awaited his arrival. As defendant stepped out of his car, the three officers pointed their guns at him and ordered him repeatedly to drop his gun. Defendant at first ignored their orders, but finally dropped the gun on the third command. The officers immediately searched him and found the Luger under his shirt. As they were taking defendant to Visalia he asked, "How is he?" Chief Borgman replied, "He was still alive when we left town, but he has probably passed away now." Defendant then said, "Good, I have been wanting to do this for a long time."

The circumstances of the killing, however, according to the testimony of defendant were: On the morning of September 28, after placing his Luger in his shirt, he left the cabin at 11:20 to seek employment for his children. After he had returned in the afternoon, Mrs. Cornett began to accuse him of drinking, but he told her that he had not been drinking. He was not angry; he warned her, however, that if she continued to accuse him he would go to town to obtain a drink. He departed shortly thereafter and drove up and down the main street of Woodlake. He returned about fifteen minutes later and learned that a neighbor had taken Mrs. Cornett and the children to the home of the decedent. He thereupon went to the home of the decedent and found him waiting on the front porch. The decedent greeted him and asked him if he wanted to come into the house. The defendant replied that his purpose in coming was merely to get the children, and that he wanted to hurry back to Woodlake, since it was getting late in the evening. As he approached the door the decedent said, "Wait," and looking back defendant saw that the decedent had drawn a gun and was pointing it at him. Defendant remonstrated with him and told him to put the gun away. Then he dashed back toward him and said, "Don't do that, Fred." The decedent thrust his left arm forth, and the defendant seized it. The decedent said, "I am going to kill you," but defendant argued with him as he held his left arm and kept down the other hand in which the decedent held his gun.

At this stage of his testimony defendant testified: "When I kept on arguing with him to put the gun down—I said, 'Get it off me. You don't want to kill me. I didn't come here for any trouble.' He said, 'Well, you've got a gun.' I said, 'That's right; I've got a gun, but I've got it buttoned up, not out like yours.' He said, 'Well, go on in,' and raised the gun back on me. And I walked sideways, but I didn't get out of his reach through the door. Then we had another argument. I kept asking him to take it off and he kept telling me five or six times he was going to kill me."

They finally entered the front room and proceeded upstairs with defendant leading the way. As the decedent followed, he held his gun in his hand but did not point it directly at defendant. Both men continued to swear and argue. Letta was near the head of the stairway looking down at them as they ascended. When they neared the head of the stairs, Letta ran down, stating that she would call the police; the decedent replied that he would take care of his own job, and that he didn't require any policemen. After they had entered the upstairs room, the decedent raised his gun toward the hips of defendant and stated, "You better make your draw. This is your last chance."

Defendant testified that at that particular time only he, the decedent, and two small children, aged three and four, were in the room; and that the two children were playing on the floor. His testimony continues: "I stepped about three steps to the foot of that bed and I looked back and he was coming on me with his gun like that. * * * As he come that way on me I turned my head on the right. I wheeled right quick and made my draw and as I run into him I struck at him and hit his right arm and that kept him sideways and his gun fell out of his hand on the floor. And the kids was in between us and I jumped back and snapped a shot and fired again as he went down." The shots "weren't over a second. They just followed one another."

After the decedent fell defendant placed his foot against his shoulder and pushed him over in order to see his face and said, "Fred, you made me shoot you." The decedent didn't answer. He picked up the decedent's gun so that the small children would not harm themselves and went downstairs. Taking the two guns with him he left the house and went to Woodlake.

Defendant denied that he had made a statement at his cabin either to Mrs. Cornett or to his children about shooting the decedent. He further denied that he had stated to the decedent to make his last draw, but testified that the decedent himself had made such a statement to him. He also testified that when he was approached by the officers at Woodlake he dropped his gun immediately upon the first command; he denied that he had made an admission to the police officers that he had been wanting to kill the decedent for a long time.

[1] Defendant contends that the trial court committed error in giving the following instruction on self-defense by including therein the words "absolutely necessary": "The court instructs the jury that the mere apprehension of danger is insufficient to justify an assault with a deadly weapon. The fear if any must have been produced by circumstances such as would be sufficient to excite the fears of a reasonable person. The law of self-defense is founded on necessity, and in order to justify the taking of life upon this ground it must not only appear to the person using the deadly weapon, as a reasonable man, that he had reason to believe, and did believe, that he was in danger of his life, or of receiving great bodily harm, but it must also appear to his comprehension, as a reasonable man, that to avoid such danger, it was *absolutely necessary* for him to use the deadly weapon on the other party. * * * The court further instructs the jury that to justify the assault with a deadly weapon of another in self-defense, it must appear to the person using the deadly weapon, as a reasonable person, that the danger, if any, was so urgent and pressing that in order to save his own life or to prevent his receiving great bodily harm, the assault with the deadly weapon of the other was *absolutely necessary*. * * *" [Italics added.] The use of the term "absolutely necessary" in such instructions has been condemned, since it might have the effect of misleading jurors to believe that the right of self-defense can be asserted only if the act of killing was actually necessary. People v. Carmichael, 198 Cal. 534, 549, 246 P. 62. Preceding the word "absolutely," however, the instruction indicates that "it must * * * appear to his comprehension, as

a reasonable man, that to avoid danger" it was necessary for the defendant to take the life of another. Although the instruction when considered in its entirety shows that the taking of life depends upon reasonable appearance to the defendant (People v. Holt, 25 Cal.2d 59, 64, 153 P.2d 21; People v. Acosta, 21 Cal.App.2d 57, 61, 68 P.2d 298), such an instruction should not be used because it might indicate to the jury that the right to self-defense is available only where the killing is absolutely necessary to save life.

[2] The trial court erred in failing to give an instruction that the jury should have viewed with caution the oral admissions of defendant. Section 2061(4) of the Code of Civil Procedure provides that a jury is "to be instructed by the court on all proper occasions: That the testimony of an accomplice ought to be viewed with distrust, and the evidence of the oral admissions of a party with caution." It is clear that in view of the foregoing code section the trial court should have given such a cautionary instruction. People v. Koenig, 29 Cal.2d 87, 94, 173 P.2d 1; see People v. Thomas, 25 Cal.2d 880, 891, 156 P.2d 7.

[3] The trial court also erred in giving the following instruction: "There must be an intent to kill, but there need be, however, no appreciable space of time between the forming of the intent to kill and the overt act—they may be as instantaneous as successive thoughts of the mind. A man may do a thing wilfully, deliberately and intentionally from a moment's reflection as well as after pondering over the subject for a month or a year. He can premeditate, that is, think before doing the act, the moment he conceives the purpose, as well as if the act was the result of long preconcert or preparation." As held in People v. Bender, 27 Cal.2d 164, 182, 163 P.2d 8, 19, and People v. Valentine, 28 Cal.2d 121, 134, 169 P.2d 1, such a combination of instructions is wholly erroneous. "Of course the instruction that there need be 'no appreciable space of time between the intention to kill and the act of killing * * *' is abstractly a correct statement of the law. It will be properly understood (at least upon *deliberation)* by those learned in the law as referring only to the interval between the fully formulated intent and its execution, *and as necessarily presupposing that true deliberation and premeditation characterized the process of, and preceded ultimate, formulation of such intent.* * * * But holding that such declaration is a correct statement of the abstract principle of law is not a holding that the same declaration made to a jury without explanation is not error. Particularly is it misleading when read in the context in which it was used. It excludes from the required showing any deliberation and premeditation between the intent and the act of killing and since other portions of the instruction eliminate any necessity for deliberation or premeditation in forming the intent, ('He can premeditate * * * the moment he conceives the purpose,' etc.) we find that the court has wholly deleted the only difference, in this type of case, between first and second degree murder." People v. Bender, supra, 27 Cal.2d 164, 182, 183, 163 P.2d 8. To say that the defendant "can premeditate * * * the moment he conceives the purpose" precludes the meaning of careful thought and the weighing of considerations embodied in the ordinary dictionary meaning of "deliberation" and "premeditation." People v. Thomas, supra, 25 Cal.2d 880, 898, 156 P.2d 7; People v. Bender, 27 Cal.2d 164, 183, 163 P.2d 8.

[4-7] The trial court, however, gave other instructions relating to the meaning of "deliberation and premeditation" essential for murder in the first degree: "The law does not undertake to measure in units of time the length of the period during which the thought must be pondered before it can ripen into an intent to kill which is truly deliberate and premeditated. The time will vary with different individuals and under varying circumstances. The true test is not the duration of time, but rather the extent of the reflection. A cold, calculated judgment and decision may be arrived at in a short period of time, but a mere unconsidered and rash impulse, even though it includes an intent to kill, is not such deliberation and premeditation as will fix an unlawful killing as murder of the first degree. To constitute a deliberate and premeditated

killing, the slayer must weigh and consider the question of killing and the reasons for and against such a choice and, having in mind the consequences, decide to and commit the unlawful act causing death." Although the foregoing instruction states the proper meaning of the deliberation and premeditation required to establish the offense of murder in the first degree, it did not cure the error, but instead created a serious conflict in the instructions. Where it is impossible to determine which of inconsistent instructions were followed by the jury, conflicting instructions have been held to constitute reversible error. People v. Dail, 22 Cal.2d 642, 653, 140 P.2d 828; Wells v. Lloyd, 21 Cal.2d 452, 458, 132 P.2d 471. It cannot reasonably be said that the jury, even though given the proper instruction, was not misled by the further instruction that "a man may do a thing * * * deliberately and intentionally from a moment's reflection. * * * He can premeditate, that is, think before doing the act, the moment he conceives the purpose. * * *" The jury could find defendant guilty of murder in the first degree only by finding that the murder was the result of deliberation and premeditation, since the killing did not take place during the commission of the felonies enumerated in section 189 of the Penal Code. The evidence is without conflict that defendant fired at the decedent after whirling around from a position in which he was looking behind a bed or screen. The jury could have found defendant guilty of murder in the first degree on the basis of either of the following findings: (1) Following the correct instruction it may have found that the defendant had formed an intent to kill after carefully weighing and considering the question of killing, or that the killing may have even been deliberated before his arrival at the home of the decedent; (2) it may have found that defendant entered the upstairs room without previously considering the question of shooting the decedent but that he conceived the thought "upon a moment's reflection" as he whirled around. In view of the evidence it is impossible to determine, therefore, whether or not the jury reached its verdict on the basis of the correct instructions. Clearly the evidence under proper instructions would have supported a verdict of murder in the first degree; it is also clear, however, that it is reasonably probable that the jury, if it was properly and unambiguously instructed, could find defendant guilty of murder of lesser degree, since it could thave concluded that he shot the decedent as the result of a sudden impulse engendered by an argument that had taken place between the two men, or by defendant's fear of his own life caused by the tense relationship between them at that time.

[8-10] The trial court committed an even more serious error by instructing the jury in the language of Penal Code Section 1105 that "Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon [the defendant], unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable." People v. Thomas, supra, 25 Cal.2d 880, 895, 156 P.2d 7. This section does not set forth a rule relating to the burden of proof, but merely declares a rule of procedure that imposes on the defendant only a duty of going forward with the evidence of mitigating circumstances. See 9 So.Cal.L.Rev., 405, 409. It was held in several early cases that the defendant under this section has the burden of proving mitigating circumstances by a preponderance of the evidence. People v. Hong Ah Duck, 61 Cal. 387, 396; People v. Raten, 63 Cal. 421, 422; People v. Arnold, 15 Cal. 476. It is now established, however, that the defendant is not required to prove mitigating circumstances by a preponderance of the evidence, but need only introduce evidence of such circumstances to raise a reasonable doubt of his guilt. People v. Bushton, 80 Cal. 160, 164, 22 P. 127, 549; People v. Elliott, 80 Cal. 296, 305, 22 P. 207; People v. Post, 208 Cal. 433, 438, 281 P. 618; People v Wells, 10 Cal.2d 610, 622, 76 P.2d 493 "The reading of section 1105 to the jurors

without explaining to them the extent of the burden cast upon defendant would tend to create in their minds the impression that the obligation cast upon defendant was much greater than the obligation cast upon him as defined by the late decisions of the Supreme Court. Since an erroneous view of section 1105 was taken by the justices in the Hong Ah Duck and other cases it cannot be successfully argued that the jurors, without the aid of an explanatory instruction, could differentiate between the view expressed in the early California cases and the view expressed in the later cases and accurately determine the extent of the obligation cast upon defendant." People v. Carson, 43 Cal.App.2d 40, 44, 45, 110 P.2d 98, 100. Thus, a jury may construe "the burden of proving circumstances of mitigation" as imposing upon the defendant the burden of persuasion on this particular issue, and may believe that mitigating circumstances do not exist unless the defendant proves the existence of such circumstances by a preponderance of the evidence or by some other degree of proof.

[11] Moreover, the instruction is erroneous in that the jury was not fully advised that such an instruction has no application in determining the degree of murder, and that it is applicable only in determining whether the homicide constitutes murder or manslaughter, or is justifiable or excusable. People v. Thomas, supra, 25 Cal.2d 880, 897, 156 P.2d 7; People v. Valentine, supra, 28 Cal.2d 121, 133, 169 P.2d 1. The expression "circumstances of mitigation" is capable of an interpretation by a jury to include any circumstance that tends to reduce the crime from murder in the first degree. Such an instruction therefore, while having no application in the determination of the degrees of murder, may have the effect of indicating to the jury that a burden is imposed upon the defendant (if the evidence shows murder in the first degree) of showing mitigating circumstances to prove murder in the second degree. It may have the effect of foreclosing any consideration by the jury that mitigating circumstances, although not sufficient in law to justify or excuse the homicide, may be enough to reduce the crime to second degree murder by counteracting the element of premeditation or deliberation. Thus, a conscientious jury, misled by the instruction, may believe that if the defendant does not satisfy the burden of persuasion relating to mitigating circumstances, it no longer has to consider such circumstances in its deliberations. Furthermore, "logic suggests that since such section in reality merely declares a rule of procedure and does not relieve the state of the burden of proving each and every essential element of guilt beyond a reasonable doubt the propriety of reading it to the jury, even with a proper explanation, is doubtful." People v. Thomas, supra, 25 Cal.2d 880, 896, 156 P.2d 7, 16.

[12] It may be contended that this instruction, though erroneous, could not have prejudiced defendant. Such an instruction may not be prejudicial, if the jury is adequately instructed in connection with instructions relating to mitigating circumstances, that the prosecution has the burden throughout the entire trial to prove every element of the crime beyond a reasonable doubt, and that the burden of persuasion never shifts to the defendant. See People v. Leddy, 95 Cal.App. 659, 672, 273 P. 110; People v. Richards, 1 Cal.App. 566, 572, 82 P. 691; People v. Hawes, 98 Cal. 648, 653, 33 P. 791. Although the trial court gave the usual instructions relating to the presumptions of innocence and the burden of the prosecution to prove every element of the crime beyond a reasonable doubt, such instructions did not render the erroneous instruction harmless. Since these instructions were not given in connection with the instructions relating to the mitigating circumstances, they did not clarify the confusion likely to result from the reading of section 1105. The jury might have concluded that an instruction based on the language of section 1105 that was given in conjunction with the general instructions on self-defense created an exception to the rule that the defendant, to be entitled to an acquittal, must only create a reasonable doubt in the minds of the jurors.

People v. Marshall, 112 Cal. 422, 425, 426, 44 P. 718.

[13] Since defendant admitted the killing and claimed that the shooting was done in self-defense, the giving of the erroneous instruction appears particularly prejudicial. People v. Roe, 189 Cal. 548, 565, 209 P. 560; People v. Marshall, supra, 112 Cal. 422, 425, 44 P. 718; People v. Post, supra, 208 Cal. 433, 438, 439, 281 P. 618. Defendant was entitled to have the jury in resolving the conflict in the evidence apply to his testimony the rule as to reasonable doubt. The jury following an erroneous view of defendant's burden may have believed that after the prosecution had completed its case the burden shifted upon defendant to prove that the homicide was excusable. Accordingly, it may have concluded that defendant by his testimony failed to sustain the burden of persuasion on this issue. That testimony, however, even though not enough in the minds of the jurors to prove self-defense, might have been sufficient to raise a reasonable doubt in their minds. Since defendant was required by the erroneous instruction to produce more evidence than the law demands to establish his defense, he was in effect deprived of the force of his testimony. Thus, it cannot reasonably be said that it is improbable that the jury would have reached a different result had they been properly instructed that defendant was required only to raise a reasonable doubt on the issue of self-defense. Such an instruction therefore may have misled the jury on a matter vital to the defense of defendant. See People v. Silver, 16 Cal.2d 714, 723, 108 P.2d 4; People v. Dail, supra, 22 Cal.2d 642, 659, 140 P.2d 828.

[14] After a consideration of the entire record it is clear that the giving of this erroneous instruction, particularly when considered with the other erroneous instructions, has resulted in a miscarriage of justice.

The judgment and the order denying the motion for new trial are reversed.

GIBSON, C. J., and CARTER, SCHAUER, and SPENCE, JJ., concur.

HUGHES et al. v. SUPERIOR COURT IN AND FOR CONTRA COSTA COUNTY.

S. F. 17685.

Supreme Court of California, in Bank.
Nov. 1, 1948.
Rehearing Denied Nov. 29, 1948.

1. Injunction ⚷231

If preliminary injunction enjoining petitioners from picketing certain store violated their constitutional right of free speech, judgment holding petitioners guilty of contempt of the injunction will be annulled upon certiorari.

2. Constitutional law ⚷90

The right to picket peacefully and truthfully is one of organized labor's lawful means of advertising its grievances to public, and as such is guaranteed by Constitution as incident of "freedom of speech". U.S.C.A.Const.Amend. 1.

See Words and Phrases, Permanent Edition, for all other definitions of and definitions of "Freedom of Speech".

3. Constitutional law ⚷90

Picketing of place of business to induce operators thereof to hire Negro clerks in proportion to white and Negro customers who patronized the store was for an unlawful purpose and, hence, injunction restraining members of certain unincorporated associations from such picketing was not violative of members' constitutional right of "freedom of speech". U.S.C.A. Const.Amend. 1.

CARTER, and TRAYNOR, JJ., dissenting.

◆

Proceeding by John Hughes and another for writ of certiorari to review judgment of the Superior Court of the state of California, in and for the county of Contra Costa, adjudging petitioners to be guilty of contempt for violating a preliminary injunction against picketing a certain store.

Judgment of contempt affirmed.

For prior opinion see 186 P.2d 756.

Edises, Treuhaft & Condon and Robert L. Condon, all of Oakland, for petitioners.

Allan Brotsky, Benjamin Dreyfus, of San Francisco, J. Bruce Fratis, of Oakland, Cecil F. Poole and Philip Adams, both of San Francisco, Robert Herman and Herbert Prashker, as amici curiae on behalf of petitioners.

Hoey & Hoey and Francis Hoey, all of Martinez, for respondent.

Edward D. Keil, George A. Connolly, Mitchell T. Neff, Willard S. Johnston and Orrick, Dahlquist, Neff & Herrington, all of San Francisco, as amici curiæ on behalf of respondent.

SCHAUER, Justice.

Petitioners through certiorari seek annulment of a judgment of the superior court of Contra Costa County by which petitioners were found guilty of contempt of court for wilfully violating a preliminary injunction. The injunction restrained petitioners and certain other individuals, as well as five named unincorporated associations, "from picketing or taking position in front of any of the places of business of Lucky Stores, Incorporated, for the purpose of compelling * * * [Lucky Stores, Incorporated, hereinafter termed "Lucky"] to do any of the following acts:

"(1) the selective hiring of Negro clerks, such hiring to be based on the proportion of white and Negro customers who patronize * * * [Lucky's] stores."[1]

We have concluded that, upon the principles enunciated in James v. Marinship Corp. (1944), 25 Cal.2d 721, 745, 155 P.2d 329, 160 A.L.R. 900, and Park & Tilford Import Corp. v. International etc. of Teamsters (1946), 27 Cal.2d 599, 607, 614, 165 P.2d 891, 162 A.L.R. 1426, the injunction properly restrained picketing for the purpose described, and that the judgment of contempt should be affirmed.

The controlling issue is whether the sole objective involved—the discriminatory hiring of a fixed proportion of Negro employes regardless of all other considerations—is lawful. Relative to this issue it is to be particularly noted that here the only activity enjoined is "picketing * * * for the purpose of compelling * * * [Lucky] to * * * [engage in] the selective hiring of Negro clerks * * * based on the proportion of white and Negro customers who patronize * * * [Lucky's] stores." This is in contrast to the situation which was presented in Park & Tilford Import Corp. v. International etc. of Teamsters, (1946), supra, 27 Cal.2d 599, 165 P.2d 891, wherein the injunction which had been issued broadly forbade "concerted activities" for any purpose. As stated in that case (page 614 of 27 Cal.2d, page 900 of 165 P.2d), "Since defendants, in connection with their concerted activities, made unlawful demands that plaintiff sign a closed shop contract and coerce its employees to join defendant unions, it was permissible for the trial court to enjoin defendants from making such demands", but (page 607 of 27 Cal.2d, page 896 of 165 P.2d), "The injunction * * * was not limited to enjoining such demands but prohibited defendant's concerted activities and thus prevented defendants from exercising their right under the law of this state and of the federal government to engage in such activities for a closed shop." It is also to be borne in mind that the proceeding before us is not an appeal from the order granting an injunction but is a petition for certiorari to annul a contempt adjudication.

Petitioners allege that on June 21, 1947, approximately three weeks after the injunction issued, they picketed in front of Lucky's Canal Store, "which store is located in the City of Richmond, County of Contra Costa, State of California, bearing placards which carried the following legend: 'Lucky Wont Hire Negro Clerks in Proportion to Negro Trade—Dont Patronize'"; that on the same day they were served with a citation to appear before the superior court on June 23, 1947, and show cause why they should not be adjudged in contempt; that on June 23 they were found guilty of "contempt of the aforesaid preliminary injunction" and received sentence. Petitioners allege further that both on June 21, 1947, and prior to issuance of the injunction petitioners and the other defendants named in the injunction proceedings "were picketing to secure a change of employment policy and working condition of Lucky * * * by seeking to have Lucky * * * hire at its Canal Store * * * a number of Negro clerks proportionate to the number of Negro customers of said Canal Store * * * A demand for these changes in employment policy was made by your petitioners upon Lucky * * * before any picketing was done at the said Canal Store, which demand related to future vacancies and did not * * * contemplate the discharge of any of the present personnel of said Canal Store." Each petitioner alleges that he is a member and officer of one of the associations named as defendants in the injunction and that each of such associations has a "substantial number of Negroes as members, in the City of Richmond." It is also alleged that petitioners "individually, and as officers" of the associations "have an interest in promoting the employment by Lucky * * * of Negro personnel and in improving the employment possibilities of Negro citizens, particularly of those Negro citizens who are members of the defendant organizations.

---

[1] The injunction also restrained picketing for the purpose of compelling Lucky to discharge certain employes who had participated in the apprehension of a man accused of theft from one of Lucky's stores located in the City of Richmond. However, at the oral argument before this court counsel for the respective parties agreed that the issue concerning the discharge of such employes had been dropped from the case. We therefore treat the injunction as being directed solely against "selective" or "proportional" hiring.

"D. The picketing conducted by your petitioners in their individual and representative capacities, and by the defendants * * * [named in the injunction] was designed to promote and foster the aforesaid interest in increasing the employment possibilities of Negro citizens.

"E. The City of Richmond, County of Contra Costa, State of California, has a large and growing Negro population in excess of ten thousand persons; unemployment among this Negro population is greatly disproportionate to the unemployment among the white persons in Richmond; traditionally, many industries and occupations are closed to Negroes and will remain closed until the Negro people can make effective their demand to obtain equality of opportunity for employment and to prevent economic discrimination against Negroes.

"F. The picketing * * * [at all times] was peaceful and orderly, without force or violence; the pickets did not prevent the customers and employees of Lucky * * * in going to and from the said Canal Store; the picketing was unaccompanied by misrepresentation, threats or intimidation of any sort."

[1] Petitioners urge that the preliminary injunction violated their constitutional right of free speech and was therefore in excess of the court's jurisdiction and void. If their position is sound, a judgment holding them guilty of contempt of the injunction will be annulled upon certiorari. (Fortenbury v. Superior Court (1940), 16 Cal.2d 405, 407–409, 106 P.2d 411; Kreling v. Superior Court (1941), 18 Cal.2d 884, 118 P.2d 470.)

After the certiorari petition was filed and the writ issued, respondent superior court and Lucky, the real party in interest, joined in filing an answer and return. They admit that the picketing by petitioners was without force or violence, but deny that it "was unaccompanied by misrepresentation." They allege that Lucky's "policy throughout has been to hire employees on their individual merit and capacity" and deny that Lucky has discriminated against the Negro race; certain affidavits in support of this allegation and denial are attached to the answer and return.

Respondent and Lucky contend, among other points, that the picketing here involved, and upon which the judgment of contempt is based, was for the attainment of an unlawful objective, viz.: not to induce Lucky not to discriminate against, but, rather, expressly to compel Lucky to discriminate arbitrarily in favor of, one race as against all others in the hiring of a portion of its clerks; and that therefore the injunction was properly issued and the judgment of contempt should stand. With this position, upon the record here, we must agree.

[2] It is now established as the law that "the right to picket peacefully and truthfully is one of organized labor's lawful means of advertising its grievances to the public, and as such is guaranteed by the Constitution as an incident of freedom of speech." (McKay v. Retail Automobile Salesmen's Local Union No. 1067 (1940), 16 Cal.2d 311, 319, 106 P.2d 373, 378, and cases there cited; see also Magill Bros. v. Bldg. Service etc. Union (1942), 20 Cal.2d 506, 511–512, 127 P.2d 542; People v. Dail (1943), 22 Cal.2d 642, 651, 140 P.2d 828; In re Blaney (1947), 30 Cal.2d 643, 647, 184 P.2d 892.) Nevertheless, as emphasized in James v. Marinship Corp. (1944), supra, 25 Cal.2d 721, 728–729, 155 P.2d 329, 334, (see also authorities there cited), the state may protect against abuses of the right; "the object of concerted labor activity must be proper and * * * must be sought by lawful means, otherwise the persons injured by such activity may obtain damages or injunctive relief." (See also Park & Tilford Import Corp. v. International etc. of Teamsters (1946), supra, 27 Cal.2d 599, 603, 165 P.2d 891; Northwestern Pac. R. R. Co. v. Lumber & S. W. Union (1948), 31 Cal.2d 441, 189 P.2d 277.)

In the Marinship case the court was concerned with the "fundamental question * * * whether a closed union coupled with a closed shop is a legitimate objective of organized labor." (Page 730 of 25 Cal.2d at page 334 of 155 P.2d.) We held that a union which holds a closed shop contract or other form of labor monopoly must admit Negroes "to membership under the same terms and conditions applicable to non-Negroes unless the union and the employer refrain from enforcing the closed shop agreement against them." There was not in that case any contention that the *number of Negroes* admitted to membership in the union or hired by the employer must be proportional, regardless of all other considerations, to the number of Negroes residing in the area or doing business with the employer. The judgment awarding a preliminary injunction which "was clearly intended to do no more than eliminate discrimination upon the basis of race and color alone", was affirmed. (Page 745 of 25 Cal.2d, page 342 of 155 P.2d; see also Williams v. International etc. of Boilermakers (1946), 27 Cal.2d 586, 588–593, 165 P.2d 903; Thompson v. Moore Drydock Co. (1946), 27 Cal.2d 595, 597–598, 165 P.2d 901.)

It is apparent that the same principles which impelled affirmance of the judgment in Marinship require that the injunction and the contempt order in the case now before us be upheld. The parties in their briefs argue as to whether Lucky does or does not discriminate against Negroes in its employment of clerks, as to whether that matter was considered or determined by the trial court, and as to whether the affidavits treating of that matter and attached to the answer and return are properly before this court. It may be assumed for the purposes of this decision, without deciding, that if such discrimination exists, picketing to protest it would not be for an unlawful objective. However, no such broad purpose is shown to have motivated the activities here and the judgment of contempt is not affected by such proposition. Petitioners themselves specifically allege that their activities were "to secure a change of employment policy and working condition of Lucky * * * by seeking to have Lucky * * * hire at its Canal Store * * * a number of Negro clerks proportionate to the number of Negro customers of said Canal Store * * *"; the injunction which petitioners violated was directed at and limited to the narrow issue of "selective hiring of negro clerks * * * based on the proportion of white and negro customers"; and the placards carried by petitioners in the course of such violation bore the words: "Lucky Wont Hire Negro Clerks in Proportion to Negro Trade—Dont Patronize." The fact that the hiring by Lucky of a small proprotion of Negro employes might tend to show discrimination against Negroes is beside the point; likewise it is immaterial here that Lucky denied any such discrimination. The controlling points are that the injunction is limited to prohibiting picketing for a specific unlawful purpose and that the evidence justified the trial court in finding that such narrow prohibition was deliberately violated.

If Lucky had yielded to the demands of petitioners, its resultant hiring policy would have constituted, as to a proportion of its employes, the equivalent of both a closed shop and a closed union in favor of the Negro race. It would have had no choice but to employ only members of the Negro race in a fixed number of clerical positions, thus effectuating a closed Negro shop as to those positions. Moreover, because race and color are inherent qualities which no degree of striving or of other qualifications for a particular job could meet, those persons who are born with such qualities constitute, among themselves, a closed union which others cannot join. It was just such a situation—an arbitrary discrimination upon the basis of race and color alone, rather than a choice based solely upon individual qualification for the work to be done—which we condemned in the Marinship case, supra, (25 Cal.2d 721, 737, 745, 155 P.2d 329). The fact that those seeking such discrimination do not demand that it be practiced as to all employes of a particular employer diminishes in no respect the unlawfulness of their purpose; they would, to the extent of the fixed proportion, make the right to work for Lucky dependent not on fitness for the work nor on an equal right of all, regardless of race, to compete in an open market, but rather, on membership in a particular race. If petitioners were upheld in their demand then other races, white, yellow, brown and red, would have equal rights to demand discriminatory hiring on a racial basis. Yet that is precisely the type of discrimination to which petitioners avowedly object.

There has been some suggestion that the case of New Negro Alliance v. Sanitary Grocery Co. (1937), 303 U.S. 552, 304 U.S. 542, 58 S.Ct. 703, 82 L.Ed. 1012, is in some way in point in this litigation, and isolated excerpts of the language in that opinion have been quoted to us. But there is no serious contention that the Norris-La Guardia Act, Act of March 23, 1932, c. 90, 47 Stat. 70, 73, 29 U.S.C.A. § 101 et seq., operates in this case to divest the state courts of jurisdiction in the premises and, in the New Negro Alliance case, the only "matter in controversy", as expressed by the court, was (page 554 of 303 U.S., page 704 of 58 S.Ct.) "whether the case made by the pleadings involves or grows out of a labor dispute within the meaning of section 13 of the Norris-La Guardia Act" and, consequently, whether the United States District Court, by sections 4 and 7 of the act, was deprived of jurisdiction to issue an order in the premises. The question involved in the cited case is not one which we reach, and as that case contains neither a discussion of any of the considerations which impel our decision nor of any controlling constitutional principle, it provides no precedent of value in resolving any issue now before us.

[3] Petitioners assert that in Park & Tilford Import Corp. v. International etc. of Teamsters (1946), supra, 27 Cal.2d 599, 607, 165 P.2d 891, we "held that peaceful picketing could not be enjoined regardless of the object of such picketing." No such sweeping license was announced in that case. The judgment there enjoined defendants from, among other activities, "any and all picketing or boycotting of plaintiff or of plaintiff's business, products or merchandise." (Page 603 of 27 Cal.2d, page 893 of 165 P.2d) We held, as previously shown, that at least one of the purposes of defendants in picketing was unlawful and that the judgment should be modified by limiting the injunction to the enjoining of defendants from continuing their activities in connection with that purpose; defendants' activities in connection with lawful demands and purposes were freed from the injunction. By contrast, the injunction in the case now before us is limited to enjoining picketing for a specifically designated unlawful purpose, viz: discrimination in favor of persons of the Negro race, based on race alone, and hence, arbitrary. Such injunction appears to have been properly issued, and the judgment of contempt based thereon will be affirmed.

Lucky contends, further, that the picketing here in issue was not "a lawful exercise of the right" and not within the constitutional guarantee of free speech, because the defendants had "no relation to the labor contract," the picketing was not directed at working conditions, and the dispute "is solely racial." Lucky also urges that acceding to petitioners' demands for proportional hiring would necessarily result in breach of its collective bargaining contract with the Retail Clerks Union. However, by reason of the conclusion we have reached as to the unlawfulness of petitioners' objective in their activities, and in view of the narrow limit of the injunction which issued and was violated, we do not reach these or other contentions of the parties.

The judgment of contempt is affirmed.

SHENK, EDMONDS, and SPENCE, JJ., concur.

CARTER, Justice.

I dissent.

As the majority make no attempt to state the facts with particularity, it seems advisable to do so here. The controversy centered around a grocery store in Richmond, Contra Costa County, one of a chain operated by Lucky Stores, Incorporated. Petitioners were adjudged guilty of contempt in that, in violation of the terms of a preliminary injunction, they admittedly continued to picket the store in question. They seek by this proceeding in certiorari to have the adjudication of contempt annulled, charging that their constitutional rights have been violated. This Court has held that certiorari is the appropriate method to test the jurisdiction of the superior court where it is challenged on constitutional grounds. Fortenbury v. Superior Court, 16 Cal.2d 405, 106 P.2d 411; Kreling v. Superior Court, 18 Cal.2d 884, 118 P.2d 470.

Lucky Stores sought an injunction in the Superior Court of Contra Costa County, naming petitioners and various organizations and individuals as defendants. In its verified complaint it alleged that it was a party to a collective bargaining contract with a certain clerks' union wherein it had agreed to employ only members of the union unless the union could not meet its demands, or unless the unemployed members of the union were not satisfactory to it, in which event it might employ non-union members, but that such non-union employees must then join the union within a specified time. It was further alleged that these petitioners and other defendants demanded that Lucky Stores agree to hire Negro clerks in such proportion as the Negro customers bore to the white customers who patronized the store, and that plaintiff (Lucky Stores) discharge those employees who had participated in the apprehension and arrest of one Jackson who had been accused of shoplifting. Lucky Stores alleged that these demands were refused because to comply with them would violate the contract existing between it and the union, and that no labor dispute exists between it and the union, and that as a result of its refusal to comply, the petitioners and other defendants have picketed its store. It is contended that this picketing will cause irreparable injury, that it is an infringement on plaintiff's right to do business, and would require it to violate its contract with the union.

In response to the order to show cause why a preliminary injunction should not issue, petitioner Hughes filed a counter-affidavit in the injunction proceeding in which he sets forth the following facts: That he is a member and an officer in several of the organizations sought to be enjoined, and that he makes the affidavit in both his personal and representative capacities; that he and the other petitioner, Richardson, met with some officials of Lucky Stores and protested the treatment accorded Jackson; that he requested Lucky Stores, so far as this particular store is concerned, to hire gradually Negro clerks until the proportion of Negro to white clerks approximated the proportion of Negro to white customers. This proportional hiring was to take place as the white clerks left the employ of the store in question, or were transferred by plaintiff to other stores owned and operated by it. It was specifically stated that petitioner did not request the discharge of any employees of the store, but only that vacancies be filled with Negroes until the approximate proportion was reached. It was further alleged that about 50 per cent of the customers at this particular store were Negroes. At this time, petitioner had no knowledge of the contract existing between

Lucky Stores and the union, but that subsequently the officials of the union informed petitioner that the union accepted Negro members, and that it had such qualified members presently unemployed, and could supply Negro clerks to any employer requesting such help. Petitioner states further that on May 19, 1947, members of several of the organizations sought to be enjoined, picketed the store in question. This picketing was confined to not more than six pickets patrolling an area more than 100 feet wide; that the pickets were peaceful and there was no violence, no comments were made to customers or employees, other than the placards which were carried by the pickets. The words on the placards were to the effect that Lucky Stores refused to hire, at this particular store, a proportionate number of Negro clerks.

The affidavit of Richardson, the other petitioner, was to the same effect, and contained substantially the same statements. Neither of these affidavits were controverted by the plaintiff in the trial court.

The trial court granted a preliminary injunction in favor of the plaintiff. Petitioners violated the terms of the injunction by picketing the store in question and were adjudged guilty of contempt of court.

It was agreed, at the oral argument before this Court, by counsel for the respective parties, that the issue concerning Jackson had been dropped from the case. The sole question involved, at the present time, therefore, is the right of petitioners to picket a retail store, thereby setting forth their grievances and demands and publicizing the same.

When the writ of certiorari issued, respondent superior court and Lucky Stores, as real party in interest, joined in filing an answer and return, alleging that the picketing was without force and violence, but denying that it was not accompanied by misrepresentation, and alleging that the policy of Lucky Stores was to hire its employees on their individual merit and capacity, and denying that there had been any racial discrimination. It was contended that the picketing here involved was for the attainment of an unlawful objective.

It is a well-established principle that the Fourteenth Amendment to the Federal Constitution invalidates legislation that infringes substantive rights of a fundamental character. The decision of the Supreme Court of the United States in Cantwell v. Connecticut, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213, 128 A.L.R. 1352, made it clear that a judicial decision in the field of substantive law might also be found to be a violation of due process. Bridges v. State of California, 314 U.S. 252, 62 S.Ct. 190, 86 L.Ed. 192, 159 A.L.R. 1346, was the first case to decide that punishment for contempt may violate the guaranty of freedom of speech.

The United States Supreme Court has held that picketing is identified with the freedom of speech guaranteed by the First Amendment to the Constitution of the United States. Bakery and Pastry Drivers Local v. Wohl, 315 U.S. 769, 62 S.Ct. 816, 86 L.Ed. 1178; Milk Wagon Drivers Union, Local 753 v. Meadowmoor Dairies, 312 U.S. 287, 61 S.Ct. 552, 85 L.Ed. 836, 132 A.L.R. 1200; Thornhill v. Alabama, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093; Carlson v. California, 310 U.S. 106, 60 S.Ct. 746, 84 L.Ed. 1104. This Court has also so held In re Blaney, 30 Cal.2d 643, 184 P.2d 892; Northwestern Pacific Railway Co. v. Lumber & Saw Mill Workers' Union, 31 Cal.2d 441, 189 P.2d 277; Park & Tilford Import Corp. v. International etc. of Teamsters, 27 Cal.2d 599, 165 P.2d 891, 162 A.L.R. 1426; McKay v. Retail Automobile Salesmen's Local Union No. 1067, 16 Cal.2d 311, 106 P.2d 373; Magill Bros. v. Bldg. Service etc. Union, 20 Cal.2d 506, 127 P.2d 542, and others. In so holding, this Court has established as the law of this state that the right to picket peacefully and truthfully is one of labor's lawful means of advertising its grievances to the public.

It is quite true that the basic reason advanced in support of the fundamental right of freedom of speech for a free people grew out of the need to speak freely concerning political matters, but it is equally true that there is a need to speak freely with reference to economic matters. This may require a rather delicate balancing of interests involved, in that labor's right to speak freely with regard to its grievances may, in some respects, infringe on the employer's right to conduct his business as he chooses. Labor, always in a less advantageous bargaining position, has been held privileged to picket in an endeavor to put before the public its position, needs, and desires.

It is conceded here that picketing is free speech and something more. It is not an absolute right, but may be said to be in a category by itself, and as such subject to *reasonable* regulation by the courts. The boundaries circumscribing the right to picket are said to be that the *object* of concerted labor activity must be proper and that it must be sought by lawful *means*, or the persons injured by such activity may obtain damages or injunctive relief. There is no dispute here concerning the means used since the picketing was admittedly peaceful. The dispute centers around the objective sought by petitioners.

The picket seeks, through economic pressure, to induce certain action on the part of another. The activity sought to be induced may be one or more of many things. He may be one of a number of employees seeking better hours, working conditions, better pay for his labor, or he may, as in the present case, seek employment for himself and members of his race. It was held by this court in C. S. Smith Metropolitan Market Co. v. Lyons, 16 Cal.2d 389, 106 P.2d 414, and in the McKay case, supra, that labor may exert economic pressure upon employers provided that peaceful means are used and the purpose is one reasonably related to labor conditions. Despite the picketing the public might choose to patronize the merchant, but labor must be given some opportunity to put its case before the public, that the public may decide for itself whether or not the worker's position is a just one.

In New Negro Alliance et al. v. Sanitary Grocery Company, Inc., 303 U.S. 552, 304 U.S. 542, 58 S.Ct. 703, 82 L.Ed. 1012, it was held that petitioners, members of a group organized to obtain advancement for the benefit of colored persons, were parties to a "labor dispute" within the meaning of the Norris-LaGuardia Act, 29 U.S.C.A. § 101 et seq. The facts were substantially the same as are presented here, except for the words on the placards which the Negroes carried. The court stated the case, 303 U.S. on page 559, 58 S.Ct. on page 706, in the following language: "The case, then, as it stood for judgment, was this: The petitioners requested the respondent to adopt a policy of employing negro clerks in certain of its stores in the *course of personnel changes;* the respondent ignored the request and the petitioners caused one person to patrol in front of one of the respondent's stores on one day carrying a placard which said, 'Do Your Part! Buy Where You Can Work! No Negroes Employed Here!' * * *" and said, 303 U.S. on page 561, 58 S.Ct. on page 707, "The act does not concern itself with the background or the motives of the dispute. The desire for fair and equitable conditions of employment on the part of persons of any race, color, or persuasion, and the removal of discriminations against them by reason of their race or religious beliefs is quite as important to those concerned as fairness and equity in terms and conditions of employment can be to trade or craft unions or any form of labor organization or association. Race discrimination by an employer may reasonably be deemed more unfair and less excusable than discrimination against workers on the ground of union affiliation * * *." [Emphasis added.]

The public policy of this state, as declared by the courts, is in exact accord with the statutory policy of the Norris-LaGuardia Act as interpreted in the above case. It has been here determined that picketing is justified even though no dispute exists between employer and employees. McKay v. Retail etc., supra. The Smith case, supra, pointed out that the term "labor dispute" is a broad one, and in the absence of statutory definition, may be properly applied to any controversy which is reasonably related to employment and to the purposes of collective bargaining. Park & Tilford Import Corp. v. International Etc. of Teamsters, supra.

It is said that petitioners' objective is unlawful for several reasons: (1) That if the demand of the petitioners had been complied with the result would have been, in effect, the equivalent of both a closed shop and a closed union in favor of the Negro race; and (2) that such a result would have resulted in discrimination in favor of the Negro race; and (3) that petitioners' objective was not a lawful exercise of the right to picket and hence not within the constitutional guaranty of free speech because petitioners had no relation to the labor contract; that the picketing was not directed at working conditions, but a racial dispute, and that a compliance with the demand would result in a breach of the contract between Lucky Stores and the Retail Clerks Union. The majority thought it unnecessary to discuss the latter point inasmuch as they found petitioners' objective otherwise unlawful.

The majority, in holding that the judgment of contempt should be affirmed, state that the case of James v. Marinship Corp., 25 Cal.2d 721, 155 P.2d 329, 160 A.L.R. 900, is controlling. The facts in the Marinship case are as follows: Marinship, as employer, had a closed shop agreement with a labor union, whereby it agreed to hire only members of a particular union. Plaintiff, a member of the Negro race, was not admitted to full membership in the union, nor were other members of his race, but he, and they, were admitted to separate Negro lodges affiliated with the union. Negroes were forced to pay dues to these lodges in order to obtain work clearances for employment at Marinship. Marinship was under contract with the Federal Government wherein it was provided that it would not discriminate against any worker because of race, color, creed or national origin. Plaintiffs were willing to become members of the union on equal terms with other members, but the union would not receive them on that basis. These, then, are the facts which led to the basic question there involved: Whether a closed union coupled with a closed shop is a legitimate objective of organized labor. This question was answered in the negative. It was held that the union may not maintain *both* a closed shop and an arbitrarily closed union.

A closed shop is defined as one that employs *only* union members. Irving v. Joint Dist. Council, United Brotherhood of Carpenters, etc. C.C.N.Y., 180 F. 896, 899; Miners in General Group v. Hix, 123 W. Va. 637, 17 S.E.2d 810, 813. A closed union is one which arbitrarily denies admittance to qualified workers. It was the combination of the two, resulting in discrimination between the races, which brought about the end result—that the discriminated-against race was unable to obtain gainful employment in the closed shop, admittedly a vicious circle, which was forbidden by the decision in the Marinship case. This is the case, which, according to the majority, is supposedly analogous to the result sought to be achieved by petitioners here.

The Retail Clerks' Union, which is involved here only incidentally, is not a closed union. It numbers among its members those of both the white and Negro races. It has also among its members, unemployed qualified Negro clerks. The contract between Lucky Stores and this union was not a "closed shop" agreement, but in reality, a "union shop" agreement. Markham & Callow, Inc., v. International Woodworkers, 170 Ore. 517, 135 P.2d 727; Miners in General Group v. Hix, 123 W.Va. 637, 17 S.E.2d 810. Lucky Stores agreed to hire union members, or if they could not be supplied, it might hire others, who must then become members of the particular union. Thus far, we have the normal situation involving a union and an employer. But the present case involves a tri-party situation, which the majority insist on considering as the usual one involving a union and an employer. Petitioners are asking that Negro clerks be hired, and they are quite willing, and would consider their demands fully met if the unemployed qualified Negro clerks, presently members of the union involved were hired. The statement in the majority opinion that the right to work for Lucky Stores would be based on race, rather than qualification for the work, is absolutely without foundation. Nothing could be more remote from the truth.

It is true that one must be born into the Negro race in order to qualify for membership within its ranks, but that is also quite true of the Caucasian, Chinese and Japanese races. But the majority have forgot that the State of California is one of the United States of America where "all men are created equal," where all have equal rights, and where it has been repeatedly declared that discrimination shall *not* exist because of race, color or creed.

The situation presented here does not fall within the rule announced in the Marinship case. It does not fall within the definitions of either a closed shop, or a closed union. It must be remembered that picketing for *either* a closed shop, *or* a closed union is not forbidden by law, but that the combination of the two is considered unlawful. It may be assumed for this purpose, that petitioners are asking that a certain proportion of their race be employed in this particular store and that the "shop" would then be closed as to a certain number of employees, although it is difficult to perceive how "closed" and *"half* closed" may be defined as meaning the *same* thing. Petitioners are not asking that the union admit only Negro members, nor are they asking that it admit any Negro members. The Retail Clerks Union which is involved is an open one. This point is ignored, and the majority assume that petitioners are members of the Negro "union", that, of necessity, it is a closed "union", and for Lucky Stores to meet petitioners' demand would result in a closed shop and a closed union, an unlawful result. As a necessary analogy then, we have every shop employing only white help operating a "closed" shop with the aid of a "closed union", since only white persons may belong to the white "union", and we have, as a result, many flagrant violations of the Marinship rule. This absurd situation follows from considering that a *race* of people constitute a "union".

The majority opinion states: "If petitioners were upheld in their demand then other races, white, yellow, brown and red, would have equal rights to demand discriminatory hiring on a racial basis." Petitioners are seeking non-discrimination, not discrimination. Discrimination is treatment which is not equal. It follows that non-discrimination must be equal treatment. Petitioners are seeking just that, and nothing more. It has long been established in Equity, that the court will look through form to substance. It has also been said often and emphatically that in Equity each case must be decided on its own facts, hence it might logically follow that in a neighborhood predominantly Chinese or Japanese or on an Indian reservation that picketing for a proportional hiring of members of the particular race involved would be just, equitable and entirely in accord with sound public policy. It is not involved here. But involved here is a store situated in a district where the population is composed of a large majority of members of the Negro race. These members of the Negro race comprise at least fifty percent of the customers of the store in question. The petitioners by means of peaceful picketing and through the words printed on their placards were seeking to publicize their grievance to members of their race, and to members of the white race in sympathy with their long struggle for freedom, so that economic pressure might be exerted to gain for them equality in the labor field. They requested only that a proportionate number of Negro clerks be hired as replacements were necessary. Not that any white person be fired that they might be hired.

It must be admitted by every thinking person that Negroes are, and have been, constantly discriminated against. They are considered by some people as being fit for only the most menial positions. It was even found necessary for the Legislatures of the various states to pass laws that they might obtain shelter and food on an equal basis with members of the white race. The abolition of slavery did not free the Negro from the chains his color imposes on him. It has been said that Negroes may obtain equal opportunities with others for employment by organization, public meetings, propaganda, and by personal solicitation. The effectiveness of these methods may well be doubted. Labor, as a whole, found that the only way it might attain its objectives of better working conditions, hours and pay was to exert economic pressure on employers. Nothing else was heeded. Is the Negro here to be denied his only effective means of communicating to the public the facts in connection with the discrimination against him, and the only effective method by which he may achieve non-discrimination?

The majority assume, without deciding, that if racial discrimination exists, picketing in protest of it would not be for an unlawful objective. How can it be said that picketing to attain non-discrimination is unlawful? Petitioners are asking *equal* treatment, that which is guaranteed to them by the Constitution of the United States, and yet their objective is called "unlawful."

The end result of the majority decision is to establish a rule which may be applied to prevent picketing for the purpose of publicizing the fact that an employer is discriminating against persons because of race or color in the selection of his employees. Because, if such employer should employ only one of such race or color in some menial position, such as janitor or or messenger boy, any claim of discrimination, according to the majority view, would be unjustified, and picketing to prevent discrimination (even though thousands of qualified members of such race or color were refused employment for that reason) would be unlawful, and could be restrained by injunction. This must be the effect of the rule announced in the majority opinion. For if an employer who employs only one or two of a certain race in 10,000 employees, when hundreds of qualified members of such race are seeking employment, and he can be picketed by the members of such race to induce the employment of an increased number of such members, then, it must follow that such employer may be picketed for the purpose of inducing him to employ a sufficient number of the members of such race to indicate an intention not to discriminate against the members of such race in the selection of his employees. In other words, if the picketing is truthful and peaceful, it may be resorted to as the exercise of the constitutional right of freedom of speech or press, and that is all petitioners did in this case.

It is my opinion, therefore, that the writ should issue annulling the judgment of contempt rendered against the petitioners.

TRAYNOR, Justice.

I dissent.

In my opinion this case was correctly decided by the District Court of Appeal and the judgment of contempt should be annulled for the reasons set forth in the opinion of that court by Presiding Justice Peters. 186 P.2d 756. It is here necessary to direct attention only to those considerations that compel me to take issue with the majority opinion of this court.

That opinion holds that the object of the picketing was to limit certain jobs to a closed shop and a closed union and that such an object is unlawful by virtue of James v. Marinship, 25 Cal.2d 721, 155 P.2d 329, 160 A.L.R. 900. In my opinion this holding is based on an erroneous application of that case. The union there had secured through its closed shop contract a monopoly of the jobs in a certain plant, and this court held that a union with such a monopoly cannot close its doors on racial grounds and simultaneously enforce its closed shop contract against those arbitrarily excluded from the union. In the present case petitioners seek, not a monopoly of the jobs available, but only a share of those jobs that they believe they would have had if there had been no discrimination against them. The union in the Marinship case was free to open its ranks to all. Here a group helpless to open its ranks to all is seeking a share of the available jobs in proportion to its patronage. Rules developed to curb abuses of those already in control of the labor market have no application to situations where the moving party is seeking to gain a foothold in the struggle for economic equality. Petitioners are seeking by reasonable methods to discourage discrimination against them. It is unrealistic to compare them with those who sought to couple a closed union with a closed shop for the very purpose of discrimination.

Those racial groups against whom discrimination is practiced may seek economic equality either by demanding that hiring be done wtihout reference to race or color or by demanding a certain number of jobs for members of their group. The majority opinion holds that economic equality cannot be sought by the second method if picketing is adopted as the means of attaining that objective. In the absence of a statute protecting them from discrimination it is not unreasonable for Negroes to seek economic equality by asking those in sympathy with their aims to help them secure jobs that may be opened to them by the enlistment of such aid. In their struggle for equality the only effective economic weapon Negroes have is the purchasing power they are able to mobilize to induce employers to open jobs to them. See New Negro Alliance v. Sanitary Grocery Co., 303 U.S. 552, 561, 304 U.S. 542, 58 S.Ct. 703, 82 L.Ed. 1012; Bakery and Pastry Drivers' Local v. Wohl, 315 U.S. 769, 775, 62 S.Ct. 816, 86 L.Ed. 1178. There are so few neighborhoods where Negroes can make effective appeals against discrimination that they may reasonably regard the seeking of jobs in neighborhoods where their appeal may be effective the only practical means of combating discrimination against them. In arbitrating the conflicting interests of different groups in society courts should not impose ideal standards on one side when they are powerless to impose similar standards upon the other. Only a clear danger to the community would justify judicial rules that restrict the peaceful mobilization of a group's economic power to secure economic equality. See Mr. Justice Brandeis dissenting in Duplex Printing Press Co. v. Deering, 254 U.S. 443, 488; 41 S.Ct. 172, 65 L.Ed. 349, 16 A.L.R. 196; C. S. Smith Metropolitan Market Co. v. Lyons, 16 Cal.2d 389, 403, 106 P.2d 414. There is no reality in the reasoning that those who seek to secure jobs where they have an opportunity to enlist public support on their behalf are thereby seeking illegal discrimination in their favor, for the fact remains that everywhere they turn for jobs they are likely to encounter the barrier of discrimination.

The picketing in this case is directed at persuading Lucky to take action that it may lawfully take on its own initiative. No law prohibits Lucky from discriminating in favor of or against Negroes. It may legally adopt a policy of proportionate hiring. The picketing confronts Lucky with the choice of adopting a policy that is not illegal in itself or risking the loss of patronage that may result from the picketing. Had California adopted a fair employment practices act that prohibited consideration of the race of applicants for jobs, it might be said that the demand for proportional hiring would be a demand that Lucky violate the law. Neither the Legislature nor the people have adopted such a statute, and I find no implication in the majority opinion that its equivalent exists under the common law of this state.

It is important to note, apart from the lawfulness of the objective, that the picketing in this case has none of the nonspeech characteristics that would justify an injunction. It is established by numerous United States Supreme Court decisions that picketing is protected as an exercise of free speech. Cafeteria Employees Union, Local 302 v. Angelos, 320 U.S. 293, 64 S.Ct. 126, 88 L.Ed. 58; Bakery and Pastry Drivers' Local v. Wohl, 315 U.S. 769, 62 S.Ct. 816, 86 L.Ed. 1178; Carpenters and Joiners Union v. Ritter's Cafe, 315 U.S. 722, 62 S.Ct. 807, 86 L.Ed. 1143; A. F. of L. v. Swing, 312 U.S. 321, 61 S.Ct. 568, 85 L.Ed. 855; Milk Wagon Drivers' Union v. Meadowmoor Dairies, 312 U.S. 287, 61 S.Ct. 552, 85 L.Ed. 836, 132 A.L.R. 1200; Carlson v. California, 310 U.S. 106, 60 S.Ct. 746, 84 L.Ed. 1104; Thornhill v. Alabama, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093; Senn v. Tile Layers' Union, 301 U.S. 468, 57 S.Ct. 857, 81 L.Ed. 1229. As such the states must deal with it as a protected right under the First and Fourteenth Amendments to the United States Constitution. Within the free speech guaranty, traditional modes of communication are protected unless a clear and present danger of serious substantive evil is shown. Thomas v. Collins, 323 U.S. 516, 65 S.Ct. 315, 89 L.Ed. 430; Bridges v. California, 314 U.S. 252, 62 S.Ct. 190, 86 L.Ed. 192, 159 A.L.R. 1346. Although picketing has not been so identified with other forms of speech that its permissible limits are governed by the same tests (Carpenters and Joiners Union v. Ritter's Cafe, supra, 315 U.S. 722, 62 S.Ct. 807, 86 L.Ed. 1143; Milk Wagon Drivers'

Union v. Meadowmoor Dairies, 312 U.S. 287, 61 S.Ct. 552, 85 L.Ed. 836, 132 A.L.R. 1200), a state may not deny it protection as free speech when the elements that differentiate it from other forms of speech are not present. (See Armstrong, Where Are We Going With Picketing, 36 Cal.L.Rev. 1, 30-40.)

In recognition of the fact that picketing often entails more than speech, the United States Supreme Court has allowed states to place limitations on picketing as they could not on traditional modes of communication. In these decisions the Supreme Court has been concerned in the main with the evils attending certain forms of picketing. Thus violent or untruthful picketing is not protected. Milk Wagon Drivers' Union v. Meadowmoor Dairies, supra, 312 U.S. 287, 61 S.Ct. 552, 85 L.Ed. 836, 132 A.L.R. 1200; see Cafeteria Employees Union, Local 302 v. Angelos, supra, 320 U.S. 293, 295, 64 S.Ct. 126, 88 L.Ed. 58; Magill Bros. v. Building Service etc. Union, 20 Cal.2d 506, 127 P.2d 542. Again, special circumstances may justify a state's limiting the places where and the persons against whom picketing may be carried on. Carpenters and Joiners Union v. Ritter's Cafe, supra, 315 U.S. 722, 62 S.Ct. 807, 86 L.Ed. 1143. A state may declare, for instance, that the conscription of neutrals, dissociated from the dispute involved, may not be enforced by picketing those neutrals. Carpenters and Joiners Union v. Ritter's Cafe, supra, 315 U.S. 722, 728, 62 S.Ct. 807. Since picketing is a form of protected free speech, some greater evil or more imminent danger must be found to justify its suppression than would be required to justify curtailment of action protected only by the due process clause independent of the First Amendment. See West Virginia State Board of Education v. Barnette, 319 U.S. 624, 639, 63 S.Ct. 1178, 87 L.Ed. 1628, 147 A.L.R. 674.

A forceful advocate of the view that picketing is not free speech has discussed the nature of picketing as follows: "Picketing is the marching to and fro before given premises with a banner usually containing assertions that the picketed person is 'unfair to organized labor,' or that his employees are on 'strike.' Sometimes the picket speaks these very same words or adds further assertions. This, substantially, is labor's method of stating its side of the controversy. Rarely, if ever, does labor inform the public of all the differences which exist between it and the employer. Nor, indeed, can labor be expected to do so since few will stop to read or listen. Thus the picket appeals basically to sympathy; sometimes, however, he appeals to the customer's sense of embarrassment. Often, too, the picket depends upon the observance by union members of the rule—either formally embodied or tacitly understood—forbidding the crossing of picket lines. Another purpose of the picket is to inform those delivering goods to or taking goods from, the picketed establishment that it is on the union's unfair list. In the Ritter's Cafe case the cafe employees had no quarrel with Ritter over the terms and conditions of their own employment; they refused, nevertheless, to cross the picket line established by the carpenters' and painters' unions, and furthermore, truckmen refused to make deliveries necessary to Ritter's business." (Teller, Picketing and Free Speeech, 56 Harv.L.Rev. 180, 201.) Virtually none of the nonspeech elements of picketing here described are present in this case.

If picketing does not contain substantial nonspeech elements and is primarily conducted to disseminate information, limitations that differentiate picketing from other forms of speech should not be invoked. The picketing here is of this type. The facts of the dispute were fully presented by the banners. Since the picketing was not being carried on by a labor union, no generally observed rules of labor unions against crossing picket lines were brought into play and no deliveries were interfered with. All that was involved in this case was an orderly appeal to the public coupled with a clear and truthful statement of the facts of the dispute. (See New Negro Alliance v. Sanitary Grocery Co., supra, 303 U.S. 552, 304 U.S. 542, 58 S.Ct. 703, 82 L.Ed. 1012.) Under such circumstances the unlawful objective doctrine may not be invoked to differentiate picketing from traditional modes of communication. To do so unreasonably interferes with petitioners' right to publicize the facts of their dispute. See James v. Marinship, supra, 25 Cal.2d 721, 730, 155 P.2d. 329, 160 A.L.R. 900; A. F. of L. v. Swing, supra, 312 U.S. 321, 325, 61 S.Ct. 568, 85 L.Ed. 855.

Rehearing denied; CARTER and TRAYNOR, JJ., dissenting.

32 Cal.2d 872

NORTHROP AIRCRAFT, Inc., v. CALIFORNIA EMPLOYMENT STABILIZATION COMMISSION.

L. A. 20298.

Supreme Court of California.

Nov. 1, 1948.

1. Taxation 🔑347

Provision of Unemployment Insurance Act that, unless employer within time prescribed protests Employment Stabilization Commission's statement showing charges and credits to employer's account, net balance of reserve, and contribution rate for next succeeding rating period, statement shall be conclusively presumed to be correct, does not prevent commission from making a timely amendment notice of contribution rate, though employer has made no protest, in view of subsequent provision that commission on its own initiative, after notice to employer and opportunity for him to protest, may amend any statement if it subsequently finds any entries thereon to be incorrect. Gen.Laws, Act 8780d, § 41.1 (b, c).

2. Taxation 🔑347

Provision of Unemployment Insurance Act that amendment by Employment Stabilization Commission on its own initiative of statement showing charges and credits to employer's account, net balance of reserve, and contribution rate for next succeeding rating period, shall not affect contribution rate for any rating period preceding rating period during which such amendment was made, limits the time within which commission may make amendments. Gen.Laws, Act 8780d, § 41.1(b, c).

3. Taxation 🔑347

The Employment Stabilization Commission has power under the Unemployment Insurance Act to reverse its rulings with respect to employer's rate of contribution to accord with a correct application of the act, but the timing of such reversals must accord with statutory limitations of the act. Gen.Laws, Act 8780d, § 41.1(b, c).

4. Taxation 🔑362

An employer making contributions under the Unemployment Insurance Act has a right to know that, in absence of fraud on his part, there is a definitely limited time within which the Employment Stabilization Commission may attempt to assess an additional contribution, and the commission has the right to have a definitely limited time within which taxpayer may successfully ask for a refund for an excessive contribution charge. Gen.Laws, Act 8780d, § 41.1(b, c).

5. Master and servant 🔑78

Though contribution of an employer under Unemployment Insurance Act may be regarded as a tax, broader aspects of act, which are to ameliorate hardships of unemployment and not strictly to raise revenue, require application of principles which will obtain enforcement of its provisions in accord with legislative intent, but such enforcement may not invade constitutional rights. Gen.Laws, Act 8780d, § 1 et seq.

6. Taxation 🔑362

No doctrine of recoupment or of permissible redetermination of an employer's liability for contributions under the Unemployment Insurance Act will bestow power on the Employment Stabilization Commission to make an additional assessment of contributions where the exercise of that power has been terminated by provisions of the act. Gen.Laws, Act 8780d, § 41.1(b, c).

7. Taxation 🔑362, 543(1)

Where employer made full and correct disclosure to Employment Stabilization Commission of all facts bearing on employer's status under Unemployment Insurance Act, and on March 27, 1943, employer received notice dated March 26, showing employer's contribution rate for 1943 to be one per cent., and employer filed reports and made contributions for first three-quarters of 1943 at one per cent., and no further action was taken by commission until December 29, 1943, when it issued an amended notice of contribution rate, increasing rate to 2.7 per cent. for 1943, amended notice was not timely, and employer which paid contributions of 2.7 per cent. for 1943 under protest could recover back contributions in excess of one per cent. Gen.Laws, Act 8780d, § 41.1(b, c).

EDMONDS, J., dissenting.

◆

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by Northrop Aircraft, Inc., against California Employment Stabilization Commission to recover amount of additional employer's tax purportedly assessed pursuant to the Unemployment Insurance Act and paid by plaintiff under protest. From a judgment for plaintiff, the defendant appeals.

Judgment affirmed.

Fred N. Howser, Atty. Gen., and Chas. W. Johnson, Deputy Atty. Gen., for appellant.

O'Melveny & Myers, Louis W. Myers, Pierce Works, and Maynard J. Toll, all of Los Angeles, for respondent.

SHENK, Justice.

This is an appeal by the defendant commission from a judgment for the plaintiff in an action to recover the amount of an additional employer's tax for 1943 purportedly assessed pursuant to the Unemployment Insurance Act, formerly Unemployment Act, Stats. 1935, p. 1226, as amended, 3 Deering's General Laws, Act 8780d, and paid by the plaintiff under protest. The controversy presents the question of the power of the commission to make the additional assessment.

The case was tried on stipulated facts which were adopted as the findings of the court. For an understanding of the relevancy of the facts, it is deemed necessary to review briefly some of the provisions of the Act in effect at the time involved.

Section 1 declares the state policy underlying the legislative enactment for a compulsory accumulation of funds to be used for a system of unemployment insurance. Section 2 states that the enactment is part of a national plan of unemployment reserves and social security without which the state system is not to function.

"Employment" is service performed for wages or under a contract of hire. Sec. 6.5.

By section 9(a) "employer" means an employing unit which in each of twenty weeks of the current calendar year has four or more individuals in employment. An "employing unit," sec. 9(e), is an individual or organization employing subsequent to January 1, 1936, one or more persons. Section 9.5 provides that an employing unit which becomes an employer subject to the act within any calendar year shall be subject to the act during the whole of that calendar year.

Section 37 requires contributions by every employer for each calendar year in which he is subject to the act. For the year 1938 and thereafter the rate of contribution is specified to be 2.70 per cent of all wages with respect to which contributions become due and payable for employment subject to the act, Sec. 38, but by section 39(c) after December 31, 1940, a minimum of 1 percent may be contributed by an employer whose separate account, see secs. 40, 41, has been subject to benefit charges during the period of twelve complete consecutive calendar quarters ending on the computation date for the rating period and his net balance of reserve is eleven per cent or more of his average pay roll.

Section 41.1(a) requires the commission annually to furnish each employer with an itemized statement showing the charges and credits to his account, the net balance of his reserve, and his contribution rate for the next succeeding rating period. For our purposes the computation date is June

30th for the purpose of establishing the contribution rate for the next succeeding calendar year, Sec. 42(a) (4), and the rating period is the full calendar year next succeeding that computation date, Sec. 42 (b) (4).

The plaintiff, Northrop Aircraft, Inc., was incorporated in this state on March 7, 1939. Prior to July 29, 1939, it had several unpaid officers, and one employed person to whom on August 1, 1939, it paid salary accrued for services rendered during the preceding May and June. Beginning on July 29, four officers and two additional employees were paid. These facts were communicated to the commission by letter, and on November 21, 1939, the plaintiff was advised that it qualified as a subject employer on December 16, 1939, and that it would be liable for contribution on total 1939 payrolls at the employer rate of 2.7%. Therefore commencing not later than July 29, 1939, the plaintiff had in its employ one or more individuals performing services for wages (employing unit), and prior to December 17, 1939, had in employment four or more individuals performing services for wages in each of twenty different weeks during the calendar year 1939. The plaintiff remained a subject employer under the act.

On March 27, 1943, the plaintiff received a notice dated March 26, 1943, of employer's contribution rate for the rating period January 1, 1943, to December 31, 1943, showing the figures of charges, credits, average base payroll, and net balance of reserve, and ratio requiring a specified contribution rate of 1%.

By section 41.1(b) of the act the employer had sixty days after the date of mailing of such notice within which to protest any of the items shown on the statement. No protest was filed by the plaintiff.

The plaintiff filed reports and made the contributions for the first three quarters of 1943 at the specified rate of 1%. No further action was taken by the commission until December 29, 1943, when it issued an amended notice of employer's contribution rate for the calendar year 1943 specifying a change in ratio calling for an increase of the rate from 1% to 2.7%, and a notice dated December 28, 1943, of additional contributions totaling $312,896.62 due for the first three quarters. These notices were mailed to the plaintiff with an explanatory letter dated December 30, 1943, and were received by the plaintiff on January 3, 1944.

The plaintiff protested the foregoing action of the commission. Its protest and objections were argued but were ineffectual. On March 31, 1944, the plaintiff paid under protest the sum of $398,133.50, representing the excess of contributions for 1943 over the one per cent. rate. This action for refund was filed within the sixty day limitation specified in section 45.10 of the act.

Neither the plaintiff nor the Commission contest the accuracy of any of the items in the statements or notices of employer's contribution rate for 1943 except the items of ratio and rate of contribution. Nor is there any question of the qualification of the plaintiff for the 1% rate for 1943 except in the matter of the initial date of employer subjectivity. The stipulation of facts conceded that the plaintiff became a subject employer and remained so after the initial date of subjectivity, but there was no agreement as to that date. On the agreed facts with reference to employment the trial court concluded that the correct opening date of subject status under the act was July 31, 1939. It was agreed, however, that all the facts bearing on the plaintiff's subject status were communicated to the commission prior to any related action by it. The court adopted the commission's view that its first action in 1943 specifying the ratio calling for the one per cent contribution rate was erroneously based on the assumption that the plaintiff's reserve account had been subject to benefit charges during twelve complete consecutive calendar quarters ending on June 30, 1942 (the computation date for the 1943 rating period). Translated, this assertion means that the commission should have taken July 31, 1939, as the date of initial subject status, in which event the period preceding the computation date for the 1943 rating period would lack one month of comprising the required 12 complete consecutive quarters. In the explanatory letter of December 30, 1943, addressed to the plaintiff, the commission admitted that it had all the necessary information from which to find the correct opening date, which in September 1939 was determined to be July 31, 1939. The commission in its letter ascribed the failure to use the latter date in specifying the 1943 contribution rate to the inadvertent omission of its accounting section to record the determined opening date in its indexes, whereupon the accounting section erroneously assumed that the organization date of March 7, 1939, was the date of initial subject status. The question remained and still remains a point of controversy, the plaintiff contending that facts of employment earlier than the asserted opening date and other provisions of the act, including section 9.5, determined its subject status as for the entire calendar year 1939, and that the trial court was in error in concluding that the correct opening date was July 31, 1939.

It becomes unnecessary to consider this point further, in view of our conclusion that the trial court correctly determined that the commission nevertheless exceeded its power in making the amendment affecting the plaintiff's contribution rate for 1943.

[1] The plaintiff invokes section 41.1(b) of the act and the fact that it filed no protest of the statement dated March 26, 1943, fixing one per cent as the contribution rate for the current rating period. The statutory language relied on provides that unless the employer protests within the time prescribed, "such statement shall be conclusively presumed to be correct." There follows a proviso, subject however to section 41.1(c) as hereinafter shown, that the "commission upon its own initiative after notice to the employer and opportunity for him to protest may amend any statement if it subsequently finds any entries thereon to be incorrect."

[2] The conclusive presumption of correctness in the absence of protest by the employer was undoubtedly provided for the purpose of concluding statements contained in the notice which might be adverse to the employer's interest, for example a statement which, if corrected, would decrease the rate. His opportunity for obtaining a correction of such matters was limited by the requirement for the filing of a protest within the time limited. On the other hand statements which, if uncorrected, might be deemed inimical to the interest of the unemployment relief system and fund maintained to sustain it, and which perforce must include the items of ratio and contribution rate, could be amended by the commission by acting under the proviso of that section. But section 41.1(b), dealing with "Protest," must be read with the pertinent portion of section 41.1(c) dealing with "amendments," which states: "An amendment by the commission on its own initiative shall not affect the contribution rate for any rating period preceding the rating period during which such amendment was made but if such amendment results in a determination that a different contribution rate should have been computed for the current rating period the commission shall compute the proper contribution rate which rate shall be effective for the current rating period. Any additional contributions thus required to be paid shall be assessed as provided in this act and shall be deemed to be due as contributions for the quarter in which the employer is notified of such determination." Read together the language of these subdivisions of section 41.1 discloses the legislative intent that the time within which the commission might make amendments on its own initiative affecting the contribution rate was not unlimited. The conclusion is inescapable that the power of the commission in that regard must be exercised at least during the rating period to be affected thereby, with notice and opportunity to be heard also within that period (which undeniably were not given), else no force could be accorded any purported change in the contribution rate. Here the asserted compliance with the requirements for notice and hearing would have effected a change in a subsequent period for a preceding rating period, which is expressly prohibited by the act. Cf. Wardall v. State of California, 29 Cal.2d 639, 177 P.2d 270. There is here no statutory authority for, but in fact a prohibition upon, the power of the commission to amend the contribution rate except as limited. That limitation on the power of the commission is operative un-

der the facts. See Kruszewski v. United States, 7 Cir., 163 F.2d 884. That the legislature desired finality of proceedings on the commission's initiative affecting the contribution rate within the rating period to be affected thereby, is reasonable as well as desirable, considering the factors of integration of the act with federal legislation, possible merit ratings under the Federal Revenue Code, 26 U.S.C.A. §§ 1601, 1604, necessity otherwise of revising state and federal income tax reports, costs under war contracts, and other pertinent required audits and reports covering operations. But, regardless of the motivating reason, the language is plain and the intent clear, and neither may be judicially overridden by applying rules of construction applicable only in cases of doubtful meaning.

The commission nevertheless argues that it had no power to specify a contribution rate other than the rate prescribed by statute; that since the facts of the plaintiff's subject status required the 2.7% rate for 1943, its first action was without authority under the law, therefore a nullity, and that its only authorized and valid action was that of December 29, 1943.

The difficulty with this position is that the commission in March 1943 was acting in the performance of a duty imposed on it by the act, that is, as an administrative body to determine the facts to which the prescribed rates applied. As such administrative body it found the facts and specified the rate which it deemed applied thereto on the facts reported to it and which it could not thereafter change except in a protest proceeding without giving the employer notice and an opportunity to be heard before the close of the rating period to which the change applied.

[3, 4] For the commission to disclaim the performance of its duty as an authorized and valid action is to disregard the facts and the law applicable thereto. The act, as the foregoing provisions indicate, expressly vests in the commission the power and the duty to do what it did. In fact it may be open to question whether the December 1943 notice received by the plaintiff in January 1944 was in the performance of the duty to give notice of the contribution rate "for the next succeeding rating period". But the plaintiff has not questioned that the March 26th statement was such notice. Furthermore the provisions of the act contemplated that the commission might make mistakes in the performance of its duty or in the exercise of its power to specify the applicable rate. Therefore it was deemed that protection against unreasonably delayed revisions of the contribution rate was as much due to the employer when the commission took the initiative, as it was to the commission when the employer protested its action. A somewhat similar contention—that unauthorized payments of benefits under the act were beyond the scope of the commission's authority and not binding—was rejected in Western Hardwood Lumber Co. v. California Emp. Comm., 58 Cal.App.2d 403, 409, 137 P.2d 76. It is true, as the commission asserts, that it has power to reverse its rulings to accord with a correct application of the statute, but the timing of such reversals must accord with the statutory limitations. La Societe Francaise De Bienfaisance Mutuelle v. California Emp. Comm., 56 Cal.App.2d 534, 550, 553, 554, 133 P.2d 47. And as said in Grand Central Public Market v. United States, D.C., 22 F.Supp. 119, 131, the taxpayer on the one hand has a right to know that in the absence of fraud or deception on his part there is a definitely limited time within which the government may attempt to assess an additional tax, while the government on the other hand has the right to have a definitely limited time within which the taxpayer may successfully ask for a refund. Such limitations are binding on both the taxpayer and the government or taxing body. Several defenses, including estoppel, were rejected in 960 Park Ave. Co., Inc., v. Anderson, D.C., 22 F.Supp. 138, where it appeared that the assessment of additional taxes was made after the statutory period had expired. Such provisions operate adversely to the commission's position and to support the conclusion of the trial court unless they are canceled by equitable considerations.

[5] The commission places reliance on the general rule stated in such cases as

Philpott v. Superior Court, 1 Cal.2d 512, 522, 523, 36 P.2d 635, 95 A.L.R. 990; and Pollak v. Staunton, 210 Cal. 656, 665, 293 P. 26 (citing authorities), and applied in tax refund cases (Pacific Fruit Express Co. v. McColgan, 67 Cal.App.2d 93, 96, 153 P.2d 607, citing Stone v. White, 301 U.S. 532, 57 S.Ct. 851, 81 L.Ed. 1265, and Lewis v. Reynolds, 284 U.S. 281, 52 S.Ct. 145, 76 L.Ed. 293), to the effect that since a suit for a refund of taxes is in the nature of an action in assumpsit, the plaintiff may recover only if it be shown that more has been exacted than in equity and good conscience should have been paid. It may be assumed that such an equitable doctrine would govern in proper cases involving over or under payments of employer contributions under the Unemployment Insurance Act. As suggested in California Employment Commission v. Black-Foxe Military Inst., 43 Cal.App.Supp.2d 868, at page 872, 110 P.2d 729, the contributions may be regarded as a tax, but the broader aspects of the act—to ameliorate the hardships of unemployment and not strictly to raise revenue—require application of principles which will obtain enforcement of its provisions in accord with the legislative intent so long as constitutional rights are not invaded. However there are statutory and constitutional considerations here which prevent the application of the invoked doctrine. Neither that doctrine nor the cases relied upon preclude recovery of a tax collected pursuant to a barred assessment.

Isolated general statements of the doctrine are not necessarily indicative of the correct result in the particular case. For example, in Lewis v. Reynolds, supra (284 U.S. at page 283, 52 S.Ct. at page 146, 76 L.Ed. 293), this statement is made: "An overpayment must appear before refund is authorized. Although the statute of limitations may have barred the assessment and collection of any additional sum, it does not obliterate the right of the United States to retain payments already received when they do not exceed the amount which might have been properly assessed and demanded." In that case the plaintiff had paid a deficiency which was duly assessed within the time limited, and then sought a refund of the amount paid on the ground of erroneous computation of tax due. But on a further recomputation made after the statute had barred further assessment, it was found that the plaintiff had in fact underpaid his tax. Obviously a refund of the previously paid deficiency duly assessed was denied because the plaintiff had not overpaid the tax due for the taxable year. The court expressly recognized that no new assessment could be made after the bar of the statute had intervened.

In cases such as Stone v. White, supra, 301 U.S. 532, 57 S.Ct. 851, 81 L.Ed. 1265, the government was permitted to retain money by way of equitable recoupment although the government's right to collect it was barred by statutory limitation.

[6] On the other hand decisions such as McEachern v. Rose, 302 U.S. 56, 58 S.Ct. 84, 82 L.Ed. 46, indicate that pertinent statutory limitations will preclude the government's retention of an overpayment under the equitable doctrine of recoupment by crediting it against an unpaid tax whose collection has been barred by limitation. See discussions and collections of the decisions on the subject in 109 A.L.R. page 1362 et seq.; 130 A.L.R. 845 et seq.; American Light & Traction Co. v. Harrison, 7 Cir., 142 F.2d 639, 154 A.L.R. 1042, and note at page 1052. However, there is no doctrine of recoupment or of permissible redetermination of the tax liability which will bestow power on the taxing body to make an assessment when the exercise of that power in respect to a particular tax has been terminated by statutory provision. To hold otherwise would be to amend or repeal the legislative enactment by judicial fiat. The distinction between the equitable doctrine and positive law was recognized in Hartwell Mills v. Rose, 5 Cir., 61 F.2d 441, 443, and cases cited.

No principle or decision relied on denies to a taxpayer the right to resist a barred assessment by appropriate legal procedure, including suit for recovery after protested payment. None of the statements in the decisions may be read to the contrary. The equitable principle of recoupment which in some cases has permitted offsetting an overpayment in one year against a tax for another year the *collection* of which has been barred by the statute (Stone v. White, supra, 301 U.S. 532, 57 S. Ct. 851, 81 L.Ed. 1265), or where the assessment was defective for technical irregularities (Couts v. Cornell, 147 Cal. 560, 82 P. 194, 109 Am.St.Rep. 168; Steele v. County of San Luis Obispo, 152 Cal. 785, 93 P. 1020), does not interfere with our conclusion. Neither a barred assessment nor a statute of limitations was involved in Pacific Fruit Express Co. v. McColgan, supra, 67 Cal.App.2d 93, 153 P.2d 607. That case was concerned solely with a redetermination of the tax liability within the statutory time. Further review of the many decisions and authorities treating of the subject is unnecessary to demonstrate that this case is not one for the consideration of the asserted equitable principles but is ruled by the statutory limitations on the exercise of the commission's power to make an amendment affecting the contribution rate except after notice and opportunity for a hearing before the close of the rating period to which it relates. Failure to comply with the statute deprived the plaintiff of the due process thus provided and rendered the belated assessment a nullity.

[7] Furthermore if it might be assumed that consideration could be given to the equities in this case, it would not follow that the judgment should be reversed. There was no concealment of any fact by the plaintiff; the defendant admittedly had possession of all the facts necessary to specify the alleged correct contribution rate and only through its own conduct did it fail to do so. All of the factors which motivated the enactment of the provision for seasonable notice of the contribution rate bear upon the burdens which must devolve upon the plaintiff if the unseasonable amendment, through no fault of its own, should be upheld. True, the actual facts of employer subject status under the act were known to the plaintiff, but there was also present the question concerning the period during which its reserve account had been subject to benefit charges. This, and the factor of substantial, if not full technical qualification for the reduced rate, do not present a case wherein it may be said that the Commission might conscionably retain the contributions in excess of the one per cent rate for 1943. Contentions similar to those advanced by the defendant were made in Lyman v. United States, D.C., 22 F.Supp. 14, where, at page 15, it was said: "It is argued that a retention of the money by the government would not result in its unjust enrichment, and, while this may be a true statement of fact, nevertheless, such retention would result in the beneficiary paying a tax which was not legally assessable against him * * * If either the beneficiary of the trust or the government is to suffer a loss, in good conscience and equity, that loss should be borne by the government, since its failure to assess a tax against the trust must be deemed to border on negligence, for it was acquainted with the set-up of the trust instrument."

The judgment is affirmed.

GIBSON, C. J., and CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

EDMONDS, Justice (dissenting).

As an incentive for continuous business operations and a minimum of labor turnover, the Unemployment Insurance Act of this state, provides for a rate of contribution based upon the ratio of the employer's average base payroll to the amount of the reserve which stands to his credit on the books of the Commission. Otherwise stated, an employer who maintains continuous employment is required to make contributions to the Fund at a lower rate than one who employs many workers for short periods of time. But to obtain this lower rate, an employer must have been subject to the requirements of the statute and chargeable for benefits throughout a three year period immediately preceding the computation date for the year for which the Commission allows the credit to him. There is no authority in the law for assessing any employer who has been subject to the requirements of the statute for less than three years at a rate below 2.7%.

The primary question in this case then necessarily becomes whether Northrop had become eligible for reduced contribution rates on the basis of experience. Section 39(c) declares that the employer becomes eligible only after "12 complete consecutive" quarters of benefit experience, rather than merely being in business for 12 quarters prior to the computation date for the rating period, as Northrop seems to argue. The provision that the "reserve account of such employer shall have been subject to benefit charges" for the last 12 consecutive quarters means that eligibility for reduced contribution rates is restricted to a certain class of employers within the large class of contributing and covered employers. To be entitled to a rate lower than 2.7% an employer must have been subject to the law and have had employment for at least three months and one day prior to the beginning of the three year experience period. Thus, for Northrop to have been eligible for an experience rate for the calendar year 1943, it must have been subject to the law and have had employment on or before March 31, 1939. In other words, the test fixed by the statute is based upon unemployment risk rather than contributions and coverage.

Assuming that Northrop became liable for the payment of contributions in the second quarter of 1939 (the earliest quarter for which it claims to have been covered), it was not eligible for a reduced rate in 1943 because under the terms of section 52.2 of the Unemployment Relief Act no claim for unemployment benefit could have been charged against its reserve fund until the fourth quarter of 1939. A claimant filing a valid claim for benefits during the second or even third quarter of 1939, could not, in the computation of benefits utilize earnings from Northrop during either of those quarters of 1939. If he had filed a claim in the second quarter of 1939, his "base period" under section 52.2 would have been the "first four out of the last five completed * * * quarters," i. e., the four quarters of 1938. Since Northrop paid him no wages during 1938, no charge could have been made to its reserve account. The same result is reached as to a claim filed in the third quarter of 1939. The base period would then be the last three quarters of 1938 and the first quarter of 1939. But Northrop admittedly made no payments of wages until the second quarter of 1939, and hence, the last quarter of 1939 becomes the first quarter in which there could be a benefit charge to the reserve account of Northrop.

June 30, 1942, is the computation date for determining whether an employer is eligible for experience rating for 1943, the year here in question, § 42, Unemployment Relief Act, and in order to qualify therefor under the statute, Northrop's reserve account must have been subject to benefit charges for 12 consecutive quarters prior to that date, or before July 1, 1939. § 39. Northrop lacks one quarter of qualifying for an experience rating for 1943; it is, therefore, not entitled to a contribution rate based upon its unemployment experience. Its rate under the statute, and regardless of any ruling by the Commission, cannot be less than 2.7 per cent.

However, Northrop claims that it is entitled to the experience rating because of the Commission's notice of assessment at the rate of 1%. It takes the position that because no protest was filed by it, the lower rate became fixed and was not subject to revision by the Commission. But the controversy is not one which arises because the Commission made an erroneous determination as to which of several rates the employer should pay, based upon his employment experience. In this case, the employer lacked the basic qualification for a lower rate than 2.7%; he had not been subject to the statute for the three years necessary to give him the benefit of the employment experience rating. The Commission's error was not in computation; it had no authority to make any concession whatever to Northrop because, at the time the 1% rate was fixed, Northrop was not a business entitled to a determination by the Commission as to which, of several different special rates it should pay. The error was not in calculation but in placing Northrop in the class of employers subject to special rating based upon a three year employment record.

As stated in the majority opinion, "the legislature desired finality of proceedings on the commission's initiative affecting the contribution rate within the rating period to be affected thereby." But the provisions of section 41.1 regarding the statement to be furnished annually by the Commission to the employer are only with regard to the basis for the determination of the contribution rate where the employer is eligible for a contribution rate of less than 2.7 per cent.

Section 39 of the Act must also be considered in this connection. It specifies the rates of contribution to be paid by employers, and fixes a percentage to be applied when the employer's net balance of reserve is a certain percentage of his average base payroll. The requirement of section 41.1 is that the Commission annually must send a statement to each employer, showing his net balance of reserve, his average base payroll and the ratio of the latter to the former. If these figures are correct, in the normal case, the contribution rate is computed by dividing the net balance of reserve by the average base payroll. If the figures are not correct, they may be amended, at the instigation of either the employer or the Commission, by following the procedure set out in that section, within certain time limits.

But section 39(c) of the Act provides in part: "no employer *shall be considered eligible* for a contribution rate of less than 2.7 per cent for any subsequent rating period unless the reserve account of such employer shall have been subject to benefit charges during the period of 12 complete consecutive calendar quarters ending on the computation date for such rating period * * *." [Emphasis added.] Such eligibility is a prerequisite to the benefit of reduced taxation based upon experience. The variation of the tax rates provided for by section 39 is based upon the past employment experience of the employer, and the method is known as "experience rating." Arnold, Experience Rating, 55 Yale L.J. 218.

Section 1602 of the Internal Revenue Code reads in part: "A taxpayer shall be allowed an additional credit under section 1601(b) with respect to any reduced rate of contributions permitted by a State law, *only* if the Board finds that under such law—(1) No reduced rate of contributions to a pooled fund or to a partially pooled account, is permitted to a person (or group of persons) having individuals in his (or their) employ except on the basis of his (or their) *experience with respect to unemployment or other factors bearing a direct relation to unemployment risk during not less than the three consecutive years immediately preceding the computation date;* * * *." [Emphasis added.] Obviously the Legislature, in providing the experience rating provisions of sections 39 and 41.1 intended those sections to conform to section 1602 of the Internal Revenue Code so that employers in this state would be given the benefit of reduced taxes on the basis of their experience rating.

But assuming that the majority opinion correctly interprets section 41.1, Northrop is not entitled to a judgment for the amount it paid. The court should apply the equitable doctrine approved in Philpott v. Superior Court, 1 Cal.2d 512, 36 P.2d 635, 95 A.L.R. 990, for Northrop would be unjustly enriched by recovering an amount for which it was justly liable. "The Statute of Limitations is to be employed as a shield, and not as a sword; as a means of defense, and not as a weapon of attack." Grant v. Burr, 54 Cal. 298, 300. If this action had been brought by the State to collect a tax, assuming a statute of limitations to be applicable, the rights of the parties would be quite different. But Northrop paid the tax and is suing for a refund; the State is not raising the statute of limitations as a bar to a recovery, for the suit is clearly brought in time. The situation here is as if "A" makes payment of a debt to "B" and then sues to recover the amount he paid, claiming he need not have paid it because a recovery was barred by the statute of limitations. "A" could not recover for the "statute is available only as a matter of defense, and cannot be set forth in an action in behalf of a debtor as conferring upon him a substantive right." Olinda Irrigated Lands Co. v. Yank, 27 Cal.App.2d 56, 61, 80 P.2d 170, 173.

The claim that Northrop had no recourse but to pay the tax and save its rights by making payment under protest is not correct. Northrop could have withheld payment and defended a civil action brought to collect the contributions (Sec. 45; California Employment Stabilization Comm. v. Guernewood Park Resort & Tavern, 70 Cal.App.2d 245, 160 P.2d 581; California Employment Stabilization Comm. v. Smileage Co., 68 Cal.App.2d 249, 156 P.2d 454) or contested a summary judgment for the recovery of contributions. Sec. 45.9. A matter of defense does not become a substantive right and, in my opinion, it was not the intention of the Legislature to place one who pays under protest in the same category as the state in an action to collect the tax, thus permitting that which is generally considered to be a matter of defense to become an affirmative right. The procedure of payment under protest is to prevent such a "delay [in] the creation of the fund as to frustrate the purposes of the act." Modern Barber College v. California Employment Stabilization Comm., 31 Cal.2d 720, 192 P.2d 916, 923.

The rule in California, like that under federal statutes, should be that refunds are limited to overpayments. "It follows that the ultimate question presented for decision, upon a claim for refund, is whether the taxpayer has overpaid his tax. This involves a redetermination of the entire tax liability. While no new assessment can be made, after the bar of the statute has fallen, the taxpayer, nevertheless, is not entitled to a refund unless he has overpaid his tax. The action to recover on a claim for refund is in the nature of an action for money had and received and it is incumbent upon the claimant to show that the [government] has money which belongs to him." Lewis v. Reynolds, 284 U.S. 281, 283, 52 S.Ct. 145, 146, 76 L.Ed. 293, quoting with approval from the opinion of the Circuit Court of Appeals in the same case, 10 Cir., 48 F.2d 515, 516.

But, assuming that the notice given under section 41.1 may include a determination of an employer's eligibility for an experience rating because of the time he has been subject to the provisions of the statute, "it adds up to no more than that the Collector could not, by legal proceedings, have enforced the collection of the tax. It does not follow that the tax having been paid the taxpayer may demand its refund. No specific authority for such a proposition has been cited; and the absence of a general principle from which such a legal corollary can be derived is indicated by Lewis v. Reynolds, 1932, 284 U.S. 281, 283, 52 S.Ct. 145, 146, 76 L.Ed. 293, where the court said: 'An overpayment must appear before refund is authorized. Although the statute of limitations may have barred the assessment and collection of any additional sum, it does not obliterate the right of the United States to retain payments already received when they do not exceed the amount which might have been properly assessed and demanded.'" Monjar v. Higgins, D.C., 45 F.Supp. 303, 304.

For these reasons, I would reverse the judgment.

---

88 Cal.App.2d 398

PEOPLE v. HAMILTON.

Cr. 2084.

District Court of Appeal,
Third District, California.
Nov. 9, 1948.

1. Bastards 🔑3

Where laws of nature make it possible that husband is the father of wife's child, presumption of legitimacy is conclusive, but where laws of nature do not, only a disputable presumption applies, and evidence by proper parties is admissible. Civ. Code, §§ 193–195; Code Civ.Proc. § 1962, subd. 5, § 1963, subd. 31.

2. Bastards 🔑3

In incest prosecution, evidence sustained jury's inferential finding that defendant was not wholly absent from wife during essential period of conception of prosecuting witness, so that presumption of prosecuting witness's legitimacy was conclusive. Civ.Code, §§ 193–195; Code Civ. Proc. § 1962, subd. 5, § 1963, subd. 31.

3. Criminal law ⚿507(7)
Incest ⚿14

Where complaining witness in incest prosecution was only 16 years old and under age of consent, she was not at law an "accomplice" of defendant, and therefore her testimony alone was legally sufficient to support conviction. Pen.Code, § 261, subd. 1.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Accomplice".

4. Criminal law ⚿1169(11)

In incest prosecution, introduction of testimony of 16 year old complaining witness concerning other alleged acts of incestuous conduct in addition to those charged in information, was not prejudicial error, on ground that evidence was uncorroborated, since prosecuting witness, being under age of consent, was not an accomplice, and corroboration of her testimony was not required. Pen.Code, § 261, subd. 1.

5. Criminal law ⚿1038(1), 1122(5)

Where defendant did not object to instruction at time it was given nor include it in record before District Court of Appeal, it would be assumed that instruction was proper.

◆

Appeal from Superior Court, Sacramento County; B. F. Van Dyke, Judge.

John Hamilton was convicted of incest, and he appeals.

Affirmed.

George E. Foote, of Sacramento, for appellant.

Fred N. Howser, Atty. Gen., and Doris H. Maier, Deputy Atty. Gen., for respondent.

PEEK, Justice.

By an information the defendant was charged with two counts of incest upon the person of his sixteen year old daughter. The jury found him guilty as charged, and from the judgment of conviction he has appealed, contending (1) that the evidence was insufficient to prove the complaining witness to be his daughter; (2) that the court erred in admitting the evidence of like offenses other than those specifically charged in the information; (3) that the instruction given by the court regarding such other offenses was insufficient, and (4) that the attorney for the prosecution committed prejudicial error in his opening statement to the jury.

An examination of the record in the light most favorable to the respondent state discloses that the birth of the complaining witness on May 14, 1931 was witnessed by her maternal grandmother, in whose home the event occurred, and by an older sister of the prosecutrix. There was further testimony by the grandmother that during the summer of 1930 the defendant visited his wife at the witness's home and that during the several days he was there he and his wife lived together. During the following years neither of these witnesses heard the defendant dispute in any way his paternity of the complaining witness although the sister was informed by her mother that the defendant had denied such parentage. In June 1944, the complaining witness, her sister, mother and grandmother moved to California to join the defendant, and ever since have lived together on the farm operated by defendant near Walnut Grove. According to the prosecuting witness, in addition to the two specific acts charged, the defendant had followed a similar course of conduct which began with her arrival in California and continued up to the time of his arrest. In July 1947, the complaining witness was taken by the defendant to San Francisco where an abortion was performed for which the defendant paid. As a result she became ill and subsequently, upon the insistence of her sister, she was taken by the defendant to a hospital in Lodi. When the doctor first questioned her concerning the abortion she implicated a young man with whom she admitted having had intercourse but later stated that it was her father and that she mentioned the boy in accordance with what her father told her to say. She made similar statements to the investigators from the district attorney's office. The defendant categorically denied his parentage of the complaining witness as well as the commission of the acts as charged.

[1, 2] Under the provisions of Civil Code sections 193, 194 and 195 children born in wedlock are presumed to be legitimate and this presumption can be disputed only by the husband or wife or the descendant of one or both of them. It is also provided in section 1963, sub. 31 of the Code of Civil Procedure that a child born in lawful wedlock is presumed to be legitimate and that the issue of a wife cohabiting with her husband, who is not impotent, is indisputably presumed to be legitimate. (C.C.P. sec. 1962, sub. 5.) The courts of this state have established the further rule that where the laws of nature make it possible that the husband is the father, the presumption is conclusive, but that where the laws of nature do not, only the disputable presumption applies, and evidence by the proper parties is admissible. In re Estate of Walker, 180 Cal. 478, 181 P. 792; Dazey v. Dazey, 50 Cal.App.2d 15, 122 P. 2d 308; In re Estate of McNamara, 181 Cal. 82, 183 P. 552, 7 A.L.R. 313; Anderson v. Anderson, 214 Cal. 414, 5 P.2d 881. It apparently is the defendant's contention that although he and the mother of the prosecutrix were husband and wife at the time of her birth nevertheless by reason of his testimony that he did not see his wife from 1929 to 1943 and that he was absent during the time conception would have been necessary for the birth of the complaining witness in May 1931, therefore he has brought himself within the disputable presumption as enunciated in the cases last cited. However, such testimony was directly contradicted by his mother-in-law who testified that he returned on several occasions to her home in Oklahoma, and in particular during the summer of 1930, where he and her daughter (the mother of the complaining witness and defendant's wife) co-habited together. The jury, disregarding the testimony of the defendant and believing the testimony of the mother-in-law, as their verdict implies, inferentially found that the defendant was not wholly absent during the essential period of conception, and therefore the conclusive and not the disputable presumption applies. Thus, as there is substantial, though conflicting, evidence to sustain such finding of the jury, this court cannot disturb its verdict on appeal. Crawford v. Southern Pacific Company, 3 Cal.2d 427, 45 P.2d 183.

Appellant's second contention is (1) that the introduction over his objection of evidence of other acts of incestuous conduct committed by him upon the complaining witness prior to the specific acts charged in the information, was uncorroborated, improper and highly prejudicial, and (2) that the instruction given by the court in relation to such testimony concerning the limited purpose of such evidence was insufficient.

[3, 4] Since the complaining witness was under the age of consent (Penal Code section 261, sub. 1) she was not at law an accomplice and therefore her testimony alone was legally sufficient to support the conviction of the two acts charged. This being true it necessarily follows that her testimony without corroboration as to the prior incestuous acts likewise was sufficient. People v. Stoll, 84 Cal.App. 99, 257 P. 583.

The so-called instruction which defendant attacks, was not in fact an instruction but was an admonition by the court to the jury following the court's overruling of defendant's objection to the introduction of evidence relating to like incestuous acts committed prior to the specific acts charged. The trial court properly and comprehensively delineated the limited purpose for which such evidence could be used by the jury.

[5] Furthermore, even if it can be argued that such admonition was not sufficient, defendant did not object at the time it was given nor has he included in the record before us the instructions given to the jury, and therefore it will be assumed that the jury was properly instructed in this regard.

Our conclusion upon the previous question is applicable also to appellant's final contention, that the opening statement of the prosecuting attorney to the jury that the state proposed to prove other acts of incestuous relations constituted prejudicial error. In this respect the record discloses that the trial judge properly admonished the jury, and again by reason of the absence of any instructions in the record we will likewise presume that the jury was fully and fairly instructed on this question.

The judgment and order are affirmed.

ADAMS, P. J., and THOMPSON, J., concur.

---

88 Cal.App.2d 498

GILMORE v. PLACER COUNTY BANK et al.

Civ. 7607.

District Court of Appeal,
Third District, California.
Nov. 13, 1948.

Appeal and error ⚷805

Where appellants, after filing notice of appeal, took no steps to perfect appeal, time for preparation of record on appeal was not extended and appellants, though notice of motion to dismiss appeal was served upon their counsel by mail, filed no opposition thereto and did not apply for relief from their default or appear on day set for hearing such motion, appeal would be dismissed as abandoned. Rules on Appeal, rule 41.

Appeal from Superior Court, Placer County; Lowell L. Sparks, Judge.

Action by Lyman Gilmore, Jr., against Placer County Bank, a corporation, and others. From a judgment for plaintiff, defendants appeal and plaintiff moves to dismiss the appeal.

Appeal dismissed.

Albert L. Wagner, of Sacramento, for appellant.

Fontaine Johnson, of Sacramento, and K. D. Robinson, of Auburn, for respondent.

ADAMS, Presiding Justice.

In the above-entitled action judgment for plaintiff was filed and entered on June 30, 1948. Notice of appeal by defendants was filed August 30, 1948. Thereafter appellants apparently took no steps to perfect their appeal, as no notice to prepare a clerk's transcript, nor any request for a reporter's transcript, was filed. No stipulation to prepare an agreed statement was entered into nor was any notice given of intention to propose a narrative statement; and no order was made extending appellants' time for preparation of the record.

On October 13, 1948, respondent filed in this court a notice of motion to dismiss said appeal, and served same upon appellants' counsel by depositing copy of same in the United States mail at Sacramento, California, on the same day, addressed to him at his office address in Sacramento. Said notice of motion to dismiss was supported by a certificate of the clerk of the trial court showing the foregoing facts.

Appellants filed no opposition to said motion, nor did they apply for relief from their default; and on November 5, 1948, the day set for hearing such motion, they failed to appear.

Under these circumstances the appeal is deemed abandoned. Rule 41 of the Rules on Appeal; Cunningham v. Taylor, 87 Cal.App.2d 701, 197 P.2d 565, and cases therein cited.

The appeal is dismissed.

PEEK and THOMPSON, JJ., concur.

88 Cal.App.2d 416

REED et al. v. CORTEZ et al.

Civ. 3496.

District Court of Appeal,
Fourth District, California.

Nov. 10, 1948.

As Modified Dec. 9, 1948.

1. Automobiles 🔑192(1)

If owner of truck involved in collision granted another permission to use truck, owner became liable for negligence in operation of truck, and fact that at time of collision truck was being operated by third person with permitee's consent and with permitee accompanying driver would not necessarily change owner's liability. Vehicle Code, § 402(a).

2. Automobiles 🔑244(26)

Evidence that automobile was being driven by its owner's employee when involved in accident warrants inference by trier of facts that such employee was operating automobile with owner's permission. Vehicle Code, § 402(a).

3. Evidence 🔑594

A trier of facts may reject witness' testimony in toto, though uncontradicted, if trier does not act arbitrarily.

4. Automobiles 🔑244(26)

The trier of facts, provided he does not act arbitrarily, is free to disbelieve testimony of owner of truck involved in collision when operated by another as to nonexistence of fact of permission and may find that such permission does exist solely on basis of inference arising from fact that driver was owner's employee. Vehicle Code, § 402(a).

5. Appeal and error 🔑930(1)

Any reasonable doubt, as to whether inference that owner of truck negligently driven by one other than owner permitted such person to use automobile has been rebutted as matter of law, should be resolved in favor of submitting question to trier of facts. Vehicle Code, § 402(a).

6. Automobiles 🔑245(30)

Evidence, including showing that driver of defendant's truck at time of collision with plaintiffs' automobile was employed in defendant's brickyard, presented question for jury as to whether driver was operating truck with express or implied consent of defendant, thereby charging defendant with liability for driver's negligence. Vehicle Code, § 402(a).

7. Appeal and error 🔑1073(1)

Failure of trial court to consider defendant's motion for judgment notwithstanding verdict before entry of judgment on verdict by clerk would not warrant reversal of judgment entered, where, by written stipulation, parties had agreed that motion for judgment notwithstanding verdict could be heard after date of entry of judgment in conjunction with motion for new trial. Code Civ.Proc., §§ 629, 664.

8. Damages 🔑131(1)

$600 to plaintiff husband for injuries sustained in automobile collision, including skinned forehead, small cuts on right knee, and bruises on left leg and chest, necessitating loss of six days' work and medical bills amounting to $123.25, and for damages to automobile requiring repairs in amount of $247.83, was not excessive.

9. Damages 🔑132(1)

$2,000 to plaintiff wife for facial lacerations and lacerations above the knee, resulting in scars which would probably be permanent in character and necessitating loss of 17 days in her work, was not excessive.

◆

Appeal from Superior Court, Orange County; Kenneth E. Morrison, Judge.

Action by Judd A. Reed, a minor, by Murrel E. Bates, his guardian ad litem, and Pauline Reed, a minor, by Murrel E. Bates, her guardian ad litem, against Donato Cortez and N. A. Ceniglis to recover for injuries sustained in automobile collision. From a judgment for plaintiffs, the defendant Ceniglis alone appeals.

Order and judgment as reduced affirmed.

Head, Wellington & Jacobs, of Santa Ana, for appellant.

Harvey, Rimel & Harvey, of Santa Ana, for respondents.

GRIFFIN, Justice.

On September 17, 1945, at about 4:40 a. m. the plaintiff, Judd A. Reed, was driving his Ford Sedan, in which his wife, Pauline Reed, was riding as a passenger, in a southerly direction on Olive-Orange Road, located in Orange County. At a point approximately one mile south of Olive and just north of the intersection of Taft Avenue, plaintiff collided with a truck operated by defendant Donato Cortez. At the time of the accident and prior thereto, Cortez was accompanied by a Mexican National known as Flat Face, and whose true name was Metios Fycola. The evidence shows that Cortez had been drinking and was intoxicated at the time of the accident and that he was driving in his left-hand lane of the highway and that the collision occurred there. The truck driven by Cortez was owned by defendant and appellant Ceniglis. Plaintiffs received some injuries. Plaintiff husband was awarded damages in the sum of $600, and his wife in the sum of $3500. Judgment was rendered against both defendants. Ceniglis has appealed from the judgment and from an order denying his motion for judgment notwithstanding the verdict.

The main question here presented is as to the sufficiency of the evidence to show that Cortez was driving the truck with the knowledge of or the express or implied consent of the owner, thereby charging defendant Ceniglis with responsibility for plaintiffs' injuries.

The evidence on this point shows that Ceniglis owned a brick yard. According to the testimony of Cortez, he and Fycola were and had been employed by Ceniglis for a month or so at the yard and lived on the premises along with other Mexican employees. He testified that he worked six days a week, making brick and had Sundays off; that he had a home in Chino where he went for the week-ends; that it was part of his duty to drive the truck in the brickyard; that on one occasion Ceniglis drove the truck to Chino and Cortez rode with him; that on other occasions Fycola drove it and that Ceniglis was present and did not object to this arrangement; that he rode with Fycola to Chino on Saturday nights and Fycola would pick him up on Sunday night or early Monday morning and bring him back to the brick yard in Ceniglis's truck; that on Saturday night, September 15th, Fycola drove the truck to Chino and on Sunday he went with the driver to Los Angeles to a dance, arriving about six p. m.; that they consumed several drinks while there and that about 2 a. m. they left that city and that he was driving "because Flat Face * * * was too drunk"; that on their return to Olive an accident took place and Flat Face disappeared.

A highway patrol officer investigated the accident and fully described the surrounding conditions and the intoxicated condition of the driver Cortez. He testified that several days after the accident he had a conversation with Ceniglis and that Ceniglis told him that the truck "was stolen that night" and that he asked him if Cortez was the boy that stole it and that Ceniglis said: "No, it wasn't"; that he said "he let that boy (Cortez) have the truck to drive to his home in Chino, to drive back and forth; that he did not have transportation; and that he had let him have the truck to drive back and forth to Chino"; that Ceniglis made no statement to him to the effect that he had discharged Cortez; that he did mention the other boy "Flat Face" and that he said he "would like to get his hands on him." Ceniglis denied that testimony.

Counsel for appellant argues that the testimony of the highway patrol officer as to the claimed oral admission by Ceniglis, involving the use of the truck in going back and forth between Olive and Chino for transportation purposes on week-ends applied to permission given "Flat Face." The evidence of other witnesses might so indicate. However, the testimony of the officer was that such permission was given to Cortez.

Ceniglis testified that his employees used that particular truck, on the premises, and in connection with their work; that the yard was closed between March 4th and September 6th; that he had not given any employee permission to take the truck out on the highway; that after his return from a trip a deputy sheriff told him the truck was smashed; that that was when he found out that the truck was out of the yard; that neither Cortez nor Flat Face worked for him prior to September 10th; that he paid them $150 on contract; that he discharged them on September 13th; that he never allowed any employees to drive his trucks on their own personal business.

It is argued that there is no evidence that Cortez or Fycola were, at the time, agents or servants of Ceniglis or were acting in the course of their employment; that any work they were called upon to do for Ceniglis related solely to the brick yard premises; that since they were on their way back from Los Angeles, they were not carrying on any activity resulting in any benefit to Ceniglis; that under the evidence Ceniglis would not be liable, citing Musachia v. Jones, 65 Cal.App. 283, 223 P. 1006; Weber v. Pinyan, 9 Cal.2d 226, 70 P.2d 183, 112 A.L.R. 407; Howland v. Doyle, 6 Cal.App.2d 311, 314, 44 P.2d 453; Henrietta v. Evans, 10 Cal.2d 526, 528, 75 P.2d 1051; Engstrom v. Auburn Auto Sales Corp, 11 Cal.2d 64, 77 P.2d 1059; Souza v. Corti, 22 Cal.2d 454, 139 P.2d 645, 147 A.L.R. 861; and Boland v. Gosser, 5 Cal.App.2d 700, 43 P.2d 559.

Under sec. 402, subd. a, of the Vehicle Code: "Every owner of a motor vehicle is liable and responsible for the death of or injury to person or property resulting from negligence in the operation of such motor vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner, and the negligence of such person shall be imputed to the owner for all purposes of civil damages."

[1] If it could be held that Fycola was using the truck with the express or implied permission of the owner and the owner thereby became liable, the fact that such permittee, who accompanied such driver, entrusted the driving of the truck to another, would not necessarily change the owner's liability. Hicks v. Reis, 21 Cal.2d 654, 134 P.2d 788; Souza v. Corti, supra; Brown v. Aldrich, 77 Cal.App.2d 693, 176 P.2d 89; Davidson v. Ealey, 69 Cal.App.2d 254, 158 P.2d 1000; Flemmer v. Monckton, 73 Cal.App.2d 271, 166 P.2d 380.

[2-5] The real question therefore is whether there is any evidence that Fycola was using the truck with the express or implied permission of the appellant at the time of the accident. The law is settled that if the evidence shows that an automobile was being driven by an employee of the owner at the time of an accident, the jury may infer that the employee was operating the automobile with the permission of the owner. Blank v. Coffin, 20 Cal.2d 457, 126 P.2d 868. Under this rule the jury, as the trier of the facts, is justified in inferring that permission existed. Providing the trier of facts does not act arbitrarily, it may reject in toto the testimony of a witness, even though the witness is uncontradicted. People v. La Fleur, 42 Cal.App.2d 50, 108 P.2d 99; 27 Cal.Jur. 182, sec. 156. The trier of facts is free to disbelieve the evidence as to the nonexistence of the fact of permission and may find that it does exist solely on the basis of the inference. Day v. General Petroleum Corporation, 32 Cal.App.2d 220, 89 P.2d 718; Market Street Ry. Co. v. George, 116 Cal.App. 572, 576, 3 P.2d 41. Of course the trier of facts may not indulge in the inference when that inference is rebutted by clear, positive and uncontradicted evidence of such a nature that it is not subject to doubt in the minds of reasonable men. If there is any reasonable doubt as to whether the inference, as a matter of law, has been rebutted, that doubt should be resolved in favor of submitting the question to the trier of facts. Hicks v. Reis, supra.

Ceniglis offered in evidence certain books of account and checks indicating that these employees had been "paid in full" at the time of the accident. However, he testified that merely because the check showed "paid in full" did not necessarily mean that the man was through with his work but that he was paid in full "for that week" or "for the period of time he works." After the accident Cortez was remanded to jail for driving while drunk and upon his release and during his probation period he returned to work for Ceniglis.

[6] While the length of time that these two employees were employed by appellant is not clear from the evidence, it fairly well appears and the evidence indicates that these men were still in appellant's employ and were returning to work that Monday morning. The accident happened within one mile of their place of employment.

It does not appear that the truck was stolen. The employees had possession of it and were driving it. Under the cases cited there is an inference that the employee was operating the truck with the permission of the owner. The evidence of the appellant opposed to this inference is not conclusive. The question, therefore, was one of fact to be determined by the jury under proper instructions. There is evidence supporting its finding in this respect.

The cases relied upon by appellant bear more upon the question of restrictive use, their argument being that the evidence, considered in its most favorable light toward respondents, is that Ceniglis only gave Cortez or Fycola implied or express permission to use the truck for the purpose of driving back and forth from their work to Chino, and that the claimed trip to Los Angeles and return to Chino was not authorized. The remaining evidence offered by respondents rather indicates the granting of permission for the general use of taking the truck from the brick yard on Saturday night and returning to work in it on Sunday night.

The facts in the instant case are closely analogous to the facts found in the case of Flemmer v. Monckton, supra. The evidence in that case shows that La Londe, an employee, was instructed that the truck driven by him was not to be used off the ranch. It appears that he took the truck off the ranch for personal business to a town ten miles distant and on returning became involved in an accident. The owner, on appeal, urged that the undisputed evidence showed that, in using the truck upon the highway, the employee was violating the express instructions of the owner, particularly in that he violated the restriction as to place of use, and contended that the rules in Engstrom v. Auburn Auto Sales Corporation, supra, and Henrietta v. Evans, supra, the cases relied upon by appellant, should be applied in that case as a matter of law. The court, in holding that there was permission, refused to apply those cases and said, 73 Cal.App.2d at page 274, 166 P.2d at page 382:

> "However, this view fails to take into consideration two important features of the instant case that were not present in the cases cited: (1) The existence of the relationship of employer and employee as noted in the case of Burgess v. Cahill, 26 Cal.2d 320, 324, 158 P.2d 393, 159 A.L.R. 1304; and (2) the fact that the trial court with apparent reason refused to give credence to much of the testimony of the defendants relative to the imposition of restrictions on the general use of the pickup * * *
>
> "From these decisions it clearly appears that, in a situation such as this, the fact that the car was owned by appellant and was being driven by his employee, together with other factors (hereinafter mentioned), was sufficient to permit the trial court to infer that the vehicle was being driven with the permission of the appellant owner."

In Brown v. Aldrich, supra, the facts are more analogous to the facts in the instant case. There, the employer owned several ranches. He employed Mexican Nationals who lived on one of the ranches. Three of the Mexicans took an unlicensed truck owned by the employer, from the ranch where they lived and drove to a town to drink beer. Upon returning they became involved in an accident. The evidence showed that one of the Mexicans had previously used the truck on and between the employer's ranches. The court held the case indistinguishable from the case of Flemmer v. Monckton, supra, and likewise held that the implied permission existed. See, also, Bayless v. Mull, 50 Cal.App.2d 66, 72, 122 P.2d 608. In the light of the authorities cited, and applying them to the facts of this case, the jury was justified in finding that there was no restriction of use which negatived the implied permission of use at the time and place of the collision herein involved.

After argument and before the jury retired, counsel stipulated that in the event the verdict was against the defendant Ceniglis that there has been a motion for a judgment notwithstanding the verdict made, which would be settled by the court "because I have no desire to stay here at night if counsel will stipulate to that." Thereafter, on April 17, a verdict was received, read and recorded. On April 18, the clerk entered a judgment on the verdict and on April 25, notice of entry of judgment was given. On May 1, notice of intention to move for a new trial was made on all statutory grounds. On May 1, counsel for the respective parties stipulated in writing that the "motion for a judgment notwithstanding the verdict made by defendant * * * with reservation by stipulation, prior to entry of judgment on the verdict, may be heard and considered by the court at the same time as the motion for a new trial." On July 12, the court denied the first motion, denied the second motion, and in doing so reduced the verdict in favor of plaintiff Pauline Reed from $3500 to $2000.

[7] On this appeal defendant now argues that the failure of the court to consider and determine the first motion before entry of judgment requires a reversal of that judgment; that under the provisions of sec. 629 C.C.P. the court was compelled to determine that motion before any judgment could be entered; that since that motion was determined on July 12, the judgment entered on April 18 was premature and void, citing Shapiro v. Equitable Life Assurance Society, 76 Cal.App.2d 75, 99, 172 P.2d 725.

Sec. 664 of the Code of Civil Procedure provides:

"When trial by jury has been had, judgment must be entered by the clerk, in conformity to the verdict, within twenty-four hours after the rendition of the verdict * * * unless the court order the case to be reserved for argument or further consideration * * * When a motion for judgment notwithstanding the verdict is pending, entry of judgment in conformity to the verdict shall be automatically stayed until the court has rendered its decision upon the motion. * * *"

Shapiro v. Equitable Life Assurance Society, supra, relied upon by appellant, was an action for an injunction and damages. The question of damages was submitted to the jury. Its verdict did not affect the equitable issues which were yet to be determined by the court upon findings of fact made by it. The clerk, without authority, entered a judgment on the verdict as to damages while the equitable issues remained to be determined and which had not been determined at the time the verdict was rendered. The court in that instance held that the trial of the action had not been concluded when the verdict of the jury was rendered; that two judgments in the same action were not contemplated; and that the judgment entered on the verdict was premature and void. Such is not the case here.

The language of sec. 664, supra, seems clear. The ministerial act of the clerk in entering the judgment before the decision of the trial court on the motion for judgment on the verdict has been performed. Under the mandatory provisions of the statute such entry "shall be *automatically stayed* until the court has rendered its decision upon the motion." Such a judgment is ineffectual during that period. While the proper procedure would have been to have delayed the entry of such a verdict until the trial court had ruled on such motion, it cannot be said that the ministerial act of the clerk in entering such a judgment prior to a determination of the motion would warrant a reversal of the judgment as entered. The entry was merely stayed until there had been a ruling on the motion. By written stipulation, the parties agreed that the motion for judgment notwithstanding the verdict could be heard after the date of the entry of the judgment and in conjunction with the motion for new trial. We have reviewed the evidence based on the appeal from the order denying judgment notwithstanding the verdict, and the order denying the motion for new trial. Since the evidence fully supports the trial court's order denying to defendants a judgment notwithstanding the verdict, no prejudicial error resulted. Christerson v. French, 180 Cal. 523, 525, 182 P. 27; Phipps v. Superior Court, 32 Cal.App.2d 371, 375, 89 P.2d 698; Beck v. Pasadena Lake etc. Water Co., 130 Cal. 50, 62 P. 219.

[8, 9] Although counsel for appellant does not raise the question of excessive damages in his brief, on oral argument he suggests examination of the evidence on this claim. The resultant injuries to Judd A. Reed, as disclosed by the record, were skinned forehead; two small cuts on his right knee with permanent scar which could be removed by successful surgery; and a left leg and chest bruise. At the time of the accident his chest bent the steering wheel down. He suffered soreness and pain in the region of his chest for about seven days. He lost six days' work and was making about $12 per day. His car was laid up for repairs from September 17 to December 4, 1945. He had used it in going to and from his work in orchard spraying and taking his wife to work. Hospital, X-ray, doctor and ambulance bills amounted to $123.25. His car repairs amounted to $247.83.

Mrs. Reed's injuries were lacerations through the lower lip extending down through the chin, lacerations extending from the inner canthus of the eye, paralleling the nose, and extending for about 1½ inches; superficial muscle and nerves surrounding the eye were severed. There were deep lacerations of the right eyebrow. Shattered glass cuts were about the face. A 2½ inch laceration was above the right knee about ½ inch deep. She carries certain scars which the doctor described as probably permanent in character. She was in the hospital two days and lost 17 days in her work at a wage of $6 per day. She suffered pain from her face injuries for about three weeks and still suffered pain from her knee at the time of trial. Her knee "gives way" on occasions when she walks; her sight is impaired to some extent; and she suffers from headaches a great deal.

The judgment in favor of Mrs. Reed for $2000 cannot be said to be excessive. The judgment in favor of Mr. Reed for $600 did not suggest any such influence of passion or prejudice on the part of the jury as would authorize this court to reverse or modify it. Butler v. Allen, 73 Cal.App.2d 866, 167 P.2d 488; O'Meara v. Haiden, 204 Cal. 354, 268 P. 334, 60 A.L.R. 1381.

Order and judgment, as reduced, are affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

88 Cal.App.2d 382

WILSON v. WILSON.

Civ. 13731.

District Court of Appeal, First District.
Division 2, California.
Nov. 9, 1948.

1. Judgment 🔑**306, 326**

Inadvertence of judge in signing judgment which does not correctly embody or carry out judgment as previously judicially ordered, is a "clerical error" rather than a judicial error which on being called to court's attention, may be corrected by a nunc pro tunc order.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Clerical Error".

2. Divorce 🔑**254**

Failure of superior judge to frame final divorce judgment disposing of community property as expressly directed by District Court of Appeal was a "clerical error" that could properly be corrected six months later by ex parte nunc pro tunc judgment signed by judge other than one who signed defective judgment.

3. Judgment 🔑**306**

Test for determining whether a judicial error is a clerical one, is whether error is one which cannot reasonably be attributed to exercise of judicial consideration or discretion.

4. Judgment 🔑**316, 326**

An order may be made correcting a judgment nunc pro tunc as of its original date without notice and on court's own motion so as to make it conform to judicial decision actually made, regardless of lapse of time.

5. Divorce 🔑254

Where superior judge signed final divorce judgment failing to dispose of community property as expressly directed by District Court of Appeal relying on plaintiff's affidavit incorrectly reciting that no motion for new trial had been made and no appeal taken from interlocutory decree, but affidavit of plaintiff's counsel for corrective nunc pro tunc order, though hearsay, established that affidavit was prepared and filed by counsel's secretary without his knowledge, plaintiff's conduct did not constitute waiver of error in the judgment.

Appeal from Superior Court, City and County of San Francisco; Geo. W. Schonfeld, Judge.

Action by Barbara Wilson against Francis A. Wilson for divorce. From a nunc pro tunc judgment correcting the final judgment and awarding community property to the parties as directed by the District Court of Appeal, defendant appeals.

Judgment affirmed.

See also, Cal.App., 194 P.2d 754.

A. B. Dunne, Dunne & Dunne and R. Mitchell S. Boyd, all of San Francisco, for appellant.

Hallinan, MacInnis & Zamloch, of San Francisco, for respondent.

DOOLING, Justice.

After a trial before Judge George W. Schonfeld in the superior court in San Francisco findings were made and an interlocutory decree entered granting plaintiff a divorce from defendant, ordering defendant to pay alimony and awarding certain community property to plaintiff. Defendant appealed from the interlocutory decree and on the appeal the interlocutory decree was ordered modified in the following language: "the interlocutory decree is modified by striking therefrom all words presently disposing of the community property and inserting words to the effect that upon the entering of the final decree the parties are entitled to have assigned to them the portions of the community property mentioned in the decree." Wilson v. Wilson, 76 Cal.App.2d 119, 133, 172 P.2d 568, 576.

After the remittitur had gone down and on December 5, 1946, another superior judge, acting on an affidavit hereafter discussed, signed and entered a final decree of divorce in the action which made no disposition of the community property, but was entirely silent on that subject. This omission in the final decree having been called to the attention of Judge Schonfeld on July 22, 1947 Judge Schonfeld signed an amended final decree of divorce expressly awarding the community property to the parties as directed by the order of the court quoted from Wilson v. Wilson, supra. This amended decree recited that the final decree of December 5, 1946 was entered "by reason of a clerical mistake", and directed that the amended decree be entered nunc pro tunc as of December 5, 1946. From this nunc pro tunc judgment defendant appeals.

[1-3] Defendant argues primarily that any error of the judge who signed the final decree of December 5, 1946, in failing to dispose of the community property as expressly directed by the District Court of Appeal in Wilson v. Wilson, supra, was a judicial error and not a clerical mistake. This view is refuted by the following authorities: Bemmerly v. Woodward, 124 Cal. 568, 57 P. 561; In re Estate of Goldberg 10 Cal.2d 709, 76 P.2d 508; Benway v. Benway, 69 Cal.App.2d 574, 159 P.2d 682; In re Estate of Remick, 75 Cal.App.2d 24, 170 P.2d 96; Davis v. Rudolph, 80 Cal.App.2d 397, 181 P.2d 765; La Mar v. Superior Court, 87 Cal.App.2d 126, 196 P.2d 98. These cases all hold that the inadvertence of a judge in signing a judgment or decree which does not correctly embody or carry out the judgment or decree as previously judicially ordered is a clerical, rather than a judicial error, which on being called to the attention of the court may be corrected by a nunc pro tunc order. This case differs from the cited cases in this particular: that in all of those cases the antecedent judicial order which the judgment or decree failed to follow was the order of the same judge who signed the

defective judgment or decree, whereas in the case before us it was the order of the District Court of Appeal directing that the community property be assigned in the final decree of divorce which was disregarded in the signing and entry of the final decree of December 5, 1946. The principle is not changed by this fact. The order of the District Court of Appeal had become the binding law of the case and it was the absolute judicial duty of the superior judge to follow it. We cannot assume that any judge would stultify himself by consciously failing to do so. The test for determining whether a judicial error is a clerical one laid down by the Supreme Court in Re Estate of Goldberg, supra, 10 Cal.2d 709, 715, 76 P.2d 508, 512, is whether the error is one "which cannot reasonably be attributed to exercise of judicial consideration or discretion". The record makes clear that the error in omitting to dispose of the community property in the final decree as directed by the order of the District Court of Appeal cannot reasonably be attributed to an exercise of judicial discretion. We cannot assume that the superior judge who signed that decree deliberately or consciously flouted the order of the District Court of Appeal. It was therefore properly corrected as a clerical error by the nunc pro tunc judgment.

[4] Appellant complains that the order was made ex parte. A clerical error apparent on the face of the judgment may be so corrected. "An order may be made correcting a judgment nunc pro tunc as of its original date without notice and on the Court's own motion so as to make it conform to the judicial decision actually made, and this is true regardless of the lapse of time." La Mar v. Superior Court, supra, 87 Cal.App. 2d ——, 196 P.2d 98, 101. Appellant attempts to distinguish the La Mar case on the ground that the decree there ordered to be corrected was one entered by the clerk and not one signed by the judge. An inspection of the record in the La Mar case shows that the decree therein ordered corrected was signed by Judge Dockweiler, who tried the cause and signed the findings. Judge Dockweiler's error in not effectively carrying one of the provisions of his own findings into the judgment signed by him was held to be a clerical error rather than a judicial one which the District Court of Appeal in the La Mar case by writ of mandate ordered corrected nunc pro tunc to truly represent his judicial decision.

[5] The original decree which omitted to dispose of the community property was signed and entered on an affidavit executed by the plaintiff which incorrectly recited that no motion for new trial had been made and no appeal taken from the interlocutory decree of divorce. On the face of the record the plaintiff was responsible for the error in the final decree and in the absence of some showing of excuse for her action her conduct might well have been held to constitute a waiver of the error in the final decree in failing to dispose of the community property. The application for the nunc pro tunc decree was supported by an affidavit of Mr. MacInnis, plaintiff's attorney, which stated that without his knowledge a stenographic secretary in his office had prepared the affidavit for the final decree and procured the plaintiff to execute it and that the affidavit and final decree (also prepared by the same secretary) had, also without his knowledge, been presented to the judge who signed the decree by a clerk in his office. While, as pointed out by appellant, this affidavit is hearsay as to how the documents were prepared and presented it does establish that it was done without the knowledge of the affiant, who was acting throughout as plaintiff's counsel in the matter. In view of the obvious errors of fact in the affidavit and the obvious failure of the decree to carry out a part of the antecedent judicial order favorable to the plaintiff the fact that plaintiff's action was taken without knowledge of her counsel or the benefit of his advice is sufficient to excuse and explain her conduct.

By a very technical argument appellant is seeking to escape from the effect of an adverse award of community property made by the trial court after hearing all of the evidence and approved by the District Court of Appeal in Wilson v. Wilson, supra, 76 Cal.App.2d 119, 172 P.2d 568.

The judgment appealed from is affirmed.

NOURSE, P. J., and GRIFFIN, J. pro tem, concur.

88 Cal.App.2d 431

BASTANCHURY et al. v. STEARNS et al.

Civ. 3815.

District Court of Appeal,
Fourth District, Division 3, California.
Nov. 10, 1948.

Vendor and purchaser ⚿322

Where executrices accepted bid for citrus grove offering to pay stated balance upon confirmation and conveyance free of incumbrances, and escrow instructions gave purchaser 60 days in which to pay after confirmation though time would be automatically extended in absence of written withdrawal by either party, and sale was confirmed but purchase price was not paid for nearly six months at which time escrow was closed and deed delivered after purchasers with permission of executrices had spent large amounts for care of property, executrices were not entitled to damages for delay in payment of purchase price.

◆

Appeal from Superior Court, Orange County; Raymond Thompson, Judge.

Equitable action by Juanita C. Bastanchury and Elizabeth Eadington, executrices of the estate of Maria O. Bastanchury, deceased, against I. C. Stearns and Mabel L. Stearns for damages for delaying payment of purchase price for a citrus grove sold in a probate proceeding. From the judgment, defendants appeal.

Reversed.

Henry O. Wackerbarth, of Los Angeles, for appellants.

Harvey, Rimel & Harvey and Milford W. Dahl, all of Santa Ana, for respondents.

BARNARD, Presiding Justice.

This is an equitable action for damages for delaying payment of the purchase price for property sold in a probate proceeding.

The property consisted of a citrus grove with certain personal property used in connection therewith. Pursuant to a notice of sale the defendants offered $275,000 for this property on October 21, 1944, and on the same day the plaintiffs accepted the bid and filed a return of sale and petition for confirmation. On or about the same day, the parties executed escrow instructions at a title company. A court order confirming the sale in accordance with the terms of this bid was entered on November 3, 1944, and on the same day a deed was placed in this escrow by the plaintiffs. The balance of the purchase price was not paid into the escrow by the defendants until April 27, 1945, at which time the escrow was closed and the deed delivered. At this time an existing trust deed on the property for $120,000, held by a bank, was paid off through the escrow, and a reconveyance was recorded.

About a month after the escrow was closed and the deed delivered this action was brought. The complaint, after preliminary matters, alleged the confirmation of the sale on November 3, 1944; that on that day the plaintiffs executed and delivered in escrow with this title company a deed, "together with all documents necessary to transfer title" to the defendants; that on November 3, 1944, the plaintiffs were ready, able and willing to deliver clear title to the property to the defendants in accordance with the terms of the bid; that the defendants failed to deposit in escrow or otherwise pay the purchase price until April 27, 1945; that the defendants were in possession of the property and received all its issues and profits for these months after the date of confirmation and after a good and sufficient deed and the documents necessary to transfer title had been deposited in escrow; and that during this period the plaintiffs were deprived of the use of the $155,000 coming to them to their damage in the sum of $5243.65.

The answer alleged that in connection with the filing of their bid for this property all parties entered into an escrow with this title company; that at all times up to April 27, 1945, this property was subject to the lien of a deed of trust for $120,000 held by this bank; and that payment for the property and delivery of the deed to the defendants was made through this escrow. It was further alleged that the time for closing the escrow had been extended by the parties, and that the plaintiffs by permitting the escrow to be closed without making further demand had waived and released any claim or right either to interest or damages.

There is little, if any, dispute as to the main facts, most of which are disclosed by written documents. A sale of the property was made and confirmed upon the showing that it was necessary, among other things, in order to secure funds with which to pay off the $120,000 trust deed. It appears, without dispute, that the defendants informed the plaintiffs in advance that it would take them some time to raise the amount of money required and that all parties signed escrow instructions before a hearing was had on the return of sale. By their written bid dated October 21, 1944, the defendants offered $275,000 for the property, 10% to be paid upon acceptance and the balance upon confirmation by the court, the property to be conveyed "free and clear of all incumbrances," with the usual exceptions not material here. On the same day, the defendants signed escrow instructions dated October 2, 1944, which were prepared on a title company blank. These instructions recited that the defendants were handing the escrow agent $27,500 "and will hand you the additional sum of $247,500 after the sale has been confirmed." The title company was instructed to use these amounts when it could issue its policy of title insurance showing title to the property in question to be vested in the defendants, subject to certain exceptions not material here. It was then provided that expenses for the care of the property were to be adjusted to the date of confirmation by the court, and that certain things should be prorated as of that date. The title company was instructed that if it was unable to comply with these instructions within sixty days, to comply with them within such additional time as might be required, unless a written demand was made by any party for the return of the money or documents to the parties who had deposited the same. An approval of these instructions was signed on October 26, 1944, by the plaintiffs in which they state that they will hand the escrow agent "papers necessary to vest title as above" and instruct the title company to use the money to pay off the $120,000 trust deed, among other things, and to pay the balance to the present record owner.

On November 3, 1944, the court entered an order finding all of the allegations of the return of sale and petition for confirmation to be true. It was ordered that the sale of this property "so made" to these defendants for the sum of $275,000, "of which 10% was paid in cash accompanying the bid, and the balance to be paid upon confirmation of sale and delivery of deed, bill of sale and assignment be, and the same is, hereby confirmed upon payment of the price aforesaid." On December 11, 1944, the plaintiffs notified the escrow agent in writing that they were extending the closing date of the escrow to January 20, 1945.

No one was living on this property during the time here in question. It was orally agreed between the parties that one of the executrices would continue to care for the property as she had in the past, using the men she had theretofore employed, and that the defendants would repay any expense thus incurred. Later, the plaintiffs refused to do certain spraying and fertilizing but permitted the defendants to do this at their own expense. By agreement expressed in the escrow instructions the plaintiffs finished picking certain oranges, which were considered a part of the 1944 crop, and kept the proceeds. Later, certain other oranges and some lemons were picked by a packing house selected by the defendants but, on orders from the plaintiffs, the proceeds were impounded to await the possible termination of this sale and were paid to the defendants after the escrow was closed.

In February, 1945, the plaintiffs being unable to pay an installment of $5000 with some interest then due on the trust deed to the bank, the defendants paid these sums through the escrow. Stearns testified that he paid these amounts pursuant to an agreement that by so doing he would be given further time in which to raise the money and close the sale. The plaintiffs testified that they remembered no such conversation. The attorney for the plaintiffs and the estate testified that he knew nothing about this matter until after the $5000 was paid. He further testified that he told Stearns several times that the escrow must be closed soon or they would declare the deal off; that the matter drifted along for several months; and that no written demand for the closing of the escrow or for the return of deposits therein was ever made. A few days before the escrow was closed Stearns notified the plaintiffs and asked them to bring in a statement of their costs in caring for the place. They handed in a statement of such expenses and also of certain taxes paid, and these were adjusted in closing the deal.

Among other things, the court found that on October 21, 1944, the plaintiffs accepted the defendants' bid and filed a return of sale and petition for confirmation; that on or about that date the parties executed escrow instructions providing for the carrying out of this probate sale and providing that the escrow holder might use the money as directed therein when it could issue its title policy showing clear title in the defendants; that on November 3, 1944, the court entered an order confirming the sale pursuant to and upon the terms of said bid; that on November 3, 1944, the plaintiffs executed and delivered into escrow a deed in favor of the defendants; that on that date plaintiffs were ready, able and willing to deliver a clear title in accordance with the terms of the bid, and the title company was ready, willing and able to issue its policy of title insurance "in compliance with the terms of the said bid and escrow instructions"; that from November 3, 1944, to April 27, 1945, the defendants were in possession of and operating the property, receiving the rents and profits, and the plaintiffs were deprived of the use of $155,000 and thus damaged in the sum of $5243.65; that the plaintiffs have no remedy at law and unless relief is granted as prayed for the defendants will be unjustly enriched; that the defendants paid $5000 and certain interest on the trust deed indebtedness in February, 1945, at their own volition, without any request from the plaintiffs and without any agreement for an extension of time in closing the escrow; and that by accepting the full purchase price upon the completion of the escrow the plaintiffs did not waive or release any claim they may have had for interest or damages. Judgment was entered accordingly and this appeal followed.

Briefly stated, the appellants contend that certain essential findings are not sustained by the evidence; that clear title was not furnished until the escrow was closed; that the money was paid and the escrow closed within the time allowed; and that the claim here relied on was waived and settled by permitting the escrow to be closed and accepting the purchase price without demanding anything further.

The respondents contend that all material findings are supported by the evidence; that there has been no waiver or settlement in full; that this is an action in equity for interest as such and not for damages incidental to the contractual breach; and that, it would unjustly enrich the appellants to excuse them from paying interest for this escrow period, during which they had possession of the property and retained its issues and profits.

Whether this is an action for interest as such and not subject to the rules governing damage actions of this nature, or whether the court properly treated it as a damage action need not be decided. It is also unnecessary to consider several points incidentally raised by both parties. It may be observed, however, that it is extremely doubtful whether the evidence is sufficient to support the finding that the defendants had possession of this property during the period in question, within the meaning of the rules and principles relied on by the respondents, or the finding that the appellants voluntarily paid $5000 and certain interest on the trust deed debt without any agreement, express or implied, for further time to raise the money with which to complete the purchase of the property. In any event, we think the essential findings to the effect that on November 3, 1944, the respondents were ready, willing and able to deliver a clear title in accordance with the terms of the appellants' bid and that on that date the title company was ready, willing and able to issue a policy insuring the title in compliance with the terms of that bid and of the escrow instructions, are entirely without support in the record.

It was respondents' theory, apparently adopted by the court, that the acceptance of this bid and confirmation by the court constituted the only contract here; that by its terms full payment was due on confirmation and upon delivery of a deed; that they fully complied by delivering a deed into escrow on November 3; that the full purchase price was then due; and that this binding contract was entirely unaffected by anything in the escrow or in its instructions, which merely provided the means for carrying out the contract which thus existed.

Even if this strict interpretation of the contract were to be adopted, and the escrow provisions disregarded, it clearly appears that the respondents did not fully comply with its terms by delivering a deed into escrow on November 3. They did not, as they allege, also deliver on that date "all necessary documents to transfer title," and the court carefully refrained from finding that they did this. The appellants' written bid did not provide for payment of the balance upon confirmation by the court, as respondents argue, but upon such confirmation plus a conveyance of title "free and clear of all incumbrances," with the usual exceptions not material here. The order of confirmation referred to this bid and its provisions, and ordered the sale confirmed "upon payment of the price aforesaid." By its own terms the order of confirmation was not to take effect until the full purchase price was paid in accordance with the bid, and by the terms of the bid the balance of the purchase price was not to be paid until the property was conveyed free and clear of incumbrances. Apart from the escrow agreement the respondents were unable to furnish such a conveyance and it clearly appears that they did not do so prior to the closing of the escrow, at which time the balance of the purchase price became due under the contract, upon which they rely.

One of the main purposes of the probate sale was to enable the respondents to pay off this $120,000 deed of trust. They desired to use the purchase price for this purpose and the escrow instructions provided for this as, otherwise, the respondents could not furnish clear title. These escrow instructions were entered into as an integral part of the deal and prior to the order of confirmation. They may not be disregarded under these circumstances and they have an important bearing upon the time when the balance of the purchase price became payable. By the provisions of the escrow instructions the appellants were given sixty days in which to pay the balance, and it was further provided that this time was to be automatically extended in the absence of a written withdrawal from the escrow by either party. No such notice of withdrawal was given. The matter was allowed to drift in the hope of an eventual completion of the proposed sale and when the balance was paid within the time as thus extended the respondents were, for the first time, able to convey a clear title, which they then did. In view of this written extension of time, contained in the escrow instructions, it is immaterial whether or not any special agreement was made in February, in connection with the payment on the trust deed which was advanced by the appellants. The appellants, by permission of the respondents, spent large amounts during the interim for the care and protection of the property. Any possible constructive possession during that period was more of a burden to them than a benefit, except as the preservation of the property might eventually benefit either party.

Whether the escrow instructions are considered a part of the contract or not, in neither event does the evidence sustain the findings that the respondents were ready, able and willing to deliver clear title on November 3, 1944, or that the title company was then able and willing to issue its policy of title insurance in accordance with the terms of the bid and the escrow agreement of the parties. Under the views thus expressed it is unnecessary to consider the further question raised as to whether or not a waiver or release of any further demands resulted from the manner in which the deal was allowed to be closed.

The judgment is reversed.

GRIFFIN, and MUSSELL, JJ., concur.

88 Cal.App.2d 345

DOWNING v. MUNICIPAL COURT OF CITY AND COUNTY OF SAN FRANCISCO.

Civ. 13862.

District Court of Appeal, First District, Division 1, California.

Nov. 5, 1948.

Hearing Denied Dec. 30, 1948.

1. Statutes 🔑234½

That parking meters had not been invented or at least used at the time of the passage of the Penal Code section penalizing the operation of a receptacle designed to receive lawful coin by means of a slug, etc., did not destroy the effect of the statute, if its provisions were otherwise lawful. Pen.Code, § 640a.

2. Statutes 🔑241(1)

The common-law rule that penal statutes must be construed strictly does not apply in California. Pen.Code, § 4.

3. Statutes 🔑241(1)

The rule that, when accused is charged with an offense defined in terms subject to two reasonable constructions, the construction favorable to accused is ordinarily adopted, does not mean that language of statute must be strained beyond the limitation of reason, but the statute must be construed according to the fair import of its terms with a view to effect its objects and to promote justice. Pen.Code, § 4.

4. Automobiles 🔑324

The right to park an automobile on a public street is "property" within the Penal Code section penalizing the use of slugs or counterfeit coins in connection with designated machines used for the sale, use, or enjoyment of "property". Pen.Code, §§ 640a, 648a.

See Words and Phrases, Permanent Edition, for all other judicial constructions and definitions of "Property".

5. Property 🔑1

The word "property" is all-embracing and includes every intangible benefit and prerogative susceptible of possession or disposition, and its construction depends upon the context with which it is used and signifies any valuable right or interest protected by law.

6. Automobiles 🔑5(3)

The city of San Francisco has the right to control by parking meters the Polk street area, in view that such area is a portion of the public land relinquished to San Francisco by an act of Congress of July 1, 1864, and by a decree of the federal court and in view of the Van Ness ordinance by which the city reserves to itself such lands as may be selected for streets and other public purposes. Act Cong. July 1, 1864, 13 Stat. 332.

7. Automobiles 🔑5(3)

Under the Constitution and ordinance of the city of San Francisco, regulation of the use of the streets by the means of parking meters is valid as for the benefit of the whole public. Const. art. 11, § 11.

8. Prohibition 🔑29

A question of whether there is a plain, speedy, and adequate remedy at law is ordinarily a question of fact as respects the right to prohibition.

9. Prohibition 🔑3(4)

Prohibition would not lie to restrain prosecution of petitioner on complaints for misdemeanors in municipal court of city and county of San Francisco on ground that petitioner had no plain, speedy, and adequate remedy, since, it having been found that the municipal court had jurisdiction of the petitioner, a plain, speedy, and adequate remedy in the ordinary course of law existed by taking an appeal from any adverse judgment.

Appeal from Superior Court, City and County of San Francisco; Herbert C. Kaufman, Judge.

Proceeding by James R. Downing for a writ of prohibition against the Municipal Court of the City and County of San Francisco. From a judgment ordering that the writ be denied, the petitioner appeals.

Affirmed.

J. W. Ehrlich and Victor E. Cappa, both of San Francisco, for appellant.

Edmund G. Brown, Dist. Atty., and Norman Elkington, Asst. Dist. Atty., both of San Francisco, for respondents.

WARD, Justice.

This is an appeal from a judgment ordering that the issuance of a writ of prohibition be denied on the "ground that the petitioner has a plain, speedy and adequate remedy in the ordinary course of law by taking an appeal from any adverse judgment" that may be rendered.

The petition for the writ of prohibition sets forth that ten separate statutory complaints were filed in the municipal court of the City and County of San Francisco charging the commission of misdemeanors —violations of section 640a of the Penal Code—in that defendant knowing and having cause to believe that a certain act was intended for unlawful use did sell and give away a device and substance by placing said device and substance in the United States mail, postage prepaid, addressed (in the present case) to the C. & H Cleaners, 1802 Polk Street, San Francisco, California. It is then alleged that the device and substance were "intended and calculated to be placed or deposited in a receptacle, depository and contrivance; to-wit; a parking meter, designed to receive lawful coin of the United States of America in connection with the sale, use or enjoyment of property or service, with the intent to defraud the City and County of San Francisco, the licensee, lessee and owner thereof." The remaining complaints are the same in form and substance except in the allegation naming the recipients of the devices.

After arrest, a motion to quash the complaint and a demurrer were filed. The motion was denied and the demurrer overruled. The defendant entered a plea of not guilty and the case was set for trial. Upon a petition alleging that the municipal court did not have jurisdiction to try petitioner on the ten or any of the stated misdemeanor complaints the superior court issued an alternative writ of prohibition. The superior court ruled as heretofore indicated and the accused petitioner in that action filed this appeal.

Petitioner contends: "(a) The complaints are void because they do not set forth facts which constitute public offenses under Section 640a of the Penal Code as parking meters are not used in connection with the 'sale, use or enjoyment of property or service' since the City under the Van Ness Ordinance of 1855 holds title to Polk Street as a trustee for the public and in regulating traffic thereon by means of the parking meters is performing a governmental function and not a proprietary one. (b) The petitioner and appellant has no plain, speedy and adequate remedy in the ordinary course of law by taking an appeal from any adverse judgment and the peremptory writ should be issued."

Section 640a, Penal Code, provides in part:

"Any person who shall knowingly and willfully operate, or cause to be operated, or who shall attempt to operate, or attempt to cause to be operated, any automatic vending machine, slot machine, coin-box telephone or other receptacle designed to receive lawful coin of the United States of America in connection with the sale, use or enjoyment of property or service, by means of a slug or any false, counterfeited * * * coin, or by any means, method, trick or device whatsoever not lawfully authorized by the owner, lessee or licensee of such machine, coin-box telephone or receptacle, or who shall take, obtain or receive from or in connection with any automatic vending machine, slot machine, coin-box telephone or other receptable designed to receive lawful coin of the United States of America in connection with the sale, use or enjoyment of property or service * * * the use or enjoyment * * * or service * * * without depositing in and surrendering to such machine, coin-box telephone or receptacle lawful coin of the United States of America to the amount required therefor by the owner, lessee or licensee of such machine, * * * shall be guilty of a misdemeanor.

"2. Any person who, with intent to cheat or defraud the owner, lessee, licensee or other person entitled to the contents of any automatic vending machine, slot machine, coin-box telephone or other receptacle, depository or contrivance designed to receive lawful coin of the United States of America in connection with the sale, use or enjoyment of property or service, or who, knowing or having cause to believe that the same is intended for unlawful use, shall manufacture for sale, or sell or give away any slug, device or substance whatsoever intended or calculated to be placed or deposited in any such automatic vending machine, slot machine, coin-box telephone or other such receptacle, depository or contrivance, shall be guilty of a misdemeanor."

A slug or token is defined in Penal Code, sec. 648a, as "of a size and shape such that the radius, the diameter and the thickness thereof are each within six one-hundredths of an inch of that of any coin of the United States of America * * *. The term 'slug' and the term 'token,' as used herein, mean any piece of metal or other material not a coin of the United States or a foreign country." Subdivision 1 of section 640a of the Penal Code throws some light on the definition and construction to be placed on similar words and terms in subdivision 2 of the same section.

[1] It appears from the briefs that parking meters had not been invented, or at least used, at the time of the passage of section 640a. However, this fact is not determinative of the question whether the complaints state a violation of the section. The fact that a new machine used for governmental purposes has been invented, and a new means, method or scheme devised to evade a lawful condition for its use does not destroy the effect of the statute if the provisions of the statute are otherwise lawful.

Petitioner first considers whether a parking meter is an "automatic vending machine" in the sense that it does not sell touchable, material property. There is no allegation in the complaint that the "parking meter" is a vending machine intended to produce tangible property upon the insertion or deposit of a device or substance. It is true that the code section and the complaint use the word "sale," but the "use or enjoyment of property or service" is the object to be obtained by the deposit of a "lawful coin" in a receptacle similar to a telephone coin receptacle upon which the property privilege of service is automatically bestowed to converse with another person. The price of the service is the deposit or payment of a coin.

[2, 3] Many of the cases cited by appellant are based upon the common law rule that penal statutes must be construed strictly. That rule does not have application in this state. It is true that when an accused is charged with an offense defined in terms subject to two reasonable constructions the construction favorable to the defendant is ordinarily adopted (People v. Valentine, 28 Cal.2d 121, 169 P.2d 1), but this method of construction does not mean that the language of a statute must be stretched and strained beyond the limitation of reason. "The rule of the common law, that penal statutes are to be strictly construed, has no application to this code. All its provisions are to be construed according to the fair import of their terms, with a view to effect its objects and to promote justice." Penal Code, sec. 4.

[4] Appellant fails to distinguish between the vending slot machine which produces tangible property, and the slot machine which gives the use and enjoyment of service which is "property" as used in section 640a. Consideration of the definition of property, as applied to parking meters, was given by Judge Eustace Cullinan, Jr., to whom the motion to quash and the demurrer were submitted. A memorandum opinion was filed covering the defi-

nition of property which we adopt in part as the opinion of this court:

"The Court finds that the right to park on a public street is a 'property' and that therefore Section 640a, Subdivision 2, applies to parking meters and so inhibits the conduct described in the complaint. One who deposits a coin in a parking meter has a paramount right to park in the adjacent parking space as against any other user of that public street, even though his right be so tenuous that he may lose it upon yielding the possession before the expiration of the allotted time.

[5] "The word 'property' has been subjected to innumerable and various definitions. Courts have said that the word 'property' is 'all-embracing so as to include every intangible benefit and prerogative susceptible of possession or disposition.' Button v. Hikes, 296 Ky. 163, 176 S.W.2d 112, 150 A.L.R. 779. See also Great Northern Railway v. Washington Electric Co., 197 Wash. 627, 86 P.2d 208; Liddick v. Council Bluffs, 232 Iowa 197, 5 N.W.2d 361; Investment & Securities Co. v. Robbins, D.C., 49 F.Supp. 620.

"Even a free game which a person might win on a pin ball machine has been judicially invested with the dignity of 'property' (Middlemas v. Strutz, 71 N.D. 186, 299 N.W. 589). As the court said in Franklin v. Franklin, 67 Cal.App.2d 717, 155 P.2d 637, the construction of the word 'property' depends on the context with which it is used and signifies 'any valuable right or interest protected by law.' See also Angelopulos v. Bottorff, 76 Cal.App. 621, 245 P. 447; Cavassa v. Off, 206 Cal. 307, 274 P. 523; Hunt v. Authier, 28 Cal.2d 288, 169 P.2d 913, 171 A.L.R. 1379."

[6] Appellant takes the position that a motorist already has the right to park on the street, and the municipality can not take that right away from him. It is claimed that the City of San Francisco does not have any property rights in its streets—particularly that part of Polk Street whereon the offense is alleged to have occurred. The alleged counterfeit device or substance was alleged to have been sent to a business address in the 1800 block on Polk Street. There is no contention that the counterfeit substance was to be used on Polk Street as parking meters are installed in other parts of San Francisco. However, the Polk Street area, near the business of the C & H Cleaners, is a portion of public lands relinquished to San Francisco by an act of Congress of July 1, 1864, 13 Stat. 332, and by a decree of the Circuit Court of the United States. The rights of parties to certain portions of the land are derived under the often referred to ordinance (The Van Ness Ordinance). "By section 4 of said ordinance the city, however, as a consideration for said grant, 'reserves to itself * * * such lots and lands as may be selected and reserved for streets and other public purposes.'" Board of Education v. Martin, 92 Cal. 209, 211, 28 P. 799, 800. In the same case the court said, 92 Cal. at page 216, 28 P. at page 802: "The proprietary interest in all such property belongs to the public, and, whether the legal title to such property be in the municipality or any of its officers or departments it is at all times held by it or them for the benefit of the whole public, and without any real proprietary interest therein."

[7] Assuming that the power of the city to exact fees for the privilege of parking is conferred by art. XI, sec. 11 of the State Constitution, and that the city ordinance (designated as Bill No. 4425, Series of 1939) provides for meter zones and that the fees are for use as police regulation of traffic, there is nothing inconsistent with the conclusion that such regulation is for the "benefit of the whole public." Board of Education v. Martin, supra. It must be admitted that the use of the meters is to make the area alongside the curb available to as many persons as possible. The public has the right to the use of the property, and hence, without the necessity of selling or renting its duly constituted authority has the right to control the use of such area.

The case of DeAryan v. City of San Diego, 75 Cal.App.2d 292, 170 P.2d 482, is stressed by petitioner. In that action for injunctive relief, the complaint alleged that several thousands of dollars were being collected from meters beyond the amount needed to meet expenditures provided in the ordinance, and that the meters were so constructed that they fail to deliver the parking time indicated by the schedules, "with the result that there is an unlawful exaction of contributions for parking services which are not delivered. The prayer is for an order * * * prohibiting the city from using 'parking meters which are not mechanically constructed to deliver the parking time as announced and advertised.'" 75 Cal.App.2d at page 293, 170 P.2d at page 483. The gist of the opinion is that the evidence supported findings that no money had been unlawfully exacted from any person by reason of the installation and use of meters. In the DeAryan case, 75 Cal.App.2d at page 296, 170 P.2d at page 485, it was said: "It has been held that such regulation of parking and control of traffic may well justify a fee system intended and calculated to hasten the departure of parked vehicles in congested areas, as well as to defray the cost of installation and supervision. In re Opinion of the Justices, 297 Mass. 559, 8 N.E.2d 179; Bowers v. City of Muskegon, 305 Mich. 676, 9 N.W.2d 889."

[8, 9] The contention that appellant has no plain, speedy and adequate remedy needs little consideration. The Supreme Court has broadened the grounds for the issuance of the writ of prohibition. Greenberg v. Superior Court, 19 Cal.2d 319, 121 P.2d 713; Rescue Army v. Municipal Court, 28 Cal.2d 460, 171 P.2d 8. However, the question of whether there is a plain, speedy and adequate remedy is ordinarily a question of fact. 21 Cal.Jur., p. 585.

It is sufficient to say that the superior court, having reached a conclusion that the municipal court had jurisdiction of the accused and the cause set forth in the complaint, was justified in denying the writ upon the ground that petitioner has a plain, speedy and adequate remedy in the ordinary course of the law by taking an appeal from any adverse judgment.

The judgment and order discharging the alternative writ are affirmed.

PETERS, P. J., and BRAY, J., concur.

---

88 Cal.App.2d 291

CHAMBERLAIN v. ABELES et al.

Civ. 16239.

District Court of Appeal, Second District, Division 3, California.

Nov. 1, 1948.

Hearing Denied Dec. 30, 1948.

1. Master and servant 🔑80(6)

An office manager, seeking recovery of commissions for procuring manufacturing contracts for his employer based on net sales from orders procured, was required to produce evidence showing that he was the "effective" or "procuring" cause of the sales.

2. Principal and agent 🔑81(1)

An agent whose compensation is conditional upon his accomplishment of a specified result is entitled to agreed commission only if he is "effective cause" of accomplishing result, quoted phrase meaning when his efforts have been sufficiently important in achieving a result for accomplishment of which principal has promised to pay him, so that it is just, that principal pay the promised compensation.

See Words and Phrases, Permanent Edition, for all other definitions of "Effective Cause".

3. Principal and agent 🔑81(1)

"Procuring and inducing cause", as respects recovery of agent's commissions, means the cause originating from a series of events that, without break in their continuity, results in the prime object of the agent's employment; the word "procure" meaning to prevail upon, induce, or persuade a person to do something.

See Words and Phrases, Permanent Edition, for all other definitions of "Procure" and "Procuring and Inducing Cause".

4. Appeal and error 🔑1011(1)

In agent's action for commission, where evidence is conflicting, conclusion as to "procuring cause" is for the trial court and will not be disturbed on appeal.

5. Appeal and error 🔑931(1)

On appeal from judgment for plaintiff in a case tried to the court, appellate court accepts as true all evidence tending to establish correctness of trial court's finding together with every inference favorable to plaintiff which may be drawn therefrom and excluding all evidence in conflict therewith.

6. Master and servant 🔑80(9)

Evidence entitled office manager to recover from employer commissions on sales derived from employer on manufacturing contracts procured by manager on ground that the manager's activities set in motion a series of events which, without break, brought about the sales involved.

7. Appeal and error 🔑1071(6)
Trial 🔑397(1)

Unless waived, full findings are required on all material issues raised by pleadings and evidence, and, where court fails to make findings, new trial is authorized provided there is evidence introduced as to such issues, and the evidence is sufficient to sustain a finding in favor of the complainant, if the omitted findings might have the effect of countervailing the effect of the other findings.

8. Trial 🔑404(1)

Trial court findings are to receive such a construction as will uphold rather than defeat its judgment thereon, and are to be read and construed together and liberally construed in support of the judgment, and, if findings are made upon issues which determine a cause, other issues become immaterial and a failure to find thereon is not prejudicial error.

9. Appeal and error 🔑1071(6)

Where finding, if made, would necessarily have been against appellant, he cannot complain of lack of such finding.

10. Appeal and error 🔑1071(6)

In action by office manager for commissions in procuring orders for sales made by his employer, where there were two separate employments, evidence of acceptance by plaintiff of pay check as manager was not a waiver of his claim to commissions under the oral agreement relating thereto, so that failure of trial court to make findings on defendant's defense of waiver and estoppel was not error.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by E. N. Chamberlain against C. T. Abeles, Jr., and others, individually and as copartners doing business under the fictitious firm name and style of the Rumsen Company, a copartnership, and another, for breach of contract to pay commissions. From the judgment, defendants appeal.

Affirmed.

Hallack W. Hoag, of Los Angeles, for appellants.

John Ruskin Lane, of Los Angeles, for respondent.

VALLEE, Justice.

Defendants appeal from a judgment in favor of plaintiff in the sum of $5,500, and costs, in an action brought by plaintiff for the breach of an oral contract by which defendants agreed to pay plaintiff a commission of 5 per cent of the net sales derived by defendants from all orders and manufacturing contracts procured by plaintiff for defendants from the Cannon Electrical Development Company.

The amended complaint, among other things, alleged that on or about April 1, 1943, it was orally agreed between plaintiff and defendants that in addition to performing his regular duties as office manager, plaintiff would use his time and efforts and business contacts to procure orders and manufacturing contracts for defendants from Cannon Electrical Development Company; that as compensation for such extra work and services by plaintiff, defendants would pay to plaintiff, over and above his salary, a commission of 5 per cent of the net sales derived by defendants from all orders or contracts obtained from the Cannon Electrical Development Company, which commissions were to be paid after the amount of such net sales had been from time to time determined; that pursuant to said agreement plaintiff, between April 1, 1943, and December 1, 1943, obtained orders and manufacturing contracts from the Cannon Electrical Development Company in excess of $115,000; that under the terms of the agreement plaintiff fully performed everything on his part to be performed; that under the agreement, and between April 1st and December 1, 1943, there accrued to plaintiff the sum of $5,750, representing commissions on said sales to Cannon Electrical Development Company; that plaintiff left defendants' employ on December 1, 1943, and that further commissions have accrued to plaintiff under the terms of the agreement; that plaintiff demanded payment of his commissions from defendants but that they have at all times failed and refused to pay the same.

Defendants' answer contained a general denial and, in addition, two affirmative defenses: (1) That plaintiff had been paid for all services rendered by him up to the date of his termination of employment on December 1, 1943, and by so accepting the amount in full and complete settlement was estopped to claim any further sum; (2) that plaintiff, by accepting the sums paid him during his employment as full and complete settlement of the obligations of the defendants, waived any right to claim further compensation.

The court found: That defendants were co-partners doing business under the fictitious firm name of The Rumsen Co.; that defendant Abeles, Jr., acted as the authorized agent and representative of the co-partnership in the general management and conduct of the business transacted by the co-partnership; that for many years prior to the time alleged in the amended complaint plaintiff had enjoyed extensive business contacts and associations in the industrial and manufacturing field in and about Los Angeles County and had built up an extensive good will among various firms and industries in and about that locality; that from March 1, 1943, to and including November 30, 1943, plaintiff had been employed by defendants as general office manager of the defendant, The Rumsen Co.; that on or about March 20, 1943, it was mutually agreed by oral agreement between plaintiff and the defendants, that plaintiff, in addition to performing his regular duties as office manager of defendant, The Rumsen Co., would "use his time, efforts and business contacts in an effort to procure for defendants orders and manufacturing contracts from the Cannon Electrical Development Company and the Cannon Manufacturing Corporation," and that defendants, in payment for such extra work and services by plaintiff, would pay to plaintiff, "over and above his regular salary, a commission of five per cent (5%) of the net sales made by defendants to said companies on orders or contracts obtained by defendants from said companies"; that pursuant to the agreement plaintiff "used his time, efforts and business contacts in procuring orders and manufacturing contracts from the Cannon Electrical Development Company and the Cannon Manufacturing Corporation for defendants and by his efforts did procure orders and manufacturing contracts for defendants from said companies which resulted in net sales by defendants to said companies in the amount of One Hundred Ten Thousand Dollars ($110,000.00)"; that there was due and owing to plaintiff from defendants the sum of $5,500 "commissions on the said net sales by defendants to said companies." Judgment followed accordingly, from which defendants have appealed.

Appellants first contend that there is no substantial evidence to support the finding that plaintiff by his efforts procured orders and manufacturing contracts for defendants from Cannon Electrical Development Company and the Cannon Manufacturing Company (hereafter referred to as "Cannon Company"), which resulted in net sales by the defendants to said companies in the amount of $110,000, assuming the parties entered into an oral contract upon the terms found by the trial court. No objection is made to the sufficiency of the evidence to support the other findings.

[1] Plaintiff's right to a commission is dependent entirely upon the terms of the agreement between the parties and the nature of the services required to be rendered by him. The agreement contemplated that plaintiff was to use his time, efforts and business contacts in an effort to procure orders from the Cannon Company, for which services he was to receive a commission upon the net sales from said orders. Although the specified result contemplated by the agreement was accomplished, name-

ly, the obtaining of the orders from the Cannon Company, in order to recover his commission it was encumbent upon plaintiff, to produce evidence showing that he was the "effective" or "procuring" cause of the sales.

[2] The principle is stated in the Restatement as follows: "An agent whose compensation is conditional upon his accomplishment of a specified result is entitled to the agreed compensation if, and only if, he is the effective cause of accomplishing the result. * * * An agent is an 'effective cause,' as that phrase is used in this Section, when his efforts have been sufficiently important in achieving a result for the accomplishments of which the principal has promised to pay him so that it is just that the principal should pay the promised compensation to him." Rest., Agency, sec. 448, comment a. See, also, 2 Am.Jur. 236, sec. 301. While the most common type of case to which this rule has been applied is that of a real estate broker or agent (Sessions v. Pacific Improvement Co., 57 Cal.App. 1, 206 P. 653; Pryor v. McGuire, 59 Cal.App. 234, 210 P. 532; Bail v. Glantz, 78 Cal.App. 49, 248 P. 258), the principle has been applied in other agency situations. See, Zinn v. Ex-Cell-O-Corporation, 24 Cal.2d 290, 149 P.2d 177 (action to recover merchandise sales commission); Washburn v. Speer, 206 Cal. 414, 420, 274 P. 519 (action to recover merchandise sales commission); Brea v. McGlashan, 3 Cal.App.2d 454, 39 P.2d 877 (action to recover commission upon obtaining radio advertising contracts); Lichtig & Rothwell, Inc., v. Holubar, 78 Cal.App. 511, 248 P. 735 (action to recover commission for procuring professional engagement of an actress).

[3, 4] The expression "procuring and inducing cause" is defined in Sessions v. Pacific Improvement Co., 57 Cal.App. 1, 17, 206 P. 653, 659, as "the cause originating from a series of events that without break in their continuity results in the prime object of the employment of the agent." In Brea v. McGlashan, supra, 3 Cal.App.2d 454, 39 P.2d 877, the court, in determining whether the finding that plaintiff was the procuring cause of obtaining certain radio advertising contracts was sustained by the evidence, said (3 Cal.App.2d page 465, 39 P.2d page 882): "The word 'procure' does not necessarily imply the formal consummation of an agreement. The Century Dictionary gives the following as the meanings of the word: 'To bring about by care and pains; effect; contrive and effect; induce; cause, as he procured a law to be passed.' In its broadest sense, the word means to prevail upon, induce, or persuade a person to do something. * * * The originating cause, which ultimately led to the conclusion of the transaction, is held to be the procuring cause.' Sessions v. Pacific Improvement Co., 57 Cal.App. 1, 206 P. 653. * * * And where the evidence is conflicting, the conclusion as to the procuring cause is one for the trial court and will not be disturbed on appeal. Jones v. Foster, 116 Cal.App. 102, 108, 2 P.2d 582." Where the agent is the procuring cause of the transaction which he was authorized to negotiate "he is entitled to his commission irrespective of the fact that the principal himself, or through others, may have intervened and actually completed the final act of the negotiation. Accordingly an agent who was the procuring cause of the transaction is entitled to his commission irrespective of the fact that it was consummated by the principal, that he was not personally present when it was entered into, that it was consummated without his knowledge, or that he did not personally see or talk to the other party entering into the transaction." 3 C.J.S., Agency, § 185, page 85. See: Washburn v. Speer, 206 Cal. 414, 274 P. 519; Brea v. McGlashan, 3 Cal.App.2d 454, 39 P.2d 877; Buhrmester v. Independent Plumbing & Heating Supply Co., Mo.App., 151 S.W.2d 509; Gould v. Ricard Boiler, etc., Co., 136 Ill.App. 322; Vining v. Lippincott, Mo.App., 182 S.W. 758; Minneapolis Steele & Machinery Co. v. Couch, 144 Okl. 259, 291 P. 74; Gemunder v. Hauser, 7 Misc. 487, 27 N.Y.S. 977, affirming 6 Misc. 210, 26 N.Y.S. 529.

The question of whether an agent is the procuring cause of a sale is a question for the trier of fact. Where the evidence is conflicting the finding as to the procuring cause will not be disturbed on appeal. Brea v. McGlashan, 3 Cal.App.2d 454, 465, 39 A.2d 877.

[5] With the foregoing principles in mind, and accepting as true all evidence tending to establish the correctness of the findings, together with every inference favorable to plaintiff which may be drawn therefrom, and excluding all evidence in conflict therewith, the record reveals the following activities on the part of plaintiff in his effort to procure for defendants orders from the Cannon Company. Sometime between the middle and the latter part of March, 1943, plaintiff suggested to defendant Abeles that since he had a contact at the Cannon Company which he thought was usable he should call upon the Cannon Company "in an effort to secure business for the Rumsen Company, which needed it." Abeles authorized plaintiff to do so and stated that if plaintiff succeeded in getting any business "a commission of five per cent would be paid for that kind of work." The commission was to apply so far as plaintiff knew "on any order received from this one particular company in response to the effort I was making on it." Plaintiff immediately contacted Mr. Bixler of the Cannon Company, a former business associate of his, who arranged for a meeting to be held "a few days later" between Mr. Rowen, purchasing agent of the Cannon Company, and plaintiff. Plaintiff testified that at this meeting Mr. Rowen asked him "questions about the product that the Rumsen Company was making and indicated that he had no use for this type of contact nut for electrical connectors. Mr. Rowen indicated to me he had no use for this type of nut and he mentioned the assembly ring they were using; he inquired what our price would be in making the contact nut and if it could be adopted in making this particular assembly ring. I replied that I did not know, that it was a little different and I would find out. * * * I returned to the office and talked with Mr. Levingston, one of the partners, and Mr. Abeles indicated the Rumsen Company might be desirous of making this particular ring for the Cannon Company and thought there would be very good business for us if the company could do it. Mr. Abeles indicated he would like to have me go over and find out whether they could be manufactured properly and if we could make the product exclusive for the Cannon Company." The Rumsen Company was not making this particular assembly ring at the time. Plaintiff then testified that he undertook the project. He contacted an engineer friend of his whom he had known for many years and during evenings, Saturdays, and Sundays worked out the process and the type of material necessary to make the product that would interest the Cannon Company. In connection with this activity plaintiff testified that he and his engineering friend "worked out the design; what type of sheet metal we would use in the construction of it; what type of die we would use, how many dies we would have to have; what the net result would be; what the tolerances were that we would have to allow; what kind of metal; what designs would meet the Cannon Company ideas; in other words, the whole detail was worked out, and the various people to do the job. It took a lot of time * * * I imagine the biggest part of a month, or longer, before all the 'bugs' were worked out." The record reveals that there were numerous meetings between Mr. Rowen and other representatives of the Cannon Company and defendant Abeles, at some of which plaintiff was present. Plaintiff testified that on one of these occasions "We presented to Cannon's a schematic presentation of what could be done; in other words, by using these different processes, the nut could be made into the assembly ring. This was a paper process, and we suggested that they let us run a pilot run in one size and ascertain whether or [not] they would actually work the way it looked like they would on paper." This pilot run was made and thereafter the Cannon people ordered the assembly ring and subsequently re-ordered. Plaintiff further testified that Mr. Abeles did not "know the prices" or "the costs" and that he collected all of the information on prices of material and labor costs and that, although the correspondence between the defendants and the Cannon Company was

signed by Mr. Abeles, he supplied the information which became the text of Abeles' letters. In effect this testimony was corroborated by the testimony of Miss Borror, a former employee of the defendants, who stated that "Any time I would go talk with Mr. Abeles regarding the Cannon order, he would refer [me] to Mr. Chamberlain, telling me Mr. Chamberlain was completely familiar with all of the Cannon Work."

Appellants make much of the fact that defendant Abeles and Mr. Rowen both testified that it was Abeles, and not plaintiff, who "obtained" the contracts. Mr. Rowen's testimony reveals that his first contact with defendant Abeles and plaintiff was at the time Mr. Bixler introduced them to him; that his purchases from the Rumsen Company were based purely on the need for the article defendants could supply; and that there was no personal reason why it should have been Mr. Abeles or plaintiff from whom he purchased.

[6] The foregoing testimony of plaintiff's activities constituted ample evidence from which the trial court was justified in believing that it was plaintiff's activities that "set in motion a series of events which, without break in their continuity" brought about the sales in question. Any conflicts in the evidence respecting plaintiff's activities were questions for the trier of fact and its conclusion will not be disturbed on appeal.

[7] Appellants next assert that the court erred in not making findings on their affirmative defenses of waiver and estoppel. The principles governing the duty on the part of the court with respect to the necessity of making findings, is succinctly stated in Petersen v. Murphy, 59 Cal. App.2d 528, 532, 139 P.2d 49, 51, as follows: "It is well established that unless waived full findings are required on all material issues raised by the pleadings and evidence in a case (24 Cal.Jur. 935, 936); that where a court renders a judgment without making findings upon all material issues of fact, the decision is against law, and constitutes ground for granting a new trial provided it appears that there was evidence introduced as to such issue and the evidence was sufficient to sustain a finding in favor of the complaining party if the omitted findings might have the effect of countervailing or destroying the effect of the other findings. 24 Cal.Jur. 940, 941; Powell v. Johnson, 50 Cal.App. 2d 680, 683, 123 P.2d 875; Wilcox v. West, 45 Cal.App.2d 267, 114 P.2d 39.

[8, 9] "But it is equally well established that the findings of a court are to receive such a construction as will uphold rather than defeat its judgment thereon (Breeze v. Brooks, 97 Cal. 72, 77, 31 P. 742, 22 L.R.A. [256] 257), and are to be read and considered together and liberally construed in support of the judgment (Menghetti v. Dillon, 10 Cal.2d 470, 472, 75 P.2d 596; Cornell v. Hollywood Turf Club, 32 Cal.App.2d 204, 208, 89 P.2d 449); and that if findings are made upon issues which determine a cause, other issues become immaterial and a failure to find thereon does not constitute prejudicial error. 24 Cal.Jur. 947; Merrill v. Gordon & Harrison, 208 Cal. 1, 6, 279 P. 996."

It is likewise the rule that where a finding, if made, would necessarily have been against the appellant, he cannot complain of the lack of such finding. Petersen v. Murphy, 59 Cal.App.2d 528, 535, 139 P. 2d 49; Moore v. Hoar, 27 Cal.App.2d 269, 81 P.2d 226; Consolidated Irrigation District v. Crawshaw, 130 Cal.App. 455, 462, 20 P.2d 119; Brooks v. Bailey, 40 Cal.App. 2d 310, 316, 104 P.2d 854; 24 Cal.Jur. 944.

[10] Appellants' assertion that they presented sufficient evidence in support of the affirmative defenses is unfounded. Defendant Abeles testified that plaintiff had been hired as office manager at a salary of $75 per week and that subsequently his salary was raised to $100 per week. He testified emphatically that plaintiff never made any additional claim for obtaining the Cannon business or claimed that he had any agreement for a commission on the Cannon business.

The trial court found that there were two separate employments—one as office manager, and the other a special employment by virtue of the oral agreement entered into between the parties. Under these circumstances, evidence of the acceptance by plaintiff of his regular pay check as office manager could in no way be construed as payment in full of plaintiff's commissions nor a waiver of his claim to commissions under the oral agreement. In order to necessitate a finding on the issues of estoppel or waiver, substantial evidence of acts or conduct on the part of plaintiff, other than the acceptance of his regular pay checks, must appear. Since the record is devoid of any such evidence, findings on these issues were not required.

Judgment affirmed.

SHINN, P. J., and WOOD, J., concur.

---

88 Cal.App.2d 278

MAGEE v. SAN FRANCISCO BAR PILOTS BENEVOLENT & PROTECTIVE ASS'N.

Civ. 13788.

District Court of Appeal, First District, Division 1, California.

Nov. 1, 1948.

Rehearing Denied Dec. 1, 1948.

1. Appeal and error ⇨1071(6)

In disabled pilot's action for declaration of his rights to associate membership in and pension from pilots' benevolent and protective association, failure to find specifically whether disability was caused by injuries received while plaintiff was performing pilot duties was immaterial on his appeal from adverse judgment, where association did not claim that judgment rested on express or implied finding that disability was not so caused and conceded that disability resulted from injury.

2. Pilots ⇨2½

A retired regular member of pilots' benevolent and protective association had no absolute right to election as associate member entitled to pension, under association's by-law requiring two-thirds vote of regular members to elect associate member, in view of evidence that main purpose of by-laws providing for pensioning of five pilots as associate members was not to provide permanent retirement system, but to prevent threatened increase in permanent number of pilots allowed by statute. Harbors and Navigation Code, § 1160.

3. Pilots ⇨2½

By-laws of pilots' benevolent and protective association, requiring vote or written consent of two-thirds of regular members thereof to elect old or disabled members as associate members entitled to pensions, were not invalid as unreasonable, not operating on all members equally, or making arbitrary discrimination.

4. Pilots ⇨2½

By-laws of pilots' benevolent and protective association, requiring two-thirds vote of regular members to elect associate members entitled to pensions, will not be held inapplicable or disregarded as contrary to general object to provide pensions for old and disabled regular members, where evidence shows that main purpose of by-laws providing for pensions was to prevent threatened increase in permanent number of pilots allowed by statute. Harbors and Navigation Code, § 1160.

5. Contracts ⇨189

Rights to pensions under contract must be measured by contract, whether pensions be construed as gratuities or not

6. Pilots ⇨2½

The San Francisco Bar Pilots Benevolent & Protective Association's by-law, requiring two-thirds vote of regular members to elect old or disabled members as associate members entitled to pensions, does not violate public policy as compelling pilots to remain on active list regardless of infirmities, in view of statute requiring Board of Pilot Commissioners to license only qualified pilots for one-year periods after yearly examinations and absence of statute requiring association to provide pension plan

7. Pilots ⇨2½

The San Francisco Bar Pilots Benevolent & Protective Association was not estopped from insisting on literal construction of its by-law, requiring two-thirds vote of its regular members to elect disabled regular member as associate member entitled to pension, on ground of five previous departures from literal construction of by-law, where none of such departures had to do with waiver of two-thirds vote and only other previous application by regular member to become associate member was denied for failure to secure required vote.

8. Pilots ⚷2½

A by-law of pilots' benevolent and protective association, requiring two-thirds vote of regular members to elect disabled regular members as associate members entitled to pensions, was not invalid for lack of consideration and mutuality as making disabled member's right to pension dependent on mere whim of one-third of members, though he was bound to make payments for other associate members' pensions, where real consideration for such payments was to prevent threatened statutory increase in permanent number of pilots and he received direct financial benefits from arrangement while he was regular pilot. Harbors and Navigation Code, § 1160.

9. Pilots ⚷2½

A pilots' benevolent and protective association member, permanently incapacitated by injuries suffered in performance of his duties and receiving sick benefits, payable under association's by-laws to temporarily incapacitated regular members, for nearly a year, was not entitled to further sick benefits until he ceased to be regular member on his receipt of membership fee and could not complain of association secretary's noncompliance with provision of by-law as to time for payment of such fee.

10. Pilots ⚷2½

A retired regular member of pilots' benevolent and protective association, who was not entitled to pension because of failure of two-thirds of association's regular members to elect him as associate member, as required by association by-law, was not entitled to accounting and return of moneys contributed by him to pensions of other associate members, where he fully acquiesced in collection of such contributions at times thereof.

Appeal from Superior Court, City and County of San Francisco; Edmund P. Mogan, Judge.

Action by William A. Magee against the San Francisco Bar Pilots Benevolent & Protective Association for a declaration of plaintiff's rights to an associate membership in defendant and to certain pension rights. From an adverse judgment, plaintiff appeals.

Affirmed.

L. L. James and Carl E. Day, both of San Francisco, for appellant.

Lyman Henry, Stephen McReavy, and Hall, Henry, & Oliver, all of San Francisco, for respondents.

PETERS, Presiding Justice.

Plaintiff brought this action for a declaration of his rights under the articles of incorporation and by-laws of defendant, seeking a determination that he is entitled to an "associate" membership in defendant and, as such, entitled to certain pension rights. Plaintiff appeals from a judgment determining that he is entitled to none of the claimed rights.

The factual background of this controversy is as follows: To guide ships in and out of San Francisco, navigators with a special knowledge of these waters are required. As early as 1870, by statute, there was created a Board of Pilot Commissioners with power to appoint not more than twenty pilots for this purpose. Stats. of 1869–1870, Chap. 243, p. 344. This statute, or its successor, has been applicable during all periods here involved, and the limitations to twenty pilots is still the law. Harbors and Navigation Code, § 1160. The pilots are examined yearly by the Board and licenses are issued for one-year periods.

In 1910 the pilots formed a corporation under the name of the "San Francisco Bar Pilots Benevolent Association," which, in 1925, was succeeded by the defendant, the "San Francisco Bar Pilots Benevolent and Protective Association." These corporations, whose members consist of the pilots, own the pilot boats and rent them at a flat monthly rental to the pilots, and perform the other functions set forth in the articles and by-laws. The pilots are stationed on a boat owned by the corporation outside the Golden Gate, and, as an incoming ship arrives, in rotation, a pilot is rowed to the ship, he boards the same, and pilots it to its destination. A ship leaving the harbor is accompanied by a pilot through the Golden Gate and over the bar, and then the pilot leaves the ship and goes over to a pilot boat. Harbors and Navigation Code, §§ 1160–1164. The pilotage fees, which are fixed by statute, are pooled by the pilots, 5 per cent of such fees are paid to the Pilot Commissioners, $400 is paid to defendant corporation for the use of its boats, other expenses of defendant corporation are deducted, and the balance divided equally among the pilots monthly.

The first corporation, the San Francisco Bar Pilots Benevolent Association, had no provision at all for the payment of pensions to its members. The corporate setup of the defendant corporation is different from that of its predecessor. The articles provide that there shall be two types of members—regular and associate—and the articles and by-laws provide the qualifications of such members, how they shall be selected, and also provide for the collection of funds from the regular members to pay the associate members a pension.

Plaintiff was duly appointed a bar pilot on May 17, 1928. He paid the then required membership fee of $5,000. During the years he served as a regular member of the corporation there was deducted from his earnings the proportionate expenses of maintaining the pilot boats, and his share necessary to pay the pensions of the associate members. The last associate member died in 1944, and thereafter no deduction was made from plaintiff's earnings for the payment of any pension. In other words, no pension fund was ever created. The pension paid each month to the associate members was paid from that month's deductions made from the regular members' earnings.

On November 12, 1945, plaintiff ceased active duty as a bar pilot because of injuries allegedly received while ascending, in the performance of his pilot's duties, the rope ladder of a ship. On December 5, 1945, plaintiff applied, in proper manner, for an associate membership in defendant, and for a pension. The application was denied because fifteen of the seventeen members present (three not being at the meeting) voted "no." Thereupon, plaintiff brought this action. The lower court determined that, under the articles and by-laws of defendant, plaintiff was not entitled to a pension; that his only right is to receive, upon surrender of his membership, the sum of $5,500, which is the value of his interest in the property of the corporation, or the sum of $7,500, which is the present regular membership fee.

Defendant states in its brief, and plaintiff admitted at oral argument, that on October 15, 1947, plaintiff surrendered his certificate of regular membership and received $7,500 for it.

[1] Plaintiff complains because the trial court made no specific finding on the issue of whether his present disability was caused by injuries recieved while performing pilot duties. The finding on this issue is that for many years plaintiff had suffered from arteriosclerosis and was so suffering in November, 1943, when he suffered the claimed injury; that plaintiff did not discover that he suffered from such condition until December, 1943. But the failure to make this finding more specific is immaterial because defendant does not claim that the judgment rests in any degree on any express or implied finding that the present disability was not caused by the injury, and is willing to concede, for the purposes of this case, that the present disability is a result of the injury claimed to have been suffered in November, 1943. The theory of the trial court was that, regardless of how or when the injury was received, the articles and by-laws of defendant are clear and unambiguous; that they validly provide that one can become an associate member only by a two-thirds vote of the regular members; that the denial of plaintiff's application to become an associate member "was simply the rejection of an application which said reg-

ular members might in their charity have allowed, but which was not a basis for legal liability."

[2] The basic problem involved is the proper interpretation of the articles and by-laws of defendant insofar as they relate to associate membership and the right to a pension. Plaintiff contended in the trial court, and contends here, that he had an absolute right to be elected an associate member, and so an absolute right to a pension. Defendant contends, and the trial court found, that plaintiff had no absolute right to become an associate member, and that election to such membership rested in the discretion of the regular members.

Article sixth of the articles, after first providing that there shall be two classes of members, regular and associate, and after providing that the regular members shall consist of the duly approved bar pilots, provides *"the associate members* shall be persons who have been such regular members, or members of the San Francisco Bar Pilots Benevolent Association, a California corporation, and *have been chosen or elected and qualified* as associate members *as provided by the by-laws."* (Italics added.)

The pertinent provisions of the by-laws are as follows:

Article II, § 3: "Any member or former member of the San Francisco Bar Pilots Benevolent Association, a California corporation, who has resigned as a San Francisco Bar Pilot in the calendar year 1925 and prior to the first day of July, 1925, may become an associate member by election by the Board of Directors and signing these by-laws.

"Any regular member of this Association who has paid all his dues and assessments and is in good standing in the Association and has served for twenty years continuously as a Pilot for the Port of San Francisco, or has reached the age of sixty-six years, or has become permanently disqualified from serving as a Pilot from injuries received while discharging his duties as such Pilot, *may apply* to the Association for an associate membership

* * *

"At no time shall there be more than five associate members for reasons other than said disqualification for injuries received.

"A two-thirds vote or the written consent of two-thirds of the whole of the regular membership is necessary to elect as associate member any person, other than those elected by the Board of Directors as herein provided. After such election, he shall not become an associate member unless or until he has ceased to be a licensed Bar Pilot and a regular member and surrendered his certificate of regular membership." (Italics added.)

Article XVIII of the by-laws provides that the corporation shall charge each regular member a percentage of his monthly income for the benefit of the associate members, and, further, that such benefits shall be paid to the associate members as long as they should live; that the corporation should act as agent for the associate members in collecting these percentages from the regular members; that each regular member should sign the by-laws, and, by signing them, such member agrees to pay such percentages to the associate members.

The trial court found that these by-laws were clear and unambiguous, and valid. It is plaintiff's main contentions that such by-laws are not clear and unambiguous; that they should not be literally interpreted; that a literal interpretation is in conflict with the fundamental purposes of defendant corporation, is not reasonable, violates defendant's property and contract rights, is violative of public policy and that defendant is estopped from urging such literal interpretation; that such interpretation results in making defendant's contract void for want of consideration and of mutuality.

Plaintiff finds himself in an untenable position. If the provisions quoted are clear and unambiguous and are to be given their literal meaning, he has no case. They clearly provide that to become an associate member the retired regular member must be elected by a two-thirds vote. The by-laws, in language too clear for misunderstanding, provide that the determination of whether an associate member shall be elected rests in the discretion of two-thirds of the regular members. On the other hand, if it be assumed that parol evidence was admissible to ascertain the true intent of the drafters and to ascertain the purpose of the provisions, plaintiff likewise cannot recover. This is so because, according to the evidence, the main purpose of organizing defendant in 1925, was not to provide a permanent system of retirement for old or disabled pilots as contended by plaintiff. The evidence most favorable to defendant shows that when defendant was organized in 1925, and the articles and by-laws drafted to provide pensions for associate members, the purpose of the regular pilots was to prevent an increase in their number and a decrease in income. As already pointed out, the income of all pilots is pooled. The greater the number of pilots, the less each will receive. The law, in 1925 as now, limited the number of pilots to twenty. In the year 1925 there was great pressure by the Legislature, from within the organization itself, and from other sources, to increase permanently, by amendment of the statute, the number of regular pilots from twenty to twenty-five. Under such circumstances the then regular members came to the conclusion that the lesser of two evils would be to induce five of their oldest members to retire on the promise to pay them a pension in order to make room for five new members. Thus, the new setup was not intended as a pension system for all old and disabled pilots, but was intended primarily to meet an existing threat and to provide a system that could meet any similar threat in the future.

That this was the basic purpose of the 1925 provisions is supported not only by the testimony of one who was a member when the change was made in that year, but also by related evidence. It is admitted that the five who were immediately retired on pension when the new organization was formed in 1925 were the only ones who have ever been associate members. The last of this original five died in 1944, and since then no one has received a pension. The evidence also shows that other regular members have retired and not sought associate membership. It also shows that, aside from the original five, but one other regular member has ever sought associate membership, and his application, like that of plaintiff, was voted down by the members, plaintiff being one of those to vote "no" on the application. There is also evidence that no pension fund was ever created, and that when the last of the original five died in 1944 the contribution for pension purposes was discontinued. Thus, the parol evidence and the literal and plain meaning of the by-laws and articles are consistent. They show that this organization never intended to set up a pension plan for all disabled or aged pilots, but intended to meet an attack that was then being made that would have materially reduced the income of its regular members. Those members were willing to contribute a small portion of their income to pension off five of their aged members rather than have their income reduced from one-twentieth of the total net take to one-twenty-fifth.

[3] These conclusions dispose of most of the objections raised by plaintiff. They dispose of his contention that the main purpose of founding the defendant association was to pay pensions to all of the old and disabled pilots. That contention is completely refuted by the language of the articles and by-laws, and by the parol evidence to which reference has been made. Plaintiff cites many cases to the effect that by-laws and pension provisions of such an association must be construed reasonably, that they must operate on all members equally, and that they must not make arbitrary discriminations. We emphatically agree with the rules of the cases cited, but such rules are to no avail to plaintiff. These by-laws are clear and unequivocal. Particularly when their background is understood they are not unreasonable, they do operate on all members equally, and no arbitrary discrimination exists.

[4] Plaintiff also cites many cases which he contends support the proposition that where language of a statute or by-law is

susceptible of being construed so as to leave the payment of benefits to the discretion of a person or body, such statute or by-law will not be so construed, but rather it will be held that the general object to be attained will control and that the ultimate determination as to the right to benefits is for the courts. Again, the plaintiff has assumed the general object of the by-laws, and such assumption is contrary to the facts. When the object here sought to be attained is understood, there is no reason to distort the language used or to disregard it. Most of the cases cited are cases where the right to the pension was not a mere gratuity, but was vested. Thus, in Robinson v. Irish-American B. Soc., 67 Cal. 135, 7 P. 435, 436, the constitution of the benevolent society provided that no money should be paid on any claims except upon the order of the trustee. The court inferentially held that plaintiff, if sick, would have a right of action on his claim even though the trustee rejected it. But the constitution of the association expressly provided that any member "who is sick and receives the doctor's certificate, shall be entitled to eight dollars per week." Thus, in that case, the member was entitled to his benefits if sick, regardless of the action of the trustee. A comparable situation cannot be spelled out of the by-laws under consideration. In all of the cases cited to prove that the apparent discretionary power of a body to award a benefit was mandatory, unlike the present case, there could be spelled out of the articles and by-laws a vested right in the beneficiary to the claimed benefit. Supreme Council Catholic Benevolent Legion v. Grove, 176 Ind. 356, 96 N.E. 159, 36 L.R.A., N.S., 913 is typical. There a by-law specified that a certain amount "shall" be paid upon the death of a member, and one-half that amount "may" be paid in case of permanent disability. The association denied the claim of a disabled member. In holding that the word "may" should be interpreted as "shall," the court relied upon a recitation in the constitution of the association to the effect that one of the basic purposes of the association was to aid members by creating a fund "for the relief of sick and distressed members." The court held that, if the by-law be literally interpreted, such interpretation would defeat this main object of the organization. In the instant case there was no such stated purpose, there was no fund created, and the articles referred to the by-laws as specifying the method of election of associate members.

[5] Plaintiff cites many cases to the effect that pensions, wherever possible, will not be construed as a gratuity. One of the latest cases so holding is Hunter v. Sparling, 87 Cal.App.2d 711, 197 P.2d 807. But, in any case, the rights must be measured by the contract involved. Thus, in Re Estate of Henderson, 17 Cal.2d 853, page 859, 112 P.2d 605, page 609 the general rule, relied upon by plaintiff here, is stated as follows: "If a group of individuals agree to contribute equal amounts into a fund to be used for the benefit of all, such a group may well be said to be non-charitable in nature because each individual is providing only for his own welfare and does not intend to make a free contribution toward the assistance of others." But, in that very case, the court went on to point out the differences between a true mutual benefit association where the members have a contractual right to receive benefits, and an association where the members have no such contractual rights. At page 860 of 17 Cal.2d, at page 609 of 112 P.2d it is stated: "A true mutual benefit association, however, is based upon reciprocal contracts and requires that a member receive benefits as a matter of right. Members of the Order of the Eastern Star who pay their required assessments acquire no right, contractual or otherwise, to be admitted to the Home, even after fulfilling the entrance requirements. *A member must be nominated by his local chapter and selected by the trustees of the Home before he can gain admittance,* and only one member out of every 500 in a local chapter can acquire residence in the Home at the same time. A member is admitted to the Home because his case is deserving and not because his previous contributions have given him a contractual right to admission." (Italics added.)

This language is directly applicable to the plaintiff in the instant case.

Another case directly in point is Pool v. Brotherhood, etc., 143 Cal. 650, 77 P. 661.

It was there held that a member's rights had to be measured by his contract, and if that contract clearly provided that a right to a benefit was dependent upon the approval of a board, he had no enforceable right without such approval. At page 654 of 143 Cal., at page 662 of 77 P., it is stated: "This is not a case of an arbitrary adjudication of the officers of a benevolent association, declaring a forfeiture of property or of vested rights. It is simply the rejection of a claim that the lodge might in its charity have allowed, but it was agreed that such a claim should be in the discretion of the lodge and not the basis of legal liability. *Plaintiff may have been unfortunate in becoming a member of a brotherhood that is not benevolent, but the court cannot undo his actions in this regard.*" (Italics added.)

[6] The contention that if the by-laws be literally construed they violate public policy is patently unsound. The argument is that it is the policy of the law to secure competent pilots, and that a literal application of the by-law would compel pilots to remain on the active list regardless of infirmities. The obvious answer is that, under the law, pilots must be licensed, and the Board of Pilot Commissioners is required to license only qualified pilots. All pilots are examined yearly and licenses are only issued for one year at a time. There is no statute requiring the corporation to provide any pension plan at all. Under such circumstances it is no violation of law or of public policy to make the right to a pension dependent upon election to associate membership.

[7] An argument is made to the effect that defendant is estopped from insisting on a literal construction of the by-laws because, so it is claimed, in five enumerated particulars in the past defendant has departed from a literal construction of its by-laws. The argument is unsound because none of the five claimed departures had to do with waiving the two-thirds vote of the regular members, and because the evidence shows that the only other application filed by a regular member to become an associate member (besides that of the original five and plaintiff's own) was that of Captain Swanson, and it was denied for failure to secure the required two-thirds vote. There is not one word of evidence that there ever was the slightest deviation from a literal and proper interpretation of the questioned by-law. There is no basis for an estoppel.

[8] The contention that if the by-law in question be considered a contract, such contract is invalid for lack of consideration and mutuality is also without merit. The argument is that plaintiff was bound to pay for the pensions of others, but that his right to a pension depended upon the mere whim or caprice of one-third of the members. Numerous cases are cited that establish the principle that where a promisor agrees to perform at his mere caprice, the promise is of no value and cannot constitute a legal consideration. Those cases are sound, but they are not here applicable. The argument assumes that the sole consideration for plaintiff's payments was the contingent possibility of securing pension rights for himself. As already pointed out, the real consideration was to prevent an increase in the number of pilots. During all the years plaintiff was a regular pilot (1928–1945) he received a very direct financial benefit from the arrangement. Had the number of pilots been increased to twenty-five or more, plaintiff's net income would have been far less than it was while there were only twenty pilots, even adding the deductions made for the pensions of associate members. Plaintiff agreed to the by-laws. He knew what they provided. He accepted the material benefits they provided. He is now in no position to avoid them.

[9] The next contention of plaintiff is that, independent of his right to a pension, he was entitled to $10 a day sick benefit from the association beginning fifteen days after his injury on November 12, 1945, and lasting until he ceased to be a regular member by receiving the $7,500 membership fee, which, it is claimed, was received on October 15, 1947. This contention is based on the following by-law as amended: "A regular member of the San Francisco Bar Pilots Benevolent and Protection [sic Protective] Association absent from duty as a

Pilot on account of sickness, injury or suspension by the Pilot Commissioners shall receive full pay for each day's such absence, not exceeding fifteen (15) such days' full pay per year. * * * During any additional days off duty from sickness, injury or suspension in excess of said fifteen (15) days, such member shall be paid, by the Association, Ten Dollars ($10.00) per day while absent from duty on such additional days." The by-laws also provide (Art. V, § 2) that when a regular member ceases to be a pilot otherwise than by death, the secretary, within 60 days, shall pay him an amount equal to the value of his interest in the company or the member may elect to receive an amount equal to the then membership fee. Upon such payment, it is provided, his regular membership shall cease.

The trial court found that plaintiff remained a bar pilot "until on or about the 22nd of August, 1946, at which time his license was not renewed by the Board of Pilot Commissioners. Plaintiff's license as such Bar Pilot, however, has not been suspended or revoked by said Board." There is no doubt, and plaintiff admits, that he received the $10 a day from the date of his claimed injury, plus 15 days (injury November 12, 1945—$10 payments started November 27, 1945) up to September 1, 1946—nine days after his failure to renew his license. He now claims that he is entitled to the continuance of these payments until he received his $7,500 membership fee on October 15, 1947, and then ceased to be a regular member.

The record shows that, although the Pilot Commissioners only issue licenses for one year, which in plaintiff's case expired August 22, 1946, the Board, in case of temporary disability of a pilot at the time of renewal, does not revoke the license but will give the pilot further examinations at three-month intervals not to exceed a year or until permanent incapacity is indicated. On April 10, 1947, the Board notified plaintiff that, unless he offered evidence of restoration to good physical condition and applied for a renewal, he would lose his right to a renewal. He made no such application. The complaint in this case was filed on July 11, 1946.

It is quite clear that the articles and by-laws of defendant intended to provide sick benefits for those regular members who were temporarily incapacitated, and that the Board would allow a year's grace before revoking a license. Here the plaintiff was permanently incapacitated. He received the sick benefits for nearly a year. He was entitled to no more. He cannot complain because the secretary of defendant failed to comply with the provision of the by-laws relating to the payment of the membership fee to the member within sixty days of his ceasing to be a pilot. Here the plaintiff was demanding the right to become an associate member, and filed a complaint to that effect in July, 1946. He was paid his sick benefits up to September 1, 1946. Certainly, under such circumstances, the plaintiff cannot avail himself of the sixty-day provision of the by-laws. Such provision cannot be interpreted as a justification for a regular member dragging out indefinitely his regular membership while attempting, by legal action, to become an associate member. This would unduly prolong the period of being paid sick benefits which were intended only for a regular member temporarily incapacitated. Here the payments were made for almost a year after plaintiff admits he was permanently disabled.

[10] In conclusion plaintiff asks that if it be adjudged that he is not entitled to a pension, then it be decreed that he is entitled to an accounting and the return of all money he has contributed to the pensions of others. The trial court concluded that plaintiff was "not entitled to the return of any part of the monies collected from him by defendant as agent for the associate members of defendant. Plaintiff fully acquiesced in all such collections and payments at the time thereof and any claim he might otherwise have with respect thereto has long been barred by laches." This conclusion is amply supported by the evidence and is a complete answer to the contention under consideration.

The judgment appealed from is affirmed.

WARD and BRAY, JJ., concur.

PEOPLE v. TUCKER.

Cr. 595.

District Court of Appeal, Fourth District, California.

Nov. 4, 1948.

Rehearing Denied Nov. 19, 1948.

Hearing Denied Dec. 2, 1948.

1. Criminal law 🔑472

Expert testimony as to facts and conclusions to which they lead is generally admissible where conclusions to be drawn by jury depend on existence of facts which are not common knowledge and which are peculiarly within knowledge of men whose experience or study enables them to speak with authority thereon, and in those cases in which conclusions to be drawn from the facts stated, as well as knowledge of the facts themselves, depend upon professional or scientific knowledge or skill not within the range of ordinary training or intelligence.

2. Criminal law 🔑494

Expert testimony may be either accepted or rejected by jury.

3. Criminal law 🔑1159(2)

The law makes no distinction in weighing evidence between expert testimony and evidence of other character, but the weight to be given expert testimony is for the jury and not reviewing court to determine.

4. Automobiles 🔑355(6)

That automobile was being driven on wrong side of highway when it collided head-on with automobile from opposite direction was some evidence that driver was under influence of intoxicating liquor. Vehicle Code, § 501.

5. Automobiles 🔑355(6)

In prosecution for injuring a person as result of doing an act forbidden by law while operating automobile under influence of intoxicating liquor, evidence warranted conclusion that defendant was under influence of intoxicating liquor at time of collision with automobile from opposite direction. Vehicle Code, § 501.

6. Criminal law 🔑323, 324

The presumption that one unable to testify as to his own conduct due to loss of memory was exercising ordinary care is itself a species of "evidence" and should prevail and control jury's deliberations until and unless overcome by satisfactory evidence.

See Words and Phrases, Permanent Edition, for all other definitions of "Evidence".

7. Automobiles 🔑355(6)

Evidence warranted conclusion that operation of automobile on wrong side of highway at time it collided with automobile from opposite direction causing injury to others was not permitted by any of statutory exceptions to requirement that automobiles be operated on right half of roadway and that such operation was in violation of statute so as to sustain conviction of injuring a person while operating automobile under influence of intoxicating liquor, notwithstanding presumption as to obedience of the law to which defendant was entitled due to loss of memory. Vehicle Code, §§ 501, 525(a); Code Civ.Proc. § 1963, subds. 4, 33.

8. Automobiles 🔑357
Criminal law 🔑829(3)

Where evidence established that head-on collision occurred on defendant's left-hand side of roadway and failed to show that defendant had any right to be traveling on that portion of highway, refusal to instruct that jury might find defendant guilty of lesser offense if it entertained reasonable doubt as to whether defendant did an act forbidden by law which proximately caused injury to another was not error, particularly in view of instruction given. Vehicle Code, §§ 501, 502, 525(a).

9. Criminal law 🔑814(3)

In a criminal case, instructions are always to be given or refused with reference to the facts introduced before the jury.

10. Criminal law 🔑814(8)

In prosecution for injuring a person as result of doing an act forbidden by law while operating automobile under influence of intoxicating liquor, refusal to instruct as to sudden peril rule was not error under evidence. Vehicle Code, § 501.

11. Criminal law ⚷393(1)

Taking a specimen of bodily fluid from defendant against his will for scientific analysis to obtain evidence as to whether defendant was intoxicated is generally considered to be a violation of his constitutional right not to be compelled to give testimony against himself. U.S.C.A. Const. Amend. 5; Const. Cal. art. 1, § 13.

12. Criminal law ⚷393(1)

A defendant may not be compelled or required against his consent to submit to examination by a physician for the purpose of obtaining evidence against him. U.S.C.A.Const. Amend. 5; Const.Cal. art. 1, § 13.

13. Criminal law ⚷393(1)

In prosecution for injuring a person as result of doing an act forbidden by law while operating automobile under influence of intoxicating liquor, testimony as to alcoholic content of blood specimen, though taken without defendant's knowledge or consent and while he was suffering from shock and cerebral concussion, was admissible over objection that it violated defendant's constitutional right not to be compelled to give testimony against himself. Vehicle Code, § 501; Pen.Code, §§ 688, 1323; U.S.C.A.Const. Amend. 5; Const. Cal. art. 1, § 13.

14. Criminal law ⚷1037(1, 2)

Statement by prosecuting attorney in closing argument to jury intimating that defense counsel did not question investigator who testified for prosecution because defense counsel had worked with him for 14 years and knew he was telling the truth was not prejudicial in absence of objection and request that trial court admonish jury to disregard such statement.

◆

Appeal from Superior Court, Tulare County; Frederick E. Stone, Judge.

Russell James Tucker was convicted of violating Vehicle Code Sec. 501 in that, while driving under influence of intoxicating liquor, he willfully refused to drive automobile on right-hand side of highway which proximately caused bodily injury to others, and from order denying his motion for a new trial he appeals.

Order affirmed.

W. G. Machetanz, of Exeter, for appellant.

Fred N. Howser, Atty. Gen., and James A. Doherty, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

Defendant was charged with violating Sec. 501 of the Vehicle Code in that, while driving under the influence of intoxicating liquor he willfully and unlawfully failed, neglected and refused to drive his car upon the right-hand side of a highway, which act is forbidden by law and which proximately caused bodily injury to one C. F. Boyd and one Mildred Davis. After pleading not guilty, defendant was found guilty by a jury. A motion for a new trial on four separate grounds was denied. He was granted probation for three years on condition that he serve 10 months in the Industrial Road Camp and pay a fine of $500 within 60 days after his release from the camp. Defendant was granted a stay of execution pending appeal.

Defendant, accompanied by Mildred Davis, drove a Chevrolet Coupe easterly on a two-lane highway No. 198 in Tulare County, about 11:30 p.m. on September 28th. He became involved in an automobile accident with a 1935 Ford Sedan driven in a westerly direction by Boyd.

Boyd testified that he was proceeding westerly on the north one-half of highway 198 at about 45 miles per hour; that there was an intersection of highways about 673 feet east of the point of collision and that before he reached that intersection he had overtaken and passed another car proceeding in the same direction; that he had returned to his side of the highway before reaching the intersection and was traveling near the north edge thereof when his car was struck by another car; that as a result of the collision he was knocked unconscious and later removed to the hospital, and that he did not remember anything that happened just before, at the time of, or immediately after the accident.

A member of the California Highway Patrol testified that there was evidence of "gouge marks" in the north one-half of the highway about 4 feet 4 inches from the north edge of the road; that tire burns proceeded along the north edge of the north half of that road westerly toward the point of collision; that the "gouge marks" were evidently made by reason of a "blown" tire; that he found defendant seated behind the steering wheel of his car and suffering from injuries; that defendant's automobile was headed in an easterly direction in the north one-half portion of the highway near the north edge of the pavement and it was facing in a northeasterly direction; that Boyd's Ford was facing in a northwesterly direction and the front portions of the two cars were together; that at a point approximately 30 or 40 feet east of the point of collision there was a driveway into what is known as the Sahara Club, located on the north side of the highway; that when he arrived at the scene of the accident Boyd was out of his car and stretched out on some seat cushions; that defendant and Mrs. Davis were still in the Chevrolet. The witness indicated, by reference to some map not before us, that near the north edge of the pavement some construction work was going on.

A Dr. Brady, a physician and surgeon at the Visalia Clinic, was then called as a witness. He testified that he treated defendant and the other injured persons at the clinic that night; that Mrs. Davis had suffered injuries and subsequently died; that Boyd had several bad cuts but less serious injuries than Mrs. Davis; that he treated defendant Tucker shortly after midnight; that he was bleeding profusely from a large scalp wound, facial lacerations, and that he had a compound fracture of the upper jaw bone. He then said that at the suggestion of the highway patrolman he took a blood sample of defendant Tucker; that he "didn't believe" he discussed the taking of the blood sample with the defendant and he was rather doubtful whether defendant "knew anything much that went on * * * although he did answer questions" and responded "by doing as he was asked to do". This blood specimen was delivered to Dr. Neal at 8:30 a.m. for analysis, to determine the alcoholic content. After showing his qualifications in that field and the tests actually employed in making the analysis, the doctor, over objections, was permitted to state that he found the alcoholic content to be 3.5 milligrams of alcohol per c.c.; that that means "that the amount of alcohol in the blood has reached that measurement, and that is a measurement something like a weight or a volume like teaspoons or tablespoons of alcohol;" that "that much alcohol indicates a definite degree of intoxication * * *. Using a scale beginning with one-half of a milligram, it is questionable whether there is any effect from the alcohol in the blood. At one milligram there is the least perceptible effect from the alcohol. At the level of two milligrams the amount of alcohol is sufficient to definitely interfere with a person's ability to do skilled acts. At three milligrams a state of distinct intoxication or distinct inability to perform ordinary acts is definite. At four milligrams a person is dead drunk. They lose consciousness as a rule"; that "a person with a 3.5 test would be definitely under the influence of intoxicating liquor * * *" and "his ability to drive an automobile safely on the highway" would be impaired; that "it would not be safe for him, a man with a 3.5 test, to be on the highway driving an automobile"; that he ran this test twice to "prevent experimental errors or to prevent an error in performance * * * And in both tests it came out 3.5".

The people then rested their case. Defendant took the stand and testified that he did not "remember anything about that accident" either before or afterwards; that it was about a week thereafter before he remembered anything; that his memory of past events is getting better; that "I was a little punch drunk there for quite a while as far as that is".

Mrs. Davis's daughter testified that she saw defendant on the evening of December 28th about 10:30 p.m.; that in her opinion he was not at that time under the influence of intoxicating liquor. On cross-examination she testified, however, that defendant and Mrs. Davis said that they had been eating at "Vic's Place" and were at "Shaw's Place". Her testimony was corroborated by her husband. The defendant then rested his case.

In rebuttal the People called a bartender employed at "Shaw's Place". He testified that he saw defendant and Mrs. Davis in his place of business about 10 a.m. on December 28th; that he did not "remember whether they drank or not". At this point the prosecution claimed surprise at the answer of the witness and was permitted to cross-examine him on his answer to the question. Thereafter, the witness testified that he told an investigator for the District Attorney's office that "I might have sold him one drink. I don't remember whether I did or whether I didn't. Pretty hard to remember that far back." In answer to this question: "You don't recall telling Mr. Lotito that you sold the defendant a mixed drink?" the defendant answered: "I don't remember who I sold it to. I couldn't say as to whether he taken it or Fred or who taken it. It is pretty hard to remember that far back.

"Q. Now that you are remembering better how many drinks did you make up? A. I couldn't say.

"Q. One or four? A. I couldn't say.

"Q. You do remember mixing a drink now? A. Yes."

The bartender at "Vic's Place" was called. He testified that he saw defendant and Mrs. Davis and one other couple there between 10 a. m. and 1 p. m. on December 28th; that he served the "four of them drinks"; that as to the number of times he served them he said "One, two three, something like that"; that he went off duty between one and four p. m.; that when he returned at 4 p. m. he said "I think they were still there at the bar" and he didn't "remember them leaving"; that he went off duty at 8 p. m.

The investigator for the District Attorney, Mr. Lotito, was then called and he stated that the bartender at "Vic's Place" told him that he went off duty between 2 and 4 p. m.; that when he came back the party of four were "still sitting at the bar drinking" and that they did leave between 5 and 8 p. m. that evening; that 4 or 5 drinks were served them, "whiskey and soda".

Dr. Brady was recalled. He testified that he "specifically remembered" that he did not smell any alcohol on defendant's breath the night of the accident.

Upon this evidence the jury found the defendant guilty as charged. Defendant raises four points on appeal: First, that the verdict is contrary to law and the evidence and that the evidence is insufficient to sustain the verdict in this (1) that there is no evidence that defendant was under the influence of intoxicating liquor at the time; and (2) that there was no evidence that he was doing any act forbidden by law that proximately caused personal injuries. In this connection it is argued that the only evidence that defendant was intoxicated is the testimony of the bartenders that he may have had some intoxicating liquor during that day, and the doctors' opinion based upon the result of the laboratory test of analysis of defendant's blood for alcoholic content. It is contended that this particular test is uncertain, and that there is not a unanimity of opinion in the medical profession as to its accuracy; that standing alone such opinion evidence is not sufficient to support the finding of the jury in that respect. Counsel cites no authority in support of his contention.

[1-5] It is the general rule that expert testimony is admissible where the conclusions to be drawn by the jury depend on the existence of facts which are not common knowledge and which are peculiarly within the knowledge of men whose experience or study enables them to speak with authority thereon, and in those cases in which the conclusions to be drawn from the facts stated, as well as knowledge of the facts themselves, depend upon professional or scientific knowledge or skill not within the range of ordinary training or intelligence. In such cases not only the facts but the conclusions to which they lead, may be testified to by qualified experts. Of course any such opinion may be accepted or rejected by the jury. Lemley v. Doak Gas Engine Co., 40 Cal.App. 146, 180 P. 671; 10 Cal.Jur. 971, sec. 228; 10 Cal.Jur. p. 959, sec. 218; Sec. 1870,

C.C.P., subd. 9. The law makes no distinction in weighing evidence between expert testimony and evidence of other character. 10 Cal.Jur. p. 974, sec. 232; Rolland v. Porterfield, 183 Cal. 466, 191 P. 913; Estate of Blake, 136 Cal. 306, 68 P. 827, 89 Am.St.Rep. 135. It is for the jury and not the reviewing court to determine the weight to be given such evidence. Dunphy v. Dunphy, 161 Cal. 380, 119 P. 512, 38 L.R.A.,N.S., 818, Ann.Cas.1913B, 1230. What additional drinks defendant may have had during the day of December 28th, other than the ones disclosed, does not appear. If his party was drinking prior to the time the bartender left "Vic's Place" at 2 p. m. and they were still there after 4 p. m. when he returned to duty, the jury might reasonably believe that other drinks were consumed during that period. The fact that defendant's car was driven on the wrong side of the road is some evidence of the condition of the driver. (2 Cal.Jur. 10-Year Supp. p. 53, sec. 26.) The facts related, in addition to the testimony of the medical expert, substantially support the conclusion of the jury that the defendant was, at the time of the accident, under the influence of intoxicating liquor.

The next argument in this connection is predicated on the contention that there is no showing that defendant was doing any act forbidden by law, or neglected any duty thus imposed, in the driving of his vehicle, which act or neglect proximately caused bodily injury to any other person. The force of the argument is, as we construe it, that since defendant was charged with violating sec. 525a of the Vehicle Code requiring that upon all roads of sufficient width a vehicle shall be driven upon the right half of the roadway, with certain prescribed exceptions, the burden was upon the prosecution to show that defendant did not come within any of the exceptions specified and that defendant was entitled to the presumption that he was at all times obeying the law, citing sec. 1963, C.C.P., subds. 4 and 33.

The testimony shows that the collision occurred in the westbound traffic lane of the highway and that defendant was driving east at the time. There is nothing in the record to indicate that defendant came within the terms of any of the subdivisions of Vehicle Code sec. 525(a), which permit a car to be driven on the left-hand side of the road.

[6, 7] Under certain circumstances, in view of one's inability because of loss of memory to testify as to his own conduct, there is a presumption that such person was exercising ordinary care. Hoppe v. Bradshaw, 42 Cal.App.2d 334, 108 P.2d 947; Douglas v. Hoff, 82 Cal.App.2d 82, 185 P.2d 607. Such presumption is in itself a species of evidence and should prevail and control the jury's deliberations until and unless overcome by satisfactory evidence. Westberg v. Willde, 14 Cal.2d 360, 94 P.2d 590; Satariano v. Sleight, 54 Cal.App.2d 278, 129 P.2d 35. In the instant case the evidence conclusively shows that defendant did drive upon the north half of the highway and did collide with Boyd's car which was being driven on that portion of the highway. The jury was thoroughly instructed in the language of sec. 525, subd. a, of the Vehicle Code and all of its subdivisions pertaining to exceptions. Its conclusion was that the defendant's conduct, including the benefit of the claimed presumption, did not bring him within any of the exceptions designated. Therefore, the jury's verdict in reference thereto cannot be disturbed on appeal. People v. Dawes, 37 Cal.App.2d 44, 98 P.2d 787; People v. Fator, 14 Cal.App.2d 403, 58 P.2d 402; People v. Sanders, 28 Cal.App.2d 746, 83 P.2d 720; People v. Trantham, 24 Cal.App.2d 177, 74 P.2d 851; People v. Graybehl, 67 Cal.App.2d 210, 153 P.2d 771.

The second ground pressed involves defendant's requested instructions numbers 3 and 6, which were refused. At defendant's request the court did instruct the jury to the effect that "the mere fact that defendant may have been driving an automobile upon the left-hand side of the highway * * * is not of itself, standing alone and unexplained, sufficient to constitute the doing of an act forbidden by law * * * You should consider all other evidence in the case in deciding whether the defendant's location on the highway at the time of the accident constituted a violation of the law, because unless he was violating some law at the time of the accident, other than driving an automobile upon a public highway while under the influence of intoxicating liquor, you cannot find him guilty of the offense charged."

[8, 9] Defendant's instruction number 6 pertained to the question of the right of the jury to find the defendant guilty of the lesser offense prescribed by sec. 502 of the Vehicle Code if it entertained a reasonable doubt as to whether defendant did an act forbidden by law which proximately caused bodily injury. We perceive no error in refusing to give the proffered instruction under the circumstances related. The evidence conclusively shows that Boyd's car was in the north lane of traffic at the time; that the defendant's car was also there, and there is no showing that defendant had any right to be traveling in that portion of the highway under the conditions disclosed. In view of these circumstances defendant cannot claim error. The evidence does not justify the giving of the proposed instruction in reference to a lesser offense particularly where the jury was instructed, at defendant's request, that if they should find that by defendant's location on the highway at the time of the accident he was not violating some law, the jury could not find the defendant guilty of the offense charged. Apparently, from its verdict it did believe defendant was violating the law as charged. In People v. McCoy, 25 Cal.2d 177, 187, 153 P.2d 315, it was held that the trial court may properly refuse to instruct on simple assault where the evidence is such as to make it clear that if the defendant is guilty at all he is guilty of the higher offense, and that in a criminal case instructions are always to be given or refused with reference to the facts introduced before the jury.

[10] Defendant's instruction number 3 involves the sudden peril rule. We perceive no evidence that was introduced entitling defendant to such an instruction. In People v. Boulware, 41 Cal.App.2d 268, 106 P.2d 436, it was held error to refuse such an instruction. However, in that case there was testimony of the defendant driver that he did see an oncoming driver of a truck and that he swerved to the right to avoid a collision with it and in doing so collided with another car. In that case there was evidence before the jury which might properly have warranted the giving of such an instruction. In Randolph v. Hunt, 41 Cal.App. 739, 183 P. 358, it was held that in an action for damages for the death of the father of the plaintiffs while traveling on foot upon a public highway through having been struck by defendant's automobile, there was a reasonable excuse for the presence of the deceased on the east or left-hand side of the highway and, as he was not aware of the approach of the machine until it was virtually upon him, the driver not having given timely warning, the deceased was, under the stress of the sudden peril, excusable for jumping, as he did, to escape the injury. Here we have no such evidence and defendant's evidence does not show a situation which would call for or entitle him to such an instruction. See, also 3 Cal.Jur. p. 836, sec. 67; 3 Cal.Jur. p. 841, sec 72, and cases cited.

[11, 12] The third point involves defendant's objection to the use of the doctors' testimony as to the alcoholic content of the blood specimen. He objected to this line of testimony on the ground that the sample was taken without his consent or knowledge, and while he was suffering from shock and cerebral concussion, in violation of Article I, section 13 of the State Constitution, and the 5th Amendment to the Federal Constitution, and secs. 688, 1323 of the Penal Code. In support of this contention he cites People v. Strong, 114 Cal.App. 522, 530, 300 P. 84; People v. Akens, 25 Cal.App. 373, 376, 143 P. 795, and People v. Bundy, 168 Cal. 777, 781, 145 P. 537. Cases involving the admissibility of evidence as to scientific analytical tests for intoxication, based upon alcoholic content of the specimen of some bodily fluid such as blood or urine or of the breath, are correlated in 127 A.L.R. p. 1513. It would appear that upon the laying of a proper foundation such evidence is admissible. State v. Jones, 124 Conn. 664, 2 A.2d 374; Kuroske v. Aetna Life Insurance Co., 234

Wis. 394, 291 N.W. 384, 127 A.L.R. 1505. The admissibility of such evidence where the specimen of bodily fluid used was taken "without his consent and where he was compelled to submit to such tests against his will and wishes" is likewise discussed and it is generally held in other states that where the accused is compelled to submit to such tests against his will it violates his constitutional right in that he may not "be compelled to give testimony against himself", and upon proper objections such evidence is inadmissible. Other cases hold that where there is no evidence of compulsion or entrapment such evidence is admissible. See, State v. Morkrid, Iowa, 286 N.W. 412; State v. Gatton, 60 Ohio App. 192, 20 N.E.2d 265; Schmidt v. District Attorney of Monroe County, 255 App. Div. 353, 8 N.Y.S.2d 787. The cases cited by defendant hold to the general rule that a defendant may not be compelled or required, against his consent to submit to an examination by a physician. Our attention has not been called to any California case directly involving the point here raised. However, People v. Mayen, 188 Cal. 237, 205 P. 435, 24 A.L.R. 1383, presented the question of the admissibility of certain evidence obtained from defendant other than by lawful search warrant. It was there held that the 4th amendment to the Constitution of the United States, relating to searches and seizures only applies to the Federal Government and its agencies; and that where competent evidence is produced on a trial the courts will not stop to inquire or investigate the source from whence it comes or the means by which it was obtained; and that the seizure by officers of the law of private papers and effects by unlawful and unauthorized entry and search, to be used as evidence in criminal prosecutions of the persons from whom taken, is a violation of the constitutional right to security against unreasonable search and seizures, but the subsequent use of articles so taken as evidence is not itself any part of the unlawful invasion of such constitutional guaranty.

People v. One 1941 Mercury Sedan, 74 Cal.App.2d 199, 168 P.2d 443, held that in a proceeding for forfeiture of an automobile used for transportation of marihuana, wherein it appeared that the driver on his apprehension had swallowed some brown paper which he had in his hands, evidence as to the narcotic content of the substances pumped from his stomach was not privileged under Const. art. I, Sec. 13, and should have been admitted, since such evidence did not depend on the testimonial utterances of the driver for its probative force; and that the privilege against self-incrimination does not preclude the introduction of physical disclosures a defendant is forced to make or the results of tests to which he has involuntarily submitted; that the privilege only protects the individual from any forced disclosures made by him, whether oral or written; and that it is limited to the protection against testimonial compulsion.

State v. Cram, 176 Or. 577, 160 P.2d 283, 164 A.L.R. 952, is factually similar to the instant case and the same question was there presented. It was there said that the admission of testimony concerning the alcoholic contents of a blood sample taken from an automobile driver following an accident and at a time when he was unconscious and under arrest and where there was a subsequent prosecution for manslaughter based on death as a result of such accident, it was not a violation of defendant's constitutional privilege against self-incrimination.

[13] Under the circumstances here related it cannot be said that the trial court erred in overruling defendant's objection to the admissibility of such evidence.

[14] The last question presented involves a statement of the prosecuting attorney made to the jury in his closing argument, commenting upon Mr. Lotito's testimony. He said: "Mr. Lotito has been an investigator in the District Attorney's office for 32 years under different heads. In fact, for 14 years of that period Mr. Machetanz was in that same office. You will note that Mr. Machetanz did not ask any questions of Mr. Lotito." It is contended that by this statement the prosecuting attorney "insinuated" that defendant's counsel knew that Mr. Lotito was telling the truth because he had worked with him for 14 years. If this statement,

by any stretch of the imagination, so indicated and if it may be classed as misconduct, in the absence of objection by counsel and a request to the trial court to admonish the jury to disregard such statement, we are unable to hold that it was prejudicial.

Order denying a new trial affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

88 Cal.App.2d 379

BRAVERMAN v. HORN.

Civ. 13752.

District Court of Appeal, First District, Division 2, California.

Nov. 8, 1948.

1. Judgment 🔑185

Where defendant alleged in answer and affidavit that check sued on was given for chips used in gambling in payor's gambling house, and that amount of check represented amount lost in such gambling, affidavits alleging that defendant received money and not chips for check without restriction on use to be made by defendant of such money but not denying material allegations of defendant's answer and affidavit presented no triable issue precluding summary judgment for defendant. Code Civ.Proc. § 437c; Civ.Code, § 1667.

2. Gaming 🔑19(1)

Owner of gambling house, having cashed check for the purpose of enabling drawer to use proceeds in a gambling game conducted by payor, could not recover on check, regardless of whether drawer received for check, chips or money without restriction on use to be made by him of such money. Civ.Code, § 1667.

◆

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

Action by F. Braverman against Fred Horn, individually and doing business as Snug Harbor, to recover upon a check issued by defendant. From an order granting defendant's motion for summary judgment and from the judgment for defendant, plaintiff appeals.

Judgment affirmed.

Orla St. Clair, of San Francisco, for appellant.

Theodore Golden and J. Bruce Fratis, both of Oakland, for respondent.

NOURSE, Presiding Justice.

Plaintiff appeals from the order granting motion for summary judgment and from the judgment for defendant in an action upon a check issued for a gambling debt.

The complaint is in two counts; in the first appellant sues on a check to "cash" for $12,400 signed by defendant and delivered by him to William Harrah, doing business as Harrah's Club in Reno, Nevada and after refusal of payment assigned by said Harrah to plaintiff for collection; the second count is a common count for moneys advanced by said Harrah to defendant, the indebtedness for which was assigned by said Harrah to plaintiff. The answer denied any indebtedness and alleged that the check was without lawful consideration, as the consideration received was chips for the purpose of gambling in Harrah's Club and the amount of the check represented the amount lost by defendant in such gambling; that the assignee had knowledge of said facts. The motion for a summary judgment in favor of defendant was supported by an affidavit of defendant to the same effect as his above defense, stating in detail how he gave checks for chips and new checks in return for the old ones adding the amount of new chips he desired or subtracting the amount of chips won which he returned. Plaintiff filed two affidavits of managers of the club stating that in the club chips are never given for personal checks, that the cashier of the club paid defendant United States money for his checks and that no restrictions of any kind were placed on the use to be made by defendant of said money.

Plaintiff did not however deny the material allegations of the answer and defendant's affidavit that, during the period of two days and one night when defendant was shooting dice in the Harrah's Club, the management cashed a series of checks (whether in coin or chips is disputed) the proceeds of which were all used and lost in the dice game. After defendant had lost the entire sum to the knowledge of the Club the latter accepted the check in suit in lieu of all the smaller checks which were then destroyed.

Appellant argues that on a motion under section 437c C.C.P. the court has only to decide whether the opponent has presented any facts which give rise to a triable issue, not to determine the issue itself, citing Eagle Oil & Ref. Co. v. Prentice, 19 Cal. 2d 553, 122 P.2d 264; that here the facts shown by appellant present a triable issue as his affidavits deny that the check was given for gambling chips, and allege that it was given for money without restriction on its use; and that according to Hamilton v. Abadjian, 30 Cal.2d 49, 179 P.2d 804, recovery is not excluded on any check cashed by the owner of a gambling house, but only on such as is cashed to provide a prospective customer with funds with which to gamble, the owner or his establishment participating in the gambling.

Respondent contends that there was no triable issue as the affidavits of appellant did not deny that the checks were cashed for the purpose of providing respondent with funds with which to gamble, that he gambled with the funds procured, nor that Harrah's Club participated in the gambling.

[1,2] This is the only triable issue on the case made in the pleadings and appellant's admissions foreclose any possibility of a judgment in her favor. Her statement of the rule of the Hamilton case is too restrictive. Though the expression relating to money given "without restriction on its use" is often used, the real factor is whether it was given "for the purpose of providing funds" to enable one to gamble with the donor. Having honored the checks, either by payment in cash or chips, for the purpose of enabling the drawer to use the proceeds in a gambling game conducted by the payor the latter has no cause of action on the checks. This is the rule of Hamilton v. Abadjian, supra, 30 Cal.2d 49, at page 52, 179 P.2d 804, at page 806, where the court said: "The owner of a gambling house who honors a check for the purpose of providing a prospective customer with funds with which to gamble and who then participates in the transaction thus promoted by his act cannot recover on the check. See Burke & Co. v. Buck, 31 Nev. 74, 80, 99 P. 1078, 22 L.R.A., N.S., 627, 21 Ann.Cas. 625; Poorman v. Mills & Co., 39 Cal. 345, 353, 2 Am.Rep. 451; Appleton v. Maxwell, 10 N.M. 748, 750, 65 P. 158, 55 L.R.A. 93; L.R.A.1918C, 247, 251."

Later California cases to the same effect are Rose v. Nelson, 79 Cal.App.2d 751, 180 P.2d 749; Lavick v. Nitzberg, 83 Cal.App. 2d 381, 188 P.2d 758.

The underlying principle supporting the judgment is that the check in suit is a contract in payment of a gambling debt and as such contra bonos mores and unenforceable under section 1667 of the Civil Code. This is the rule of Union Collection Co. v. Buckman, 150 Cal. 159, 88 P. 708, 9 L.R.A.,N.S., 568, 119 Am.St.Rep. 164, 11 Ann.Cas. 609, which has been uniformly followed.

Judgment affirmed.

GOODELL and DOOLING, JJ., concur.

88 Cal.App.2d 376

COTTER v. WOLFF et al.

Civ. 13671.

District Court of Appeal, First District,
Division 2, California.

Nov. 8, 1948.

Hearing Denied Jan. 6, 1949.

1. Administrative law and procedure 🔑383
Municipal corporations 🔑184(2), 197

Under charter of City of San Francisco making city civil service commission the sole judge of adequacy of test to be given applicants for places in classified service, and further providing that applicants for positions in uniformed forces of fire and police departments should have physical qualifications required for enlistment in the armed forces, commission had power to increase physical standards of examination above those qualifying for enlistment in the armed forces. St. 1931, p. 3062, § 145.

2. Administrative law and procedure 🔑797

Unless rules enacted by administrative agency under statute imposing certain duties upon the agency and conferring the power to make and enforce rules to aid in performance of those duties are wholly unreasonable, arbitrary, or such a breach of discretion that they transcend purpose for which the power was conferred, court will not substitute its opinion or discretion for that of the administrative body.

◆

Appeal from Superior Court, City and County of San Francisco; Herbert C. Kaufman, Judge.

Petition by William V. Cotter against Harry K. Wolff and others, for a writ directing civil service commission of San Francisco and its personnel director to give petitioner a further medical examination upon the standards set forth in the municipal charter, wherein others were permitted to intervene and three veterans' organizations were permitted to appeal as amici curiæ. From denial of petition, the petitioner appeals.

Affirmed.

Frank A. Flynn, of San Francisco, for appellant.

John J. O'Toole, City Atty., and Bernard J. Ward, Jr., Deputy City Atty., both of San Francisco, for respondents.

NOURSE, Presiding Justice.

Petitioner appeals from the denial of his petition for a writ directing the civil service commission of San Francisco and its personnel director to give petitioner a further medical examination upon the standards set forth in section 145 of the municipal charter.

[1] Petitioner is a discharged veteran and was rejected in an examination because of his failure to qualify under the physical standards adopted by the commission which are higher than those required for enlistment in the armed forces. Many objections to the physical examination as held are stated in the petition, a great number of other rejected applicants were permitted to intervene and three veterans' organizations were permitted to appear as amici curiæ. On appeal only one question is raised: Do respondents under section 145 of the charter have power to increase the physical standards of examination above those qualifying for enlistment in the armed forces?

Section 145 of the city charter, Stats. 1931, pp. 3062, 3063, provides in part as follows:

"All applicants for places in the classified service shall submit to tests, which shall be competitive and without charge to the applicants. * * * The commission shall be the sole judge of the adequacy of the tests to rate the capacity of the applicants to perform service for the city and county. * * *

"Applicants for entrance positions in the uniformed forces of the fire and the police departments shall be not less than twenty-one years of age, nor more than thirty-five years of age at the time of appointment, and shall have the physical qualifications required for enlistment in the United States Army, Navy and Marine Corps."

The single question raised must be answered in the affirmative. The charter section makes the respondent commission "the sole judge of the adequacy of the tests" to be given "all applicants for places in the classified service". The special portions relating to physical qualifications of applicants in the uniformed forces of the fire and police departments do not purport to fix the maximum or only physical requirements for such applicants. The expression "shall have" such physical requirements means nothing more than these simple words mean in their general and accepted usage. If it had been intended to limit the power of the commission in this respect it would have been a simple matter to have declared that the physical qualifications should be the same as those required by the United States Army, Navy and Marine Corps and nothing more. But the language used plainly gives those standards as minimum qualifications only and leaves to the commission full power to exercise its discretion as "sole judge of the adequacy of the tests" to comply with changing conditions of time and experience.

The case is in line with our recent decision in Hunt v. State Board of Chiropractic Examiners, 87 Cal.App.2d 98, 196 P.2d 77, where we held that a statutory minimum requirement for licensees did not prevent the board from imposing new and additional requirements.

[2] We have here a situation of frequent occurrence in the work of administrative agencies of this general character. The statute imposes certain duties upon the agencies and confers the power to make and enforce rules and regulations to aid in the performance of those duties. Unless rules enacted under such power are wholly unreasonable, arbitrary, or such a breach of discretion that they transcend the purpose for which the power was conferred, the court will not substitute its opinion or discretion for that of the administrative body. This is the accepted rule since Cook v. Civil Service Commission, 160 Cal. 589, 595, 117 P. 663, and followed in a long line of cases cited in part and approved in Nelson v. Dean, 27 Cal.2d 873, 881, 168 P.2d 16, 168 A.L.R. 467. Here the appellant does not contend that the rule requiring additional physical qualifications in the tests for positions in the fire and police departments is arbitrary, capricious, or unreasonable and hence there is no base upon which a court could anchor a ruling in appellant's favor.

Judgment affirmed.

GOODELL and DOOLING, JJ., concur.

Hearing denied; CARTER, J., dissenting.

---

88 Cal.App.2d 328

IMPERIAL-YUMA PRODUCTION CREDIT ASS'N v. SHIELDS et ux.

Civ. 3689.

District Court of Appeal,
Fourth District, Division 3, California.
Nov. 4, 1948.

1. Trial 🔑139(1), 165, 178

A nonsuit or directed verdict for defendant may be granted only when, giving plaintiff's evidence all value to which it is legally entitled, indulging every legitimate inference therefrom, and disregarding conflicting evidence, there is no sufficiently substantial evidence to support verdict for plaintiff.

2. Trial 🔑139(1)

A court is not justified in taking case away from jury and rendering decision itself, unless no other conclusion is reasonably deducible from evidence as matter of law.

3. Chattel mortgages 🔑235

In action on note secured by mortgage on crops, proceeds of sale of which were assigned by defendants to plaintiff production credit corporation and a seed company, to which evidence showed that defendants delivered more wheat, for which they were entitled to credit on note, than such company's books showed, court erred in excluding defendant's testimony that plaintiff ordered defendants to take wheat to seed company for storage. Civ.Code, § 1476.

4. Chattel mortgages ⚷235

Whether makers of note secured by mortgage on crops, proceeds of sale of which they assigned to payee for credit on note, were credited with full amount of wheat delivered by them to seed company for storage, as directed by payee, and whether actual proceeds of such wheat were turned over to payee, were questions for jury.

◆

Appeal from Superior Court, Imperial County; V. N. Thompson, Judge.

Action on a note by the Imperial-Yuma Production Credit Association, a corporation, formerly the El Centro Production Credit Association, a corporation, against E. S. Shields and wife, in which defendants filed a cross-complaint for the amount of credits due them on the note for the proceeds of a sale of wheat covered by a mortgage securing payment of the note and damages for destruction of a barley crop, the proceeds of which were to be credited on the note, because of plaintiff's failure to have it pastured at the proper time. Judgment for plaintiff, and defendants appeal.

Reversed.

For prior opinion, see Cal.App., 196 P.2d 69.

Leslie L. Burr, of El Centro, for appellants.

George R. Kirk, of El Centro, for respondent.

GRIFFIN, Justice.

This case was before this court before. The appeal was based on an order granting a new trial. Imperial-Yuma Production Credit Association v. Shields, 74 Cal. App.2d 932, 169 P.2d 671. The nature of the proceedings, pleadings and factual background are the same as there related. The original action was based on a promissory note for $6281.12, signed by defendants, upon which there was an unpaid balance in the sum of $3422.48. Its due execution was admitted in the answer. Defendants denied that there was anything due thereon and filed a cross-complaint alleging that $2310.88 was due them because plaintiff had failed to give them credit on the note for the sale of 1010 sacks of wheat. Secondly, that in 1941, defendants planted a crop of barley and that it was the understanding that at the proper time the acreage in barley was to be pastured and the return from the pasturage was to be paid to plaintiff; that plaintiff failed to have the pasturing done at the proper time and the crop, consisting of 120 acres, was destroyed and that if permitted to be pastured at the proper time that acreage would have produced a grain crop valued at $3500 and therefore defendants suffered this amount of damage less a credit of $298.88 already allowed for such pasturage.

The case was tried before a jury on April 22, 1947. At the conclusion of the evidence the trial judge, apparently believing that the defendants had failed to substantiate their alleged claim under their answer and cross-complaint, granted a motion on behalf of plaintiff for an instructed verdict in the amount sought in plaintiff's complaint and directed that defendants recover nothing upon their cross-complaint. A verdict, in this form, was presented to it. The jury retired for deliberation and on returning refused to obey the court's instruction. Counsel for plaintiff moved that the jury be dismissed and also moved for a judgment for plaintiff as prayed for and asked the court to enter such a judgment. Counsel for defendants then moved for a mistrial and asked that the jury be discharged. Later, the court denied defendants' motion and granted that of plaintiff and on the same day a written judgment in favor of plaintiff was presented to the court and signed. A motion for a new trial and to vacate the judgment was denied. This appeal followed.

The defendants argue that it was error to grant plaintiff and cross-defendant's motion for entry of judgment by the court and to later enter such a judgment; that the denial of the motion of defendants, upon the refusal of the jury to return a directed verdict for the plaintiff was error; and that the judgment of the court is void as being in violation of section 616 of the Code of Civil Procedure; and that it was error to deny defendants and cross-complainants' motion for a new trial and to deny the motion to vacate the judgment.

[1] We are guided first by the general rule with reference to the authority of a trial court to direct a verdict. It is the established law of this state that the power of a court to direct a verdict is the same as the power of the court to grant a nonsuit. Quoting from Estate of Flood, 217 Cal. 763, 21 P.2d 579, 580, it is said:

"A nonsuit or a directed verdict may be granted 'only when, disregarding conflicting evidence and giving plaintiff's evidence all the value to which it is legally entitled, herein indulging in every legitimate inference which may be drawn from the evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiff if such a verdict were given.'"

[2] A similar statement of the rule is set forth in Gish v. Los Angeles Railway Corp., 13 Cal.2d 570, 90 P.2d 792, and it is there said that a court is not justified in taking a case away from the jury and itself rendering the decision unless it can be said that, as a matter of law, no other conclusion is reasonably deducible from the evidence. See, also, Powers v. Cherry, 42 Cal.App.2d 489, 109 P.2d 361.

We must therefore first analyze the evidence presented, in the light of this rule, to determine whether or not there was sufficient substantial evidence presented in support of the defendants' answer and cross-complaint upon which the jury could have found in their favor.

[3] Plaintiff offered in evidence the promissory note as well as its books of account showing all credits given defendants. A crop mortgage and a chattel mortgage on certain described farming implements were executed by defendants as security for the payment of the original note. Assignments of proceeds of sale of mortgaged crops for 1940, 1941 and 1942 were obtained from defendants and also the Warner Seed Company, where defendants delivered their crops. A similar assignment was signed respecting proceeds from rentals of certain lands for forage for 1940-1941. Letters in evidence show that defendants wrote plaintiff in September, 1940, acknowledging an indebtedness and expressing a great desire to pay it off. The Warner Seed Company's records were received in evidence. They disclose an account for all grains it claims it received from defendants and of the payments made to plaintiff which were the proceeds under the assignment.

This action was instituted in 1944. The farm implements and machinery given as security under the chattel mortgage are all worn out and have no particular value.

Plaintiff's agent testified that Mr. Shields admitted owing the balance due but claimed "Times were pretty tough."

Considerable testimony was received in respect to the amount of grain delivered to the Warner Seed Company by defendants. Defendants contend that they delivered more than the records of the Warner Seed Company reflect by their books.

Since the publication of the opinion in 196 P.2d 69, counsel for defendants made application to argument the record by bringing up additional testimony omitted from the original record on appeal. This request was granted. It now appears from that record, from the evidence produced and proffered, that defendants did deliver to the Warner Seed Company more grain than was reflected by their books of account; that plaintiff company was the one who directed that defendants take their grain to the Warner Seed Company for processing and that the seed company did not give credit to defendants for the true amount of grain received by it; that if such is the case, under sec. 1476 of the Civil Code, defendants would be entitled to credit for the amount of grain actually delivered, notwithstanding the fact that the seed company notified plaintiff that defendants were entitled to a lesser amount as a credit on their note. Sec. 1476 of the Civil Code provides:

"Effect of directions by creditors.

"If a creditor, or any one of two or more joint creditors, at any time directs the debtor to perform his obligation in a particular manner, the obligation is extinguished by performance in that manner, even though the creditor does not receive the benefit of such performance."

A rehearing was granted for the purpose of giving further consideration to this evidence. There is in evidence an agreement between defendants and plaintiff company, that in accepting the loan, defendants agreed (Par. 4, subd. (b) Exhibit 2): "Shipments to marketing agencies or other purchasers are to be consigned in the name of undersigned and your Association as joint consignors with direction to the consignee to remit all proceeds of sale to your office, together with account sales, * * * said consignments shall be made only to responsible agencies or other purchasers after first procuring your consent to the agencies or other purchasers chosen by undersigned and after undersigned has first executed in your favor an assignment of proceeds of sale of said security". Defendants' Exhibit A is an assignment, apparently prepared by plaintiff on a form furnished by it which is signed by defendant grower. It assigns all proceeds of sale of certain crops of wheat produced by grower in 1940, 1941 and 1942, "which grower agrees to deliver to Warner Seed Company". This agreement is accepted by Warner Seed Company. The record discloses, from the testimony of Mr. Shields, that 80 acres of wheat were involved under this assignment; that it was threshed in May of 1940, and delivered to the Warner Seed Company. He specifically testified that he was going to put it in a certain warehouse but the "Production Credit ordered me to take it to the Warner Seed Co. for storage." The "last part" was ordered stricken as a conclusion. Defendants' attorney then proceeded to inquire as to who ordered defendants to take the wheat to the Warner Seed Company. The court sustained the objection after several attempts to show that fact. It appears to us that defendants were entitled to show who ordered the wheat crop taken to the Warner Seed Company.

[4] Defendant Shields was then shown 11 tickets or forms of receipt of the Warner Seed Company (Defendants' Exhibit B). He testified that they were receipts for wheat turned over to his driver by that company; that they have noted on them the number of sacks and their weight; that there were 1010 sacks of wheat in all, delivered in 1940. These receipts went into evidence without objection. He then testified that from the records of the Warner Seed Company that company only gave him credit for approximately 500 sacks of wheat.

One witness testified that he worked on the 80-acre tract; that he worked with a Mr. Bonham and that a representative of plaintiff company was keeping track of the wheat harvested on one of the 80-acre tracts; that the witness was sewing sacks and that he knew two bales of 500 sacks each or more were used on that 80 acres in 1940.

Mrs. Shields testified that as the wheat was hauled to the Warner Seed Company she kept the records and filed them; that the receipts marked Exhibit B were such receipts. These receipts on their face show that there were 1010 sacks of wheat delivered.

Mr. Warner, of the seed company, testified that according to his records he received only 500 sacks of wheat from the defendant in 1940, weighing 510.80 pounds; that a considerable amount of that wheat had to be "cleaned" or "screened"; that he paid the plaintiff, under the assignment, after deducting his charges, $200.77; and that was all he owed the defendants.

Bonham, now deceased, testified that in 1940 he was running the harvester for Shields; that every day during that time a representative of the Production Credit Company was there and keeping track of the harvest as it progressed; and that approximately between 1000 and 1100 sacks were harvested.

It now appears that there is considerable conflict in the evidence as to the exact amount of wheat delivered to the Warner Seed Company by the defendants. The evidence might indicate that defendants were not credited with the full amount delivered, and that the amounts turned over to plaintiff were not the actual proceeds of defendants' crop. This was a factual question which the jury was entitled to determine. The order directing a verdict in favor of plaintiff, in view of this conflict in the evidence, cannot be sustained. Under the circumstances it becomes unnecessary to determine the remaining questions raised on this appeal. They may not present themselves after another trial of the issues here discussed.

Judgment reversed.

BARNARD, P. J., and MUSSELL, J., concur.

SWARS v. COUNCIL OF CITY OF VALLEJO et al.

Civ. 7513.

District Court of Appeal
Third District, California.

Nov. 8, 1948.

Hearing Granted Jan. 6, 1949.*

1. Administrative law and procedure 🔑486
Municipal corporations 🔑185(11)

Resolution of municipal civil service commission upholding action taken by city council in dismissing police officer did not comply with charter requirement that commission make written "findings" and conclusions. St.1941, p. 3377, § 11.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Finding".

2. Administrative law and procedure 🔑749
Municipal corporations 🔑185(13)

On certiorari to review decision of municipal civil service commission approving dismissal of police officer, in absence of findings by commission that charges against officer were true, court could not presume that commission so found.

3. Administrative law and procedure 🔑486
Trial 🔑393(3), 395(5)

Where a court or administrative board is required by law to make written findings and conclusions, such findings must be made in writing, and they must be findings of fact and such findings of fact must be sufficient to support the conclusions which purport to follow therefrom.

4. Administrative law and procedure 🔑484
Trial 🔑404(1)

A "finding" by court or administrative board means the ascertainment of facts by court or board as the result of a hearing.

5. Administrative law and procedure 🔑485

Compliance with statutory requirement for findings of fact is necessary to support orders of administrative agencies.

6. Criminal law 🔑635

Exclusion of general public from hearing before municipal civil service commission on application to review action of city council in dismissing member of police department for conduct unbecoming a police officer did not violate constitutional guarantee of public trial in criminal prosecutions. Const. art. 1, § 13.

7. Administrative law and procedure 🔑473
Municipal corporations 🔑185(8)

Whether general public should be excluded from hearing before municipal civil service commission on application to review action of city council in dismissing police officer was a matter for commission to decide under charter provision authorizing commission by unanimous vote to determine that a private hearing is necessary to secure all the facts. St.1941, p. 3377, § 11.

8. Administrative law and procedure 🔑108, 473
Municipal corporations 🔑216(1)

Municipal civil service commission, though its proceedings are quasi-judicial, is not a "court of justice" within meaning of statute providing that except as otherwise provided, the sittings of every court of justice shall be public. Code Civ.Proc. §§ 124, 125.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Court of Justice".

◆

Appeal from Superior Court, Solano County; Mervin C. Lernhart, Judge.

---

* Subsequent opinion 206 P.2d 355

Certiorari by William J. Swars against the Council of the City of Vallejo and the Civil Service Commission, a municipal corporation, to review an order dismissing petitioner from Police Department of the City of Vallejo. From an order dismissing the writ of certiorari, petitioner appeals.

Order reversed with directions.

J. W. O'Neill, of Oakland, for appellant.

Rolland L. Pope, of Vallejo, for respondents.

ADAMS, Presiding Justice.

This case was formerly before this court on an appeal from an order of the Superior Court of Solano County which denied a petition for a writ of certiorari filed therein by appellant. We then held that the order denying the writ should be reversed. 64 Cal.App.2d 858, 149 P.2d 397. Thereafter the trial court issued the writ, respondents made a return thereto, and the matter was submitted to that court upon the verified petition and the return, copies of Bills Nos. 821 N.S. and 793 N.S. of the city of Vallejo being made a part of the said return. Nearly three years later the said court rendered a decision in favor of respondents, and this appeal was taken therefrom.

The allegations contained in appellant's petition for the writ were that he was a sergeant of police in the city of Vallejo, qualified under civil service rules; that on October 10, 1942, the chief of police presented to the city council a written recommendation that petitioner be dismissed for the reason that he had conducted himself in a manner unbecoming a police officer in that he had unnecessarily and unmercifully beaten an intoxicated person; that the city council had thereupon dismissed petitioner, whereupon he had requested the Civil Service Commission of the city to review said matter; that said commission set said matter for hearing and petitioner with his attorney appeared at the time and place set, and demanded a public hearing which was denied; that petitioner thereupon left, and the hearing proceeded behind closed doors. The petition also alleged, on information and belief, that no testimony had been received at said hearing that petitioner had ever inflicted personal injuries upon anyone; and it was also urged that the commission failed to make findings as required by the charter, and that therefore the commission had exceeded its jurisdiction in dismissing petitioner.

The return made by respondents after the prior decision of this court contains a stenographic report of the proceedings before said commission, and testimony given by the various witnesses called. It also contains minutes of the executive secretary of the commission, dated October 30, 1942, which recite that the commission adopted the following "Resolution":

"After due consideration of the evidence presented in this case, we, the Vallejo Civil Service Commission, *uphold the action taken by the City Council* in the adoption of Resolution 28191 N.S., dated October, 10, 1942, wherein the office of Police Sergeant held by William J. Swars, is hereby declared vacant and he is hereby dismissed from the service of the City of Vallejo effective the 10th day of October 1942." (Italics ours.)

Appellant now contends that from this record it appears that the commission failed to comply with the provision of the city charter that it make "written findings and conclusions"; that his dismissal was invalid because the jurisdiction of the commission to order it does not appear upon the face of the record; that there was no evidence before the commission that would support a finding that he was guilty of "conduct unbecoming an officer, said misconduct consisting of unnecessarily and unmercifully beating an intoxicated person"; and that he was denied a public hearing though same was demanded.

The charter of the city of Vallejo, as amended in 1941, Stats.1941, ch. 62, p. 3377, provides that a civil service employee may be demoted or removed from office for "misconduct, incompetency, inefficiency, failure to perform the duties, or to observe the rules and regulations of the department." An employee has a right of appeal to the civil service commission when his dismissal has been ordered by the city council, and to file an answer to charges against him; the commission shall then hold a hearing, at which time it shall hear evidence for or against said employee. "Written findings and conclusions" shall be made by the commission within ten days, and thereafter same shall be certified to the city council and to the official from whose order the appeal has been taken.

[1, 2] Respondents contend that the resolution above set forth was sufficient to comply with the requirement that the commission make "written findings and conclusions." We cannot agree with this contention. The resolution of the commission makes no finding of fact whatsoever. It merely "upholds the action" taken by the council in dismissing petitioner. It does not purport to find that petitioner unnecessarily and unmercifully beat an intoxicated person—which was the only thing charged to justify his dismissal. Respondents say that when the commission upheld the action taken by the city council it *found* that the reasons stated in the council's resolution were true—that any other interpretation of the action of the commission "is unreasonable." If respondents mean that in order to support the order of dismissal the commission was required to find that petitioner was guilty of the charges against him, we may agree; but as stated in our former decision (64 Cal.App.2d 864, 149 P.2d 397), no presumptions can be indulged in favor of the orders of the commission; and in the absence of any finding by the commission that the charges were true, we cannot presume that it so found. All that the resolution shows is the conclusion of the commission that petitioners should be dismissed; its reasons are left for surmise.

[3] The general rule, which applies as well to a commission such as this civil service commission as to a court, is that where written findings and conclusions are required by law, such findings must be made in writing, and they must be findings of fact; and that such findings of fact must be sufficient to support the conclusions which purport to follow therefrom.

It is said in 42 Am.Jur., sec. 149, p. 494: "An administrative officer exercising delegated powers must comply with the statutory requirements for the exercise of such powers, and if the making of a finding is a condition precedent to an act, the fulfillment of that condition should appear in the record of the act, or the act is void. However, the necessity for a finding to sustain an administrative order does not rest wholly upon a statutory requirement of a finding. Apart from statutes requiring findings, an order of an administrative body cannot be sustained unless supported by findings of the basic or quasi-jurisdictional facts conditioning its power."

[4] In 36 C.J.S., Find, page 767, a "finding" is defined as "A word which imports the ascertainment of a fact in a judicial proceeding. Specifically applied, the term is defined as an ascertainment of facts by the court * * * or by an administrative board as the result of a hearing."

[5] Numerous cases defining "finding" and establishing the necessity of compliance with statutory requirements regarding them, are set forth in 17 Words and Phrases, Perm. Ed., pages 16-19 and 20-24; and in 146 A.L.R. 209-239, is to be found a note on the subject of findings of fact to support administrative determinations, citing numerous cases supporting the rule that compliance with statutory requirements for findings of fact is necessary to support orders of administrative agencies. That note follows the reported case of Laney v. Holbrook, 150 Fla. 622, 8 So.2d 465, 146 A.L.R. 202, a case frequently cited, in which it was held that where an order of a county board of public instruction removing a public school principal failed to state the facts found upon which the order was based, the order should be quashed by a reviewing court and the case remanded to the board to make findings of fact with sufficient definiteness to advise the principal as to what facts the board found sufficiently proved to substantiate charges that would warrant the forfeiture of his position. Also see same case in Laney v. Board of Public Instruction for Orange County, 153 Fla. 728, 15 So.2d 748, 753, where the court said that "Administrative findings, in order

to be upheld by the courts, must be supported by substantial evidence."

In Scudder v. O'Connell, 272 App.Div. 251, 70 N.Y.S.2d 607, 609, it was held that the State Liquor Authority, in denying a license to sell liquor, should make findings of fact which show the actual grounds of the decision, so that a reviewing court may determine whether the findings are supported by the evidence, and whether the facts, so found, are legally sufficient to support the determination. As reasons for such conclusion the court there quoted from a report of the commissioner to the effect that:

"Intelligent judicial review of a quasi-judicial determination is possible only if the deciding officer has made findings of fact which show the actual grounds of decision,—findings sufficiently specific so that the reviewing court may judge, first, whether the findings themselves are supported by the evidence in the record of the quasi-judicial hearing and, second, whether the facts so found are legally sufficient to support the determination. Primarily to provide the necessary basis for intelligent judicial review, therefore, the courts have laid down a requirement that such findings of fact be made (citing cases). Such findings are required whether or not the departmental statute governing the procedure of the particular agency contains specific provision for findings of fact, as some statutes do.

* * * * * *

"Findings of fact serve other purposes besides affording a basis for intelligent judicial review. The obligation to formulate findings, rather than simply to announce a result tends to assure considered action by the administrative deciding officer. As a corollary, the findings themselves offer some assurance to the parties that the decision has been arrived at rationally, on the evidence; and the findings at least enable the parties to judge for themselves the soundness of the decision, and afford them assistance in deciding whether or not to seek to reverse it on rehearing or judicial review."

In that case the court cited Wood v. Board of Education of the City of New York, 267 App.Div. 959, 47 N.Y.S.2d 221, where the court said: "The report of the trial committee did not include findings of fact, so that, in adopting the report without making findings of fact of its own, the dismissal was not predicated upon any factual basis." (With citations.)

In Aniolek v. Conservation Department, 267 App.Div. 795, 45 N.Y.S.2d 534, the court said, regarding a determination of the Conservation Commissioner discharging a game protector accused of trapping activities and the setting of snares by which wild animals were taken, that: "The Commissioner made no findings and for that reason alone we are required to annul the determination." The court then cited Elite Dairy Products, Inc., v. Ten Eyck, 271 N.Y. 488, 3 N.E.2d 606, 610, where the court said that only after the commissioner has made findings of fact can the court decide whether the findings are sustained by the evidence. And in Petition of New York Water Service Corp., 283 N.Y. 23, 27 N.E.2d 221, 224, it was said:

"Findings of fact in support of decisions by courts and administrative boards alike serve to give assurance to parties concerned that the decisions are based upon evidence of record and were not reached arbitrarily or influenced by extra-legal considerations. Where, as in this instance, a statutory review of the decision may be had (Conservation Law, § 523) findings of fact in some form are essential to enable the parties and any appellate court intelligently to determine whether the decision follows as a matter of law from the facts stated as its basis and whether the findings of fact have any substantial support in the evidence."

Also see California Employment Comm. v. Malm, 59 Cal.App.2d 322, 324, 138 P.2d 744; Herman v. Glasscock, 68 Cal.App.2d 98, 101, 102, 155 P.2d 912; Tennessee Cent. R. Co. v. Pharr, Tenn.App., 198 S.W.2d 289, 293; Chicago Rys. Co. v. Commerce Comm., 336 Ill. 51, 167 N.E. 840, 845, 846; Toyos v. Bruckman, 266 App.Div. 28, 41 N.Y.S.2d 672, 674; People v. State Tax. Comm., 261 App.Div. 416, 26 N.Y.S.2d 425, 429.

As for appellant's contention that there was no evidence before the commission that would support a finding that he was guilty of "conduct unbecoming an officer, said conduct consisting of unnecessarily and unmercifully beating an intoxicated person," since the commission has made no such finding it is unnecessary to pass upon this matter at this time.

[6] As for his final contention, that he was entitled to a *public* hearing, appellant cites no decisions in support thereof. While Art. 1, sec. 13, of the Constitution of this state provides that in criminal prosecutions, in any court whatever, the party accused shall have a right to a speedy and public trial, we are cited to no case in which it was held that the exclusion of the general public from a hearing, such as this was, before a civil service or similar commission, violates the constitutional mandate.

[7] While an ordinance of the city of Vallejo provides that hearings conducted by the commission shall be public, it further provides that by unanimous vote the commission may determine that a private hearing is necessary to secure all the facts in the case, and may limit the attendance at the hearing. Such a vote was taken in this case; and while we cannot see any good reason while it should have been so done, that was matter for the commission to decide.

[8] Section 124 of the Code of Civil Procedure is also relied upon by appellant. That section provides that the sittings of every court of justice shall be public, except as provided in section 125. But a commission, though its proceedings are quasi-judicial, is not in the true sense of the word a "court of justice". See Chinn v. Superior Court, 156 Cal. 478, 482, 105 P. 580; Inglin v. Hoppin, 156 Cal. 483, 491, 105 P. 582; 20 C.J.S., Counties, § 83, p. 853, n. 43.

The order of the trial court dismissing the writ of certiorari is reversed, and the trial court is directed to annul the order of the civil service commission.

PEEK and THOMPSON, JJ., concur.

---

88 Cal.App.2d 460

PEOPLE ex rel. WAGNER v. CITY OF POMONA et al.

Civ. 16390.

District Court of Appeal, Second District, Division 2, California.

Nov. 12, 1948.

Rehearing Denied Dec. 9, 1948.

See 200 P.2d 176.

1. Municipal corporations 🔑63(1)

In absence of fraud or collusion between city council and private land owners, act of city council in ordering vacation of a street is legislative in character, and is binding upon courts both as to necessity or convenience of the improvement and as to extent thereof.

2. Municipal corporations 🔑657(2)

Mere fact that a property owner who will benefit by vacation of street agrees to pay all expenses incident to such improvement does not of itself make the proceedings not in the public interest.

3. Municipal corporations 🔑657(2)

Proceedings taken by a city council in vacating streets for purpose of general industrial expansion are in the "public interest".

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Public Interest".

4. Municipal corporations 🔑657(6)

Evidence supported finding that city council, in vacating a portion of street in City, acted in good faith and solely by reason of public interest in aid of industrial expansion, notwithstanding that industrial concern paid expenses incident to abandonment of the street.

WILSON, J., dissenting.

◆

Appeal from Superior Court, Los Angeles County; Samuel R. Blake, Judge.

Action by the People of the State of California, by Robert W. Kenny, Attorney General of the State of California, on the relation of L. L. Wagner, against the City of Pomona, James B. Pettit, Mayor, Roscoe M. Hart and others, constituting the City Council of the City of Pomona and others, for purpose of setting aside an order of the

City Council vacating for public purposes a portion of a street in the city. From judgment for defendants, the relator appeals.

Affirmed.

Allard, Brownsberger & Shelton, of Pomona, James G. Whyte, of Claremont, and Roy A. Linn, of Los Angeles, for appellant.

O'Melveny & Myers, Pierce Works and Deane F. Johnson, all of Los Angeles, for defendants City, the Mayor and Members of the City Council.

Nichols, Cooper & Hickson and Don P. Nichols, all of Pomona, for Fairbanks, Morse & Co.

McCOMB, Justice.

The present action was instituted by relator L. L. Wagner in the name of the people of the State of California for the purpose of setting aside an order of the City Council of Pomona, vacating for public purposes a portion of Commercial street in the City of Pomona lying between Gibbs and Palomares streets.

Commercial street runs in an easterly and westerly direction, dead-ending with Rebecca street on the west and Towne avenue on the east. It parallels and lies one shallow block north of the side-by-side Southern Pacific and Union Pacific rights of way through Pomona. Throughout its entire length it and the lots abutting upon it are zoned for heavy industry.

The trial court found that the street closing was in the public interest and ordered by the city council "in good faith, and without any fraud, collusion or connivance with any person, firm or corporation, or any abuse of discretion, and solely for and by reason of the public necessity, interest and convenience."

This is the sole question necessary for us to determine:

Is there substantial evidence to sustain the trial court's finding that in vacating, closing and abandoning the portion of Commercial street in the City of Pomona here involved, "each and every act and thing done in connection therewith, and incidental thereto, the members of the Council of the City of Pomona, and each of them, and each and every officer, agent and representative of the said City of Pomona acting in connection therewith, acted in good faith, and without any fraud, collusion or connivance with any person, firm or corporation, or any abuse of discretion, and solely for and by reason of the public necessity, interest and convenience."

[1] This question must be answered in the affirmative and is governed by these pertinent rules:

(1) In the absence of evidence of (a) fraud or (b) collusion between a city council and private land owners, the act of a city council in ordering the vacation of a street is legislative in character and is conclusive and binding upon the courts both as to the necessity or convenience of the improvement and as to the extent thereof. (Beals v. City of Los Angeles, 23 Cal.2d 381, 385 et seq., 144 P.2d 839; People v. City of Oakland, 96 Cal.App. 488, 496, 274 P. 438; People v. City of San Rafael, 95 Cal.App. 733, 739, 273 P. 138.)

[2] (2) The mere fact that a property owner who will benefit by the vacation of the street agrees to pay all the expenses incident to such improvement does not of itself make the proceedings not in the public interest. (City of Oakland v. Parker, 70 Cal.App. 295, 298, 233 P. 68; Santa Ana v. Harlin, 99 Cal. 538, 541, 34 P. 224; People v. City of Oakland, 96 Cal.App. 488, 274 P. 438.)

[3] (3) Proceedings taken by a city council in vacating streets for the purpose of general industrial expansion are in the public interest. (People v. City of Oakland, 96 Cal.App. 488 et seq., 274 P. 438; Ponischil v. Hoquiam Sash & Door Co., 41 Wash. 303, 83 P. 316, 317.)

In the present case the record discloses that the Mayor of respondent city testified as follows:

"I would have voted to close that street from one end to the other if we could get industries who owned land on each side, any time, would do it today, sir, my thought being that that would bring industrial expansion to the City of Pomona. My purpose in voting to close Commercial Street between Gibbs and Palomares was to encourage and to keep industries in Pomona, give those industries a chance to operate.

"I was elected on an industrial expansion program and reelected and reelected and to vote to close that street for the expansion of an industry or as many industries as could be established on that street was according to my policy. It was my wish to increase our industries and bring other industries to Pomona. With reference to industry zoning, there is nothing on the south side of the railroad tracks that is adjacent to the Union Pacific. Only the north side of the Southern Pacific is available and there is probably not anything available on that side. Neither is there an inch available on the Union Pacific side so we have to economize on every square foot we can get with railroad frontage. The portion of the industrial zone shown on this map which abuts the main line transcontinental facilities includes Commercial Street as shown on the map, defendant's Exhibit E, throughout its entirety. Commercial Street is just back of the Southern Pacific track and all of it lies within the heavy industry zone.

"The map, defendant's Exhibit E, reflects the industry planning of the City Planning Commission of the City of Pomona as approved and carried into effect by the City Council in its zoning ordinance.

"I also took into consideration in arriving at my decision in this matter the recommendation of Gordon Whitnall as expressed in the letter read to the Council by Mr. Nichols at one of our meetings. I took into consideration the following statement contained in Mr. Whitnall's letter: 'Normal industrial uses desire sites having depths. City lots cramped between streets forming limited size blocks do not lend themselves satisfactorily to substantial industrial purposes. This is amply demonstrated by what has already happened in cases where given industries contiguous to the railroad have been forced to expand plants on the properties across Commercial Street. Fairbanks Morse and Sanitary Laundry are examples.'

"Modern planning practices recognize these facts and they have developed the policy of providing suitable industrial sites by: 1. Consolidating areas where possible in developed sections of cities. 2. Designing new areas ample as to size and shape and well served with all required transportation facilities."

Similarly, various councilmen testified as follows:

Councilman Lindesmith: "I gave consideration to possible industrial expansion in the City of Pomona adjacent to the Southern Pacific right-of-way on the north side. I gave consideration as to the street closing and as to industrial expansion to the depth of the lots, the location as to the railroads, the fact that the street is not a through street, and also I observed the traffic condition existing on the street before the closing. The traffic, I would say, was comparatively light in reference to trucks and heavy deliveries being made. It is my observation that most of them are made either from Fifth or Garey to the adjacent north and south streets to the plant where the commodity is being delivered and there does not exist, in my opinion, a heavy traffic problem on that street in regard to delivery of commodities.

"The recommendation of the Planning Commission was directed to the Council; all the discussion was as to the traffic condition existing on Towne Avenue and the over-all picture as to the benefit the City, as a whole, would acquire by the closing of the street. I recall at one of those meetings an excerpt was read to the persons present from a letter from Mr. Gordon Whitnall, a planning expert for the City Planning Commission.

"I took the recommendation of the Planning Commission into consideration and it helped fit into the picture of my final decision.

"I could not see very much difference in the volume of traffic on Commercial Street after the closing or barricading of the street in 1941—I could see no great change. That particular block has been by-passed for years there as far as traffic is concerned."

Councilman Philpott: "There were and are—there has been no change—more boulevard stops on that piece of street than there is on any other street in town; more widely cut up than any other section of Pomona. There were boulevard stop signs blocking east and west traffic at the intersection of Commercial with Main Street, Garey, Gibbs, and Palomares. From what I have seen of the trucking traffic in that area, there is none. To a heavy hauler, the most abominable thing he has in his life are boulevard stops at every block. As a result, all heavy traffic, to the best of my knowledge, comes in on Holt or Fifth or one of these through streets and coming in from the other direction, they come in from the west, again avoiding boulevard stop signs.

"As to the factors which I took into consideration in voting for the closing, I have some very definite ideas as to land use, being an engineer. In any one of these small 330-foot blocks, the area of the streets bounding it equals thirteen city lots while in the block itself there are but twelve. In other words, in any residential area, as this town was laid out in the old days, there is actually more area in the streets surrounding a block than there is in the block itself. It is the duty of a city official to determine whether a community is getting the most advantageous benefits of the public domain. A city street or public property has to be evaluated when it comes to closing as to whether it is more valuable as a so-called thoroughfare or a public property. It is my opinion that unless a street serves its purpose best as a thoroughfare, it should always be closed. My personal opinion was confirmed by the Whitnall report and with all considerations then before me, I decided in my own mind without any equivocation that that street should be closed. I also took into consideration as a factor the question of general industrial expansion within the limits of the City of Pomona.

"What I am trying to convey is this. A piece of land should be used to the best advantage of the community, the greatest return to the community. If there are few vehicles crossing it as a thoroughfare, it is of little value to the community as a street. It has little value because they do not use it. On the other hand, if this same piece of property, Fairbanks, Morse or anyone, I am not concerned, it might be John Doakes—if that same piece of property can be used to support a project, whether it is a business, industry or even an off street parking project, in view of the less usage as a street, it is more important for this other specific purpose. In this particular case, closing it for Fairbanks, Morse, the individual company, to use, I feel that the good to Fairbanks Morse was incidental to the good of the community in closing that street.

"What I have said here, in effect, Your Honor, is that the value and use of that street to the whole of the City of Pomona was greater closed than open."

Councilman Persons: "I consider the vacation of the portion of Commercial Street in which we are interested here was to the best interests of the public of the City of Pomona. I made up my mind after contacting some businessmen out on the east end of Commercial Street that the closing would not damage any of the business people along Commercial Street that might use it if it was open. I had in mind the industrial zoning which had been laid out by the Planning Commission and approved by the Council and I took very much into consideration the question of present and future industrial expansion of the City of Pomona and I considered such industrial over-all expansion as being to the best interests of the public. I took into consideration the statements by Mr. Whitnall in arriving at my decision on this matter. As a member of the Planning Commission, I was somewhat familiar with that report. The matter was discussed in open Planning Commission meetings when Mr. Whitnall was present.

"In voting for closing Commercial Street between Gibbs and Palomares, that was in line with my idea of what the industrial expansion of the City should be. In other words, anything which would permit industrial expansion in the City of Pomona would be, in my mind, for the public benefit."

Councilman Hart: "Due to the industrial expansion of the town and for the encouragement of industries that were here along with the over-all plan, the railroad being a predetermining factor, I felt it was to the best interests to start steps in that direction and the closing of Commercial Street would be just the beginning of that. I attended the meeting of January 29th when the Whitnall letter was read and I took into consideration, as one of the factors which influenced me in my action, the views of Mr. Whitnall as discussed in that letter."

The foregoing testimony clearly supports the trial court's finding that the city council, in vacating the street in question, acted in good faith and without fraud or collusion and solely by reason of public necessity, interest and convenience, and that the vacation of the street was in the public interest.

[4] Under rule 1, supra, the finding being supported by substantial evidence is binding upon this court. Under rule 2, it was immaterial that Fairbanks, Morse and Company paid the expenses incident to the abandonment of the street. Likewise under rule 3, supra, since the abandonment was for the purpose of industrial expansion, the abandonment was in the public interest. Under this same rule it is immaterial in the present proceeding that the city council had not as yet adopted a master plan for the zoning of the entire city of Pomona.

The case of People v. City of Los Angeles, 62 Cal.App. 781, 218 P. 63, relied on by plaintiff, is not applicable to the facts of the present case for the reason that in the cited case the city was endeavoring to sell to a private property owner street property (Argyle Avenue in the City of Los Angeles), which it was attempting to vacate, and the court in such case held that it was not in the public interest for the city council to sell to a private owner street property of the municipality. The court said 62 Cal.App. at page 785, 218 P. at page 65, People v. City of Los Angeles, supra, "To put the matter bluntly, on the evidence adduced the finding of the court was to the effect that, without the interest or convenience of the public being considered in any way, the city council sold a public street to the Famous Players-Lasky Corporation for a consideration of $1,000." Again 62 Cal.App. at page 787, 218 P. at page 65, "According to the evidence and the findings by the court in this case, there was no such thing as the public interest or convenience of the public taken into consideration by the city council."

In the instant case the street is not being sold to Fairbanks, Morse and Company by respondent city, but the basis of the vacation of the street is the public interest which as we have heretofore pointed out finds substantial support in the evidence.

In view of our conclusions, the judgment is affirmed.

MOORE, P. J., concurs.

WILSON, Justice.

I dissent. To affirm the judgment in this case is to ignore the indubitable and unquestioned facts shown by the exhibits and by the entire evidence, other than that of the city officials upon which the majority of this court rely, and to accept the testimony of the latter as statements of fact, whereas their evidence consists of conclusions unsupported by facts. The majority opinion disregards and disavows every principle of law stated in People v. City of Los Angeles, 62 Cal.App. 781, 218 P. 63.

The trial court found (1) that the closing up, vacating and abandoning of the portion of Commercial Street described in the resolution of the city council was and is required by the public interest and convenience and (2) that the elimination of traffic over that portion of the street was and is promotive of the public safety and welfare.

There is nothing in the record or in the briefs convincing in the slightest degree that the closing up and vacating of the single block of Commercial Street here involved is for the interest, convenience, necessity or welfare of the public, or that the public safety and welfare will be promoted by the elimination of traffic thereon. The facts demonstrated by the evidence, especially the exhibits, and the inferences to be drawn therefrom, so overcome and outweigh the testimony of the witnesses to the effect that the acts of the city council were for the public benefit and not for the private gain of Fairbanks, Morse & Company that the support necessary to sustain the finding is nonexistent.

In taking this position I do not overlook the rule that a finding of the trial court is binding on a reviewing court if there is substantial evidence to sustain it. However, as stated in Herbert v. Lankershim, 9 Cal.2d 409, 471, 71 P.2d 220 251, this rule "does not relieve an appellate court of its duty of analyzing the evidence in the light of reason and human experience and giving consideration to the motives and propensities which tend to influence or prompt human action, in an effort to solve the question as to whether the judgment is reasonably and substantially sustained by the evidence * * * There must be more than a conflict of mere words to constitute a conflict of evidence. The contrary evidence must be of a substantial character, such as reasonably supports the judgment as applied to the peculiar facts of the case." If the evidence is so slight and tenuous as not to create a real and substantial conflict the reviewing court may set aside the finding. Fewel & Dawes, Inc., v. Pratt, 17 Cal.2d 85, 89, 109 P.2d 650. In order that a finding be sustained there must be more than a scintilla of evidence to support it—the evidence must possess sufficient substance to bear the weight of the burden placed upon it in the situation existing in the case. Whether or not there is substantial evidence is a question of law to be determined by the court—any court to which the challenge is addressed—and when the question is whether there is sufficient substance in the evidence to support the finding the court must determine that question as applied to the peculiar facts of the case. In re Guardianship of Sturges, 30 Cal.App.2d 477, 497, 498, 86 P.2d 905.

The fact is that the oral testimony of the members of the city council consists to a greater degree in the expression of opinion that the vacating of the block in question would redound to the benefit of the city of Pomona in the future than in any statement of fact indicatory of any benefit whatsoever to the city. Their evidence (by evidence I refer to testimony as to facts, not to opinions and conclusions) whereby they attempt to justify their acts on the ground that the closing of the block was for the public benefit and convenience, is so trivial and insignificant in comparison with the actualities disclosed by the record that it does not furnish the substantial evidence that will preclude an appellate court from reviewing the entire record for the purpose of determining whether the findings and judgment have the requisite support.

It needs only an examination of the map annexed to the complaint, on which Commercial Street is platted for its entire length of approximately one mile and which indicates the use made of property fronting thereon, to demonstrate (1) that the resolution of the city council ordering the vacating of the block here involved is based on a false premise; (2) that the findings of fact are not sustained by the evidence; (3) that the testimony of the witnesses that the closing of the street is a part of an "over-all plan" has no foundation whatsoever insofar as is shown by the evidence in the case; (4) that the vacating and abandonment of the block as a public street and highway and the elimination of traffic thereover will not promote the public safety, convenience and welfare, and that the statement in the council's resolution to that effect is not a true statement.

Commercial Street is approximately one mile in length. Nine streets extend across it and three others deadend into it. The street consists of 10 blocks on the south side and 14 on the north. Two lots fronting on the south side are vacant; on the north side seven lots are vacant and five are occupied by residences. With these exceptions the entire frontage is occupied by commercial and manufacturing establishments, including several heavy industries.

The evidence quoted in the majority decision consists of statements of conclusions and opinions of the witnesses without factual support. I have searched the record in vain for a single statement of fact which supports the findings (a) that the vacating and abandoning of the street is "required by the public interest and convenience" and (b) that the elimination of traffic over the block in question "is promotive of the public safety and welfare."

The members of the city council were in accord in their opinions testified to at the trial that the vacation of the block is a part of a plan to encourage and keep industries in Pomona and that it would bring industrial expansion to the city; that in vacating the block they gave consideration to possible industrial expansion of the city along the Southern Pacific Railroad, and the closing of the street was according to their policy for the expansion of industry; that they gave consideration to the fact that there was no heavy traffic problem on the street; they considered the closing of the block as a part of some so-called "over-all picture" to be a benefit to the city as a whole; they considered the several boulevard stops on the street and that such stops are inconvenient to a heavy hauler; they admitted that the closing of the block would be of benefit to Fairbanks, Morse & Company but they considered that such benefit was incidental to the general good of the community; they believed that anything that would promote industrial expansion would be for the public benefit; they considered that the desire for industrial expansion of the city and the encouragement of industries already established, along with the "over-all plan," (not yet formalized) required them to begin in that direction and the closing of the block of Commercial Street would be just the beginning. The Whitnall letter, upon which some of the witnesses relied, sets forth merely the general self-evident proposition that industrial establishments must have ample space but it does not contain a single word suggesting in what manner or to what extent this street closing proceeding will add to the industrial progress of Pomona or how it will promote the public convenience, safety and welfare.

None of the witnesses testified to any fact that would support their opinions and beliefs upon which the majority opinion relies for the affirmance of the judgment. Their testimony consists of the same hopes and wishes for great industrial expansion of the city that are in the minds of officials of all cities but they do not even suggest any presently existing plant that will be enlarged nor any prospective industry that will be established in the city as a result of closing the block in question or that will be attracted by the evanescent "over-all plan."

How the closing of one block, both sides of which are occupied by one manufacturing establishment, would encourage any new industry in the city or how it would bring industrial expansion is not indicated in the evidence; closing of the block could not possibly cause industrial expansion on Commercial Street since all property fronting thereon, with the exceptions above noted, is already occupied by business installations, nor is it shown that the abandonment proceedings would result in adding industries on adjacent streets; there is nothing in the evidence to indicate how the traffic problems of the other business establishments on the street, which occupy the frontage not covered by Fairbanks, Morse & Company's plant, would be aided by the closing of this block; the "over-all plan" is not disclosed by the record; there is no evidence that any such plan had been adopted by the city prior to the passage of the resolution abandoning the block, or had been adopted at the time of the trial of this action, and there is no evidence as to when such plan is expected to be adopted, if at all, or what it will represent if and when it materializes; it is not indicated in what manner the closing of the block will eliminate boulevard stops; furthermore, the closing of the block will cause heavy haulers to detour around it, with the necessity of making four right-angle turns, instead of going straight through; the benefit to the community is not shown, but the closing of the block does allow Fairbanks, Morse & Company to expand their plant over the public highway to the exclusion of the public; it is obvious that the closing of the block in question cannot cause any general industrial expansion in other parts of the city; again, no explanation is forthcoming as to how the closing of this block would tend to satisfy the desire for industrial expansion or conform with the nonexistent "over-all plan."

If any "over-all plan" had been adopted or had attained even a tentative form it should have been shown to the court so that a finding relating to such plan would have had some reference to the evidence.

The relator in this action is the president of Southern Service Company, which owns the land on both sides of Commercial Street directly across Palomares Street from Fairbanks, Morse & Company's property and has operated a laundry thereon for more than 25 years. Although the company would gain by the abandonment of the street between its two properties, it, through its president, opposes such action. He testified to the inconvenience in the operation of his company's trucks and to the retail customers who bring in and call for their laundry, such traffic being compelled to travel around the closed block instead of going directly along the street.

In addition to the findings above discussed the court found that the members of the city council acted in good faith and without fraud or collusion with any person, firm or corporation. Such finding applies to the motive of the council and its members in ordering the block to be vacated and abandoned. However, motive and purpose are not synonymous. People v. City of Los Angeles, 62 Cal.App. 781, 787, 218 P. 63. A person's motive is any consideration or object promoting or inciting a choice; his purpose is that which he sets before himself as an object to be attained; the end or aim to be kept in view in any plan or operation. Webster's New International Dictionary, 2d Ed.

Although the motive of the city council may have been, as testified by its members, to benefit and advance the interests of the city, nevertheless the purpose and object of the abandonment proceedings were to give the land occupied by the street to Fairbanks, Morse & Company. That the company's interest in the matter was motivated by the personal advantage resulting to it rather than by its concern in the welfare and convenience of the public is manifest from the evidence. It owns the property on both sides of the street and will become the owner of the street free of the public easement. It petitioned the council to abandon the block offering to pay all expenses of the vacation proceedings and of the rerouting of all public utilities and a cash consideration equal to the reasonable value of the property as well. Upon ascertaining that payment to the city for the land occupied by the street would render the proceeding void (see People v. City of Los Angeles, supra, 62 Cal.App. 781, 790, 218 P. 63) that part of the offer was withdrawn. The company's attorney approved the resolution as to form. The only property included in the assessment district was that owned and controlled by the company and the members of the city council had knowledge of that fact at the time of the adoption of the resolution of intention to vacate the block.

Conceding that in the absence of a showing of fraud or collusion the motives of the members of the city council cannot be inquired into, nevertheless, since the law deals with results and not with mere forms, the purpose to be accomplished and the object attained may always be, indeed must be, considered in determining the validity of an ordinance vacating a public street. Kansas City v. Hyde, 196 Mo. 498, 96 S.W. 201, 205, 7 L.R.A.,N.S., 639, 113 Am.St.Rep. 766; Smith v. McDowell, 148 Ill. 51, 35 N.E. 141, 142, 22 L.R.A. 393. In the Smith case the trustees of the village attempted to vacate a strip five feet wide and 85 feet long off the side of a street for the purpose of permitting its use by the adjoining owner as an areaway in connection with the basement of his proposed building. The court, looking to the purpose and not to the motive of the trustees, declared that the municipal corporation held its streets in trust for the use of the general public without power of converting them to other uses. In Pederson v. Town of Radcliffe, 226 Iowa 166, 284 N.W. 145, 147, it is said that although courts will not ordinarily interfere with a legislative action of a town council in vacating a street or alley, yet where the council acts arbitrarily and without regard for or against the interest of the public its action in attempting to vacate a street will be declared invalid.

The court will look beyond the recitals in the resolution and beyond the declarations of the members of the city council and will examine the results and the surrounding circumstances to learn the real purpose of vacating a street. 4 McQuillin, Mun.Corp., 2d Ed., sec. 1520; People v. City of Los Angeles, supra, 62 Cal.App. 781, 791, 792, 218 P. 63. The court may and should inquire whether the purpose of an ordinance vacating a street is to serve a public benefit or a private use. Ligare v. City of Chicago, 139 Ill. 46, 28 N.E. 934, 936, 32 Am. St.Rep. 179; People v. Corn Products Refining Co., 286 Ill. 226, 121 N.E. 574, 577; Moskal v. Catholic Bishop of Chicago, 315 Ill.App. 461, 43 N.E.2d 206, 211. Where the city sought to condemn land for the widening of a street sufficiently to permit the laying of railroad tracks, the court held that the result,—the effect of the act of the city council—was the exclusion of the general public from a portion of a public street. While such purpose was not expressed in the ordinance, the court looked to the result and declared the ordinance void. Ligare v. City of Chicago, supra. In Corcoran v. Chicago, M. & N. R. Co., 149 Ill. 291, 37 N.E. 68, the facts are similar to those in the Ligare case. The ordinances were held void on the ground that municipal authorities have no power to vacate a public street for the sole benefit and use of a private individual or corporation. The same ruling was made in Texas Co. v. Texarkana Machine Shops, Tex.Civ.App., 1 S.W.2d 928, 931. Land cannot be condemned by a city for a public street when the actual purpose is, after acquiring the property, to permit the construction of railroad tracks thereon which will practically exclude the public from the use of the street. Kansas City v. Hyde, supra, 196 Mo. 498, 96 S.W. 201, 204, 7 L.R.A., N.S., 639, 113 Am.St.Rep. 766. A city cannot vacate a portion of a street for the purpose of correcting deficiencies or errors in the claim of one who asserts title to the street and who requests the abandonment for the purpose of perfecting his title. DeLand v. Dixon Power & Lighting Co., 225 Ill. 212, 80 N.E. 125, 126, 127.

A street may not be abandoned for the purpose of inducing a person to establish a lumber yard or any other business (City of Colome v. Von Seggern Bros. & Ludden, 56 S.D. 390, 228 N.W. 800, 801) or in order to permit the erection of a building on a portion of an alley (Van Witson v. Gutman, 79 Md. 405, 29 A. 608, 24 L.R.A. 403) although in return therefor the city would receive a lease or a conveyance of part of the building for public use. Horton v. Williams, 99 Mich. 423, 58 N.W. 369, 371. In an action brought by a city to close an alley where it was intended to allow the land to revert to a private individual who offered to pay $2,000 therefor, the court held that a cash consideration to be paid to the city is not a public use for which private property may be taken from one citizen and transferred to another. City of Louisville v. Bannon, 99 Ky. 74, 35 S.W. 120, 121.

In all the cases above cited the courts looked not to the motives of the municipal authorities but to the inducing cause of their action, the purpose of the proceedings and the result that would follow the vacating of the street, to wit, the donation of a public highway to private individuals for their personal use and the exclusion of the public therefrom. The advantage that is derived by the public from the abandonment of a street must arise from the vacation itself rather than from the use to which the property will be put and unless the closing of the street will inure to the public service or necessity or will promote the public interest, convenience and welfare the proceedings will be annulled. Horton v. Williams, supra; Van Witson v. Gutman, supra; Ligare v. City of Chicago, supra.

A comparison of the facts in the instant case with those in People v. City of Los Angeles, supra, 62 Cal.App. 781, 218 P. 63, will show that the proceedings now before this court cannot be sustained without overruling the Los Angeles case. The only difference between the two cases is that in the Los Angeles case the company which benefited by the vacation of the street paid the city a cash consideration for the land it would have received, and in the instant case no such payment was made, although it was offered when the petition for abandonment was filed. In each case the street was improved and the roadway and sidewalks were used for general public travel; the company owning the property on both sides of the street petitioned for the abandonment; the public received no benefit or advantage from the closing of the street but on the contrary was deprived of the use of a street that had been improved at the expense of the property owners; the purported purpose of vacating the street was to promote industry in the city "as a whole," to encourage the maintenance and building up of industry for the mutual benefit and advantage of the city and its inhabitants. The payment to the city for the land was not the only reason for invalidating the proceeding in the Los Angeles case. In that case the court said that the statement in the final ordinance of vacation that "there are no damages, costs, or expenses arising out of said work and that no assessment is necessary for said work" supplied the inference that "the entire scheme was for the sole benefit of the defending" corporation. The resolution in the instant case declares that "it appears that no assessment of benefits or damages on account of said work or improvement is necessary." The opinion in the Los Angeles case states that the city council did not contemplate any rearrangement of public streets or any other public improvement that would necessitate or render advisable the vacation of the street, and that the result would be that the street would be taken from the public and nothing of a public nature substituted in its place. The last statement is applicable to the instant case. The interest, convenience and welfare of the public in each case were rendered nonexistent by the purpose and object of aiding a private corporation which would gain title to the abandoned street.

In the cases cited in the majority opinion the court did not distinguish between the motives of the city officials and the purpose and object of the abandonment proceedings. In People v. City of Oakland, 96 Cal.App. 488, 274 P. 438, the appeal having been on the judgment roll, the review of the case was confined to errors appearing therein and the sufficiency of the evidence did not arise. The city sought to condemn land for the extension of two streets through a parcel of real property, the owner of which offered to donate the two strips to the city and to pay the cost of paving and other improvement thereof if the city would abandon a parallel street already in existence, three streets not being required in the vicinity but would hamper industrial development. On this showing it was found that the abandonment of the street in question was for the purpose of rearranging the streets to serve more adequately the public needs and convenience. In People v. City of San Rafael, 95 Cal.App. 733, page 736, 273 P. 138, the closing of the street in question was a part of a general plan of improving street conditions and rerouting traffic in the vicinity of the railroad station and tracks. The general plan to be followed is shown by the record and is discussed in the opinion. In the instant case no land is substituted for the abandoned street, there is no rearrangement of streets and no general plan to improve traffic conditions. In Beals v. City of Los Angeles, 23 Cal.2d 381, 387, 144 P.2d 839, the court held that the closing of a part of an alley which left the plaintiff's property fronting on a cul-de-sac resulted in the taking or damaging of private property for public use and that the complaint which recited those facts stated a cause of action for damages.

Since the record is devoid of evidence of facts in support of the findings, the judgment should be reversed with directions to the trial court to make findings and to enter judgment in favor of plaintiff.

NATIONAL UNIVERSITY LIBRARY
3 1786 10047 7055

NATIONAL UNIVERSITY